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PRACTICAL STATUTES

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BEING A COLLECTION OF STATUTES OF PRACTICAL UTILITY

IN FORCE IN ONTARIO

WITH

NOTES ON THE CONSTRUCTION AND OPERATION THEREOF

BY

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PREFACE.

The editors have taken those Statutes which, in the opinion of the directors of legal education in this province, are of most concern to the practising solicitor, and have attempted to collect the authorities construing them. Legislation is so replete that there are few subjects of concern which are not affected by some Statute. It may fairly be stated that a knowledge of the Statutes placed on the course of legal education will equip one with almost all practical knowledge requisite for daily practice.

The task of taking these Statutes and considering the many branches of legal science which they affect is not a light one. The editors will be satisfied if the profession will find that the system adopted is simple, and that such research as has been made is easily available to even a casual reader.

It is difficult to pick out from text books dealing with a particular branch of law the decisions upon such Statutes as relate to those branches.

Annotations of Statutes have, therefore, in many cases been found to be more useful than text books. The danger in annotating is to include too much, making it difficult for the practitioner to put his hand quickly upon what he requires.

In the present work the decisions affecting the Statutes have been compressed into notes in the shortest possible space and arranged in a manner which it is hoped will be found to lighten labor.

There has been no attempt to show the evolution of the law on any particular subject, but it has been sought simply to give the decisions construing the different enactments. The Statutes are published intact, and the editors' work has been confined to the endeavor to state what the Courts have said the Statutes mean and what their effect is as a result of the decisions.

The editors desire to express their thanks to the many members of the bar who have given kindly advice and assistance.

The index is the work of Mr. J. H. Hunter, Jr., Student-at-law, to whom the editors are much indebted.

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TABLE OF CONTENTS.

	PAGE.
Preface.....	iv.
Table of Contents.....	v.
Table of Cases.....	vii.
Additional Notes.....	xli.
PART I.	
<i>Construction and Operation of Statutes.</i>	
Form and Interpretation of the Statutes, R. S. O. c. 1	3
PART II.	
<i>Canadian Constitutional Law.</i>	
The British North America Act, 1867, (Imp. Act, 30-31 V. cap. 3)	19
PART III.	
<i>Evidence.</i>	
Witnesses and Evidence, R. S. O. c. 73	75
Canada Evidence Act, 56 V. c. 31 (D.)	99
PART IV.	
<i>Torts.</i>	
Libel and Slander, R. S. O. c. 68	109
Seduction, R. S. O. c. 69.....	118
Protection of Public Officers from Vexatious Actions, R. S. O. c. 88	121
Compensation of Workmen for Injuries, R. S. O. c. 160	133
Accidents, Compensation to Families of Persons Killed by, R. S. O. c. 166	154
PART V.	
<i>Practice and Procedure.</i>	
Supreme Court of Judicature, R. S. O. c. 51.....	163
County Courts, R. S. O. c. 55	219
Lunatics, R. S. O. c. 65	238
Replevin, R. S. O. c. 66	247
Actions for Dower, R. S. O. c. 67.....	251
Absconding Debtors, R. S. O. c. 79	257
Arrest and Imprisonment for Debt, R. S. O. c. 80.....	267
Infants, R. S. O. c. 168	279
An Act respecting the Supreme Court of Ontario and the Judges thereof, 60-61 V. c. 34 (D.).....	290
PART VI.	
<i>Contracts.</i>	
Limitation of Certain Actions, R. S. O. c. 72.....	294
Powers of Attorney, R. S. O. c. 116.....	299
Written Promises and Acknowledgments, R. S. O. c. 167.....	301
Master and Servant, R. S. O. c. 167, secs. 3-5 (inc.)	310
Interest, 60-61 V. c. 8 (D.).....	312
PART VII.	
<i>Personal Property.</i>	
Executions, R. S. O. c. 77, as amended by 62 V. c. 7	317
Mortgages and Sales of Personal Property, R. S. O. c. 148, as amended by 62 V. c. 11.	334
Conditional Sales of Chattels, R. S. O. c. 149	360

CONTENTS.

PART VIII.

Equity.

	PAGE.
Voluntary and Fraudulent Conveyances, R. S. O. c. 115	367
Trustees and Executors, R. S. O. c. 120, as amended by 62 V. c. 15	372
Investments by Trustees, R. S. O. c. 130, as amended by 62 V. c. 33	399
Protection of Persons Acting as Executors and Administrators, R. S. O. c. 131	405

PART IX.

Commercial Law.

Preventing Priority among Execution Creditors, R. S. O. c. 78, as amended by 62 V. c. 11	410
Mercantile Amendment Act, R. S. O. c. 145	432
Bills of Lading, 52 V. c. 30 (D.)	439
Assignments and Preferences by Insolvents, R. S. O. c. 147	445
Contracts relating to Goods entrusted to Agents, R. S. O. c. 150	475
Limited Partnerships, R. S. O. c. 150	484
Registration of Co-partnerships, R. S. O. c. 152	490
Wages, R. S. O. c. 156, as amended by 62 V. c. 17	498
Bills of Exchange, 53 V. c. 33 (D.), as amended by 54 and 55 V. c. 17 (D.), and 60-61 V. c. 10 (D.)	502
Banks and Banking, 33 V. c. 31 (D.), secs. 1, 2, 64-79	549

PART X.

Real Property.

Mortmain and Charitable Uses, R. S. O. c. 112	571
Transfer of Property, R. S. O. c. 119	575
Mortgages of Real Estate, R. S. O. c. 121	594
Devolution of Estates, R. S. O. c. 127	612
Wills, R. S. O. c. 128	634
Limitations of Actions in respect to Real Property, R. S. O. c. 133	659
Evidence between Vendor and Purchaser, R. S. O. c. 134	693
Registration of Instruments relating to Lands, R. S. O. c. 136, as amended by 62 V. c. 16	699
Property of Married Women, R. S. O. c. 163	768
Right to Dower, R. S. O. c. 164	789
Conveyances by Married Women, R. S. O. c. 165	799
Law of Landlord and Tenant, R. S. O. c. 170	806
Overholding Tenants, R. S. O. c. 171	831

STATUTE OF 1899.

Compensation to Workmen, 1899, 62 V. c. 18	838
--------------------------------------------------	-----

TABLE OF CASES.

A.

- A. B., Re, 285, 286.
 Abbott v. Metcalfe, 610.
 Abbott v. Richards, 330.
 Abell v. Morrison, 761, 765.
 Abergavenny, Earl of v. Brace, 677.
 Abernethy v. McPherson, 120.
 Abraham v. Abraham, 467, 762.
 Abraham v. Hacking, 783.
 Abrath v. North Eastern Ry. Co., 129.
 Accountant Supreme Court v. Marcon, 354.
 Ackroyd v. Smith, 687.
 Acocks v. Phillips, 823.
 A'Court v. Cross, 307.
 Acraman v. Corbett, 371.
 Adams, Re, 389.
 Adams v. Ackland, 267, 277.
 Adams v. Batty, 94.
 Adams v. British & Foreign Steamship Co., 156.
 Adams v. Gamble, 783.
 Adams v. Loomis, 779, 780.
 Adame's Trusts, Re, 781.
 Aday, Re, 245.
 Aday v. Deputy Master of Trinity House, 235.
 Administrator-General of Jamaica v. Lascelles, 464.
 Agar-Ellis, Re, 288, 289.
 Agency Co. v. Short, 675.
 Agg-Gardner, Re, 697.
 Agnew v. Jobson, 130.
 Ahern v. Bellman, 827.
 Ahrens v. McGilligat, 16.
 Ainley v. Balsden, 825.
 Ainsworth, Re, 648.
 Airey v. Bower, 656.
 Airey v. Mitchell, 207.
 Aitcheson v. Mann, 14.
 Aitkin v. Newport, 145.
 Albertson, Re, 590.
 Alcock v. Smith, 543, 546.
 Alderson v. Elgey, 606.
 Aldrich v. Aldrich, 94.
 Aldrich v. Canada Permanent Loan Co., 610.
 Alexander v. Barnhill, 788.
 Alexander v. Jones, 264.
 Alexander v. Wavell, 465.
 Allen v. Chisholm, 444.
 Allen v. Dundas, 407.
 Allen v. Edinburgh Life Assce. Co., 332, 333, 588.
 Allen v. England, 678.
 Allen v. Hamilton, 95.
 Allen v. Hanson, 50, 71.
 Allen v. McQuarrie, 130.
 Allen v. McTavish, 297, 683.
 Allhusen v. Brooking, 588.
 Allison, Re, 681.
 Allsop, Re, 501.
 Allwright v. Perks, 130.
 Alway v. Anderson, 830.
 Amend v. Murphy, 328.
 Amer v. Rogers, 786.
 Amiss, Re, 649.
 Amos v. Duffy, 146, 152.
 Amstell v. Alexander, 96.
 Anderson v. Anderson, 652.
 Anderson v. Dougall, 597.
 Anderson v. Glass, 466.
 Anderson v. Hamilton, 249.
 Anderson v. Lady Hay, 781.
 Anderson v. Rannie, 119.
 Anderson v. Sanderson, 306.
 Andrews, Re, 288, 356.
 Andrews v. Chapman, 116.
 Andrews v. Motley, 650.
 Andrews v. Salt, 288.
 Anglin v. Township of Kingston, 557.
 Anglo-Canadian Music Publishers v. Suckling, 56.
 Angus v. Smith, 96.
 Ann, Re, Wilson v. Ann, 784.
 Annandale, Ex parte, 246.
 Anon, 243, 244, 397.
 Anonymous, 243, 244.
 Anstee, Re, 244, 646.
 Anstee v. Nelmo, 676.
 Anthony, Re, Anthony v. Anthony, 658.
 Applebee, Re, 654.
 Applegath v. Graham, 130, 249.
 Appleton v. Lepper, 128, 129.
 Arbib and Class, Re, 696.
 Archbold v. Bldg. & Loan Assn., 609.
 Archer, Re, 647.
 Archer v. Leonard, 306.
 Archer v. Severn, 387, 398.
 Archibald v. McLaren, 129.
 Arden v. Goodacre, 278.
 Arkwright v. Gell, 686, 687.
 Armstrong, Re, 782.
 Armstrong v. Harrison, 587.
 Armstrong v. Lye, 761.
 Armstrong v. McCutcheon, 66.
 Armsworth v. The South Eastern Ry. Co., 157.
 Arnold v. Cheque Bank, 480.
 Arnold v. Cummer, 679.
 Arnold v. Higgins, 249.
 Arnold v. Playter, 363, 364.
 Arnold v. Robertson, 356.
 Arnsby, Ex parte, 96.
 Arscoth v. Lilley, 129, 132.
 Arthur, Re, 648.
 Arthur v. Grand Trunk Ry., 689.
 Ashbury v. Ellis, 50, 66.
 Ashley v. Brown, 460, 463.
 Ashworth v. Outram, 781.
 Aspinalls and Powell, Re, 697, 698.

- Astbury v. Beasley, 388.
 Astley v. Essex, 684.
 Aston v. Innis, 764.
 Aston v. Perkes, 131.
 Astor v. Merrett, 328.
 Atkinson, Re, 244.
 Atkinson v. Morris, 653.
 Atkinson v. Newcastle Waterworks, 15.
 Atrill v. Platt, 277.
 Atty-Gen. v. Bouwens, 557.
 Atty-Gen. v. Brackenbury, 656.
 Atty-Gen. of British Columbia v. Atty-Gen. of Can. (1889) 71.
 Atty-Gen. v. Bryant, 97.
 Atty-Gen. for Canada v. Atty-Gen. for Ont. (1890) 67, 72.
 Atty-Gen. for Canada v. Atty-Gen. for Ont. (1894) 51, 57, 465, 467.
 Atty-Gen. for Canada v. Atty-Gen. for Ont. (1896) 51, 54.
 Atty-Gen. for Canada v. Atty-Gen. for Ont. (1898) 53, 55, 56, 59, 62.
 Atty-Gen. for Dominion v. Atty-Gen. for Ont. (1898) 59, 65.
 Atty-Gen. v. Dorking, 689.
 Atty-Gen. v. Flint, 50.
 Atty-Gen. v. Hitchcock, 96.
 Atty-Gen. v. Magadalen College, 685.
 Atty-Gen. v. Mercer, 61, 70.
 Atty-Gen. of Ont. v. Atty-Gen. of Dom. (1894) 56, 57, 58, 64, 65, 66.
 Atty-Gen. of Ont. v. Atty-Gen. of Dom. (1896) 51, 53, 57, 59, 61, 62, 67, 68, 72.
 Atty-Gen. of Quebec v. Queen's Insurance Co., 58, 60, 62.
 Atty-Gen. v. Skinner's Co., 277.
 Augers v. Montreal, 55, 60, 62.
 Austen, Re, 650.
 Austin v. Austin, 289.
 Austin v. Llewelyn, 677.
 Aveson v. Kinnaird, 94.
 Axford, Re, 287.
 Ayers v. South Australian Banking Co., 558, 559.
 Ayerst v. McClean, 606, 797.
 Aylesford v. Great Western Ry. Co., 787.
 Aylesford (Earl) v. Morris, 592.
 Aynsley v. Glover, 687, 690.
 Ayotte v. Boucher, 291.
 Ayr American Plough Co. v. Wallace, 545.
 Ayres, Re, 787.
 Ayres v. Bull, 148.
 Ayton v. Bowles, 306.
- B.**
- Babbage v. Babbage, 94.
 Baby v. Ross, 781.
 Backus v. Smith, 686, 688.
 Bacon v. Daves, 147, 149.
 Bacon v. Rice Lewis & Co., 352, 354.
 Badcock, Re, 246.
 Badcock v. Freeman, 147.
 Baddeley v. Baddeley, 593.
 Baddely v. Earl Granville, 151.
 Badeley v. Consolidated Bank, 311.
 Badgerow v. G. T. R., 148, 149, 156.
 Baggett v. Meux, 778, 785.
 Bahama Islands, Re, 72.
 Bahen v. Hughes, 787.
 Baie des Chaleurs Ry. Co. v. Nantel, 69.
 Bailey, Re, 389, 391.
 Bailey v. Bank of Hamilton, 460.
 Bailey v. Birkenhead, 15.
 Bailey v. Frowan, 649.
 Bailey v. Stephens, 687, 688.
 Bailey v. Stevens, 692.
 Baillie v. Dickson, 544.
 Baillie v. Inchiquin, 395.
 Bailly v. Collett, 300.
 Bain and Leslie, Re, 678, 697.
 Bain v. Malcolm, 395, 462, 464.
 Baines v. Lumley, 675.
 Baines v. Swainson, 481, 482.
 Baird, Re, 631.
 Baird v. Story, 472.
 Baker, Re, 469.
 Baker v. Atkinson, 824.
 Baker v. Bradley, 785.
 Baker v. Dawbarn, 797.
 Baker v. Stuart, 632.
 Baker v. Whetton, 681.
 Bald v. Thompson, 398.
 Baldey v. Parker, 564.
 Baldwin v. Benjamin, 351.
 Baldwin v. Kingston, 631.
 Baldwin v. Wanzer, 826.
 Balke, Re, 788.
 Ball v. Goodman, 120.
 Ball v. G. T. R., 236.
 Ball v. Tennant, 466, 467.
 Ballard v. Dyson, 688.
 Balsam v. Robinson, 779, 780.
 Bank of British North America v. Clarkson, 562, 565, 566.
 Bank of British North America v. Mallory, 395.
 Bank of British North America v. Strong, 129.
 Bank of England v. Vagliano, 541.
 Bank of Hamilton v. Aikin, 266, 430.
 " " v. Baine, 265.
 " " v. Durrell, 430.
 " " v. Halstead, 566.
 " " v. Isaacs, 96.
 " " v. Noye Mfg. Co., 563, 565, 566.
 " " v. Shepherd, 562, 566.
 " " v. Tambllyn, 463.
 Bank of Montreal v. Little, 558.
 " " v. McTavich, 330.
 " " v. Gilchrist, 236.
 " " v. McWhirter, 560.
 " " v. Sweeney, 558.
 Bank of New South Wales v. Owston, 292.
 Bank of Nova Scotia v. Fish, 543.
 Bank of Scotland v. Dominion Bank, 546.
 Bank of Toronto v. Cobourg Ry. Co., 557, 593.
 " " v. Lambe, 55, 56, 57, 59, 60.
 " " v. MacDougall, 355, 357.
 " " v. Nixon, 496.
 " " v. Perkins, 559.
 Bank of Upper Canada v. Spafford, 265.
 Banks v. Robinson, 350, 351.
 Banner v. Berridge, 305.
 Banque d'Hochelaga v. Merchants Bank, 566.
 Banque Jacques Cartier v. Strachan, 546.
 Barber, Re, Burgess v. Vinnicome, 652.

- Barber v. Burt, 150.
 Barber v. Crathern, 471.
 Barber v. McKay, 766.
 Barber v. McPherson, 351, 356, 357.
 Barber v. Maughan, 357.
 Barber v. Meyerstein, 441, 442, 443.
 Barclay, Ex. parte, 349, 354.
 Barclay v. Owen, 683.
 Barclay v. Raine, 695.
 Barclay v. Sutton, 250.
 Bariatinski, Re, 244, 245.
 Baring v. Corrie, 479.
 Barker, Re, 287.
 Barker v. Leeson, 351.
 Barker v. Westover, 786.
 Barkworth v. Young, 657.
 Barlow v. Teal, 836.
 Barnes v. Bellamy, 822.
 Barnes v. Glenton, 297.
 Barnes v. Jones, 16.
 Barnes v. Metcalf, 308.
 Barnes v. Ward, 160.
 Barnett v. Lucas, 157.
 Barnhart v. Greenshields, 766.
 Barrack v. McCulloch, 779.
 Barraclough v. Greenough, 98.
 Barrett v. Winnipeg, 70.
 Barrington, Re, 396.
 Bartlett v. Smith, 98.
 Bartlett v. Thompson, 837.
 Barton v. Bricknell, 128.
 Bartram v. London Free Press Co., 117.
 Barwick v. Barwick, 307, 681.
 Barry v. Eccles, 275.
 Barry v. McGrath, 116.
 Bass v. Gregory, 687, 692.
 Bateman v. Brider, 306.
 Bateman v. Faber, 785.
 Bateman v. Pennington, 649.
 Bateman v. Pinder, 307.
 Bates v. Bates, 278.
 Bathgate v. Merchants Bank, 559.
 Batt, Re, Wright v. White, 398.
 Battersea v. Commrs. of Sewers, 690.
 Battishill v. Reid, 686, 691.
 Bavins v. London South Western Bank, 547.
 Baxendale v. McMurray, 689.
 Baxter v. Wyman, 147.
 Bayley v. Great Western Ry. Co., 589.
 Baylis v. Lawrence, 115.
 Beard v. Ketchum, 306.
 Beard v. Steele, 55, 64.
 Beasley v. Clarke, 692.
 Beasley v. Roney, 788.
 Beasley, Re, 407.
 Beaty v. Fowler, 357.
 Beaty v. Hackett, 266.
 Beaty v. Shaw, 592, 608.
 Beatson v. Skine, 97.
 Beattie v. Holmes, 465.
 Beattie v. Wenger, 461, 464, 465.
 Beaumont v. Foster, 607.
 Beaupre's Trusts, Re, 781.
 Beavis v. McGuire, 797.
 Becher v. Woods, 560.
 Bechtel v. Street, 692.
 Bechuanaland Exploration Co. v. London Trading Bank, 557.
 Beck v. Pierce, 787.
 Beckett v. G. T. R., 159.
 Beckett v. Manchester Corporation, 153.
 Beckett v. Tasker, 784.
 Beddington v. Altee, 589.
 Beecher v. Austin, 352.
 Beemer v. Oliver, 463, 466, 787.
 Beer v. Stroud, 689.
 Beers v. Waterbury, 357.
 Beggan v. McDonald, 689.
 Beigle v. Dake, 681.
 Beinrstein v. Walker, 544.
 Belair v. Buchanan, 117.
 Bellamy v. Badgerow, 798.
 Bellamy, Re, Elder v. Pearson, 778.
 Bellamy and Metropolitan Board of Works, Re, 392, 588, 697.
 Bell, Re, 243, 461.
 Bell v. Golding, 674.
 Bell v. Hughes, 649.
 Bell, Re, Lake v. Bell 684.
 Bell v. Ottawa Trust Co., 469.
 Bell v. Walker, 763.
 Belleville School Trustees v. Grainger, 70.
 Benavides v. Hunt, 824.
 Benedict v. Van Allen, 488.
 Benfield and Stevens, Re, 696.
 Bennett, Re, 244, 287.
 Bennett v. Davis, 778.
 Bennett v. Empire Printing Co., 117.
 Bennett v. Pharmaceutical Assn., 64, 67.
 Bennington, Re, 632.
 Bennisson v. Cartwright, 691.
 Bent v. Roberts, 836.
 Bentley v. Rotheram and Kimworth Local Board of Health, 16.
 Bentley v. Vilmon, 249.
 Beresford v. Armagh, 788.
 Berkeley's Trust, Re, 398.
 Bernardin v. North Dufferin, 14.
 Berry v. Berry, 657.
 Berry v. Donovan, 278.
 Berryman, Re, 288.
 Bert v. Gray, 826.
 Bertram v. Pendry, 356.
 Bertram v. Wichcote, 589.
 Besant, Re, 288.
 Bessela v. Stern, 94.
 Bethel, Re, 306.
 Beven v. London Portland Cement Co., 679.
 Beverley's case, 243.
 Bew v. Bill, 464.
 Bewley v. Atkinson, 688.
 Beyfus and Masters, Re, 697.
 Beynon v. Cook, 592.
 Beytagh v. Cassidy, 690.
 Bibb v. Thomas, 653.
 Bickerton v. Dakin, 14.
 Bickerton v. Walker, 587, 611.
 Biggar v. Dickson, 397.
 Biggs v. Burnham, 119.
 Biggs v. Freehold Loan & Savings Co., 684.
 Bingham v. Bettinson, 358, 359.
 Bingham and Wriggleworth, Re, 690.
 Birch v. Ridgway, 98.
 Bird v. Defonville, 827.
 Bird v. Gammon, 305.
 Bird, Re, Oriental Commercial Bank v. Savin, 388.
 Birk v. Guy, 308.

- Birkin v. Frith, 309.
 Birmingham, Dudley and District Banking Co. v. Ross, 589.
 Birmingham v. Malone, 822.
 Birt, Re, 646.
 Bishoprick, Re, 287.
 Bishton v. Nesbitt, 277.
 Bissell v. Fox, 547.
 Bissett v. Pearce, 358.
 Blachford v. McBain, 291.
 Black v. Fountain, 797.
 Black v. Ontario Wheel Co., 148, 149.
 Blades v. Free, 300.
 Blain v. Peaker, 466.
 Blake v. Midland Ry. Co., 156, 157, 159.
 Blakeley v. Gould, 462.
 Blanchet v. Powells Llantvit Collieries Co., 444.
 Blean v. Blean, 287.
 Blong v. Fitzgerald, 606, 797.
 Blumberg v. Life Interests and Reversionary Securities Corporation, 483.
 Blumenthal v. Solomon, 276.
 Blythe v. Fladgate, 388.
 Bobier and Ontario Investment Co., Re, 697, 698.
 Boddy, Re, 287.
 Boice v. O'Loane, 297, 683.
 Bokatal, Re, 430.
 Bolding v. Lane, 681.
 Boldrick v. Ryan, 356.
 Bolkow v. Foster, 95.
 Bolling v. Hobday, 680.
 Bolton v. London School Board, 695.
 Bond v. Conmee, 129, 130, 131.
 Bond v. Toronto Railway Co., 147.
 Bondy v. Fox, 765.
 Bonner v. Lyon, 783, 784.
 Bonsor and Smith, Re, 679.
 Bonzi v. Stewart, 483.
 Booth v. Alcock, 690.
 Booth v. Clive, 189.
 Booth's Estate, Re, 632.
 Booth and McLean, Re, 697.
 Booth v. Smith, 591.
 Bortick v. Head, 152.
 Borrowers v. Ellison, 685.
 Borton v. Ockford, 98.
 Boston v. Lelievre, 14.
 Bott v. Smith, 371.
 Boucher v. Smith, 761.
 Boulcott v. Boulcott, 654.
 Boulter v. Webster, 757, 158.
 Boulton v. Blake, 822, 827.
 Boud v. Lawrence, 145.
 Bourdin v. Greenwood, 305.
 Bourgoin v. La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental Ry. Co., 58.
 Bourke v. Cork & Macroom Ry. Co., 158.
 Boustead and Warwick, Re, 698.
 Boustead v. Whitmore, 780.
 Bowden, Re, 393 394.
 Bowen v. Anderson, 836.
 Bowen v. Lewis, 657.
 Bowerman v. Phillips, 430, 461.
 Bowers v. Flower, 275.
 Bowes v. Hall and Holland, 488, 489.
 Bowie, Re., Ex parte Bruell, 264.
 Bowie v. Rankin, 148.
 Bowlby v. Bell, 562.
 Bowlby v. Woodley, 692.
 Bowles v. Jackson, 650.
 Bown, Re, O'Halloran v. King, 785.
 Bowyer v. Woodman, 682.
 Box, Re, 396.
 Boyd v. Glass, 464.
 Boyd v. Mortimer, 542.
 Boyes v. Cook, 656.
 Boyes, Re, Crofton v. Crofton, 541.
 Boynton v. Boyd, 356.
 Boys' Home v. Lewis, 397, 398.
 Bracken, Re, 395.
 Bradburn v. Great Western Ry. Co., 159.
 Bradburn v. Morris, 688.
 Bradley v. James, 308.
 Bradley v. McIntosh, 97.
 Bradshaw v. Duffy, 236.
 Bradshaw v. Lancashire and Yorkshire Ry. Co., 152, 157.
 Bradt, Doe d. v. Hodgins, 804.
 Brady v. Walls, 761.
 Brall, Re, Ex parte Norton, 465.
 Brammell v. Lees, 158.
 Brannigan v. Robinson, 146, 148.
 Brantom v. Griffiths, 351.
 Braunstein v. Lewis, 783, 784.
 Brayley v. Ellis, 461.
 Bready v. Robertson, 117.
 Breary, Re, 389.
 Breed's Will, Re, 396.
 Breeze v. Knox, 461, 462.
 Brega v. Dickey, 767.
 Breithaupt v. Marr, 430.
 Brett v. Brett, 651.
 Brett v. Rogers, 827.
 Brett v. Smith, 276.
 Brewers & Malsters Assn. of Ont. v. Atty-Gen. for Ont., 59, 60, 62.
 Brewster, Re, 654.
 Bridewell Hospital v. Ward, 690.
 Bridge, Re, 245.
 Bridger, Re, Brampton Hospital v. Lewis, 573.
 Bridges v. Ontario Rolling Mills Co., 148.
 Bridges v. Real Estate Loan & Debenture Co., 763.
 Brier, Re, Brier v. Evison, 388.
 Briggs v. Evelyn, 129, 130.
 Briggs v. Semmens, 589.
 Briggs and Spicer, Re, 697.
 Briggs v. Wilson, 308, 788.
 Bright v. Walker, 686, 688, 689, 692.
 Brigstocke v. Smith, 308.
 Brillinger v. Ambler, 829.
 Bristol and West of England Bank v. Midland Ry., Re, 441, 442.
 Britain v. Rossiter, 311.
 Britton v. Great Western Cotton Co., 151.
 Britton v. Knight, 782.
 Britton v. Milson, 544.
 British and Canadian Loan and Investment Co. v. Williams, 607.
 British Columbia Mills v. Scott, 148.
 British India Steam Navigation Co. v. Inland Revenue Commissioners, 593.
 Broadbent v. Groves, 658.
 Brock v. Benness, 680.

Brock v. Ruttan, 328.
 Brocklehurst v. Law, 470.
 Brodie v. Ruttan, 351.
 Bromley v. Cavendish Spinning Co., 147.
 Bromley v. Holland, 300.
 Brook v. Evans, 116.
 Brooke v. Gibson, 679.
 Brooke v. Ramsden, 152.
 Broomfield v. Williams, 690.
 Brophy v. Atty-Gen. of Manitoba, 70.
 Bross v. Huber, 130, 132.
 Brower v. Canada Permanent, 763.
 Brown v. Alabaster, 589.
 Brown v. Brown, 94.
 Brown v. Cocking, 234.
 Brown's Estate, Re, Brown v. Brown, 297.
 Brown v. Grove, 466.
 Brown v. Harper, 300.
 Brown v. Hawkes, 129.
 Brown v. Hose, 235.
 Brown v. McAdam, 235.
 Brown v. McLean, 765.
 Brown v. McNab, 573.
 Brown v. Perrott, 329.
 Brown v. Powell Coal Co., 443.
 Brown v. Winning, 787.
 Brown v. Zimmerman, 249.
 Browne, Re, 288, 289.
 Browne v. Hammond, 657.
 Browne v. Lockhart, 609.
 Bruce v. McLay, 767.
 Bruere, Re, 246.
 Bruges, Re, 244.
 Brunnell v. C. P. R., 149, 150, 156.
 Bryan v. Cowdal, 674.
 Bryant and Barningham, Re, 698.
 Bryant v. La Banque de Peuple, 542, 558.
 Bryant v. Lefever, 687, 689.
 Brydges v. Plumtree, 308.
 Bryan, Re, Williams v. Mitchell, 656.
 Bryson v. Ontario and Quebec Ry. Co., 780.
 Bucknam v. Stewart, 683.
 Buck v. Hunter, 131.
 Buel v. Ford, 692.
 Buell v. Read, 688.
 Building and Loan Assn. v. Carswell, 606.
 " " v. Palmer, 463.
 " " v. Poaps, 676, 763.
 Bullock, Re, 244.
 Bullock v. Bennett, 655.
 Bulmer v. Bulmer, 160.
 Bunker v. Midland Ry. Co., 149.
 Bunton v. Williams, 266.
 Burke v. Heney, 363.
 Burland v. Lee, 149.
 Burley v. Bethune, 129.
 Burn v. Burn, 95.
 Burnaby v. Bailie, 94.
 Burnett v. McBean, 349.
 Burnham v. Garvey, 690.
 Burns v. McAdam, 804.
 Burns v. McKay, 460.
 Burns v. Wilson, 460, 463, 464.
 Burr v. Monroe, 249.
 Burritt v. Burritt, 388.
 Burrough's case, 824.
 Burroughs and Lynn, Re, 606.
 Burroughs v. McCreight, 680.
 Burrows v. Walls, 387.

Bursill v. Tanner, 787.
 Burton v. Barclay, 823.
 Burton v. Bellhouse, 350.
 Burwell v. London Free Press Co., 116, 828.
 Bury v. Thompson, 827.
 Busfield, Re, 696.
 Bush v. Fry, 479, 481.
 Bush v. Pinlott, 249.
 Bushnell v. Moss, Re, 236.
 Buskin, Re, 305.
 Buskin v. Edmonds, 824.
 Butcher v. Stead, 463.
 Butler v. Birnbaum, 148.
 Butler, Ex parte, 501.
 Butler v. Ablewhite, 264.
 Butler v. Butler, 404, 656, 784.
 Butler v. Rosenfeldt, 276.
 Byers v. McMillan, 250.
 Byles v. Cox, 647.

C.

C's Settlement, Re, 785.
 Cahn v. Pockets Bristol Channel Packet Co., 441.
 Cahuac v. Cochrane, 681.
 Calcutt v. Ruttan, 278.
 Calder v. Halket, 129.
 Caldwell, Re, 396.
 Caldwell v. Mills, 147, 148.
 Callender v. Lagos, 71.
 Callicott, Re, 287.
 Calvert v. Black, 797.
 Calvert v. Moggs, 131.
 Calywold, Re, 652.
 Cameron v. Bejhune, 397.
 Cameron v. Cusack, 463.
 Cameron v. Gibson, 607.
 Cameron v. Heighs, 787.
 Cameron v. Kerr, 560.
 Cameron, Re, Mason v. Cameron, 395.
 Cameron v. Wait, 14.
 Cameron v. Walker, 677, 780.
 Cammell v. Sewell, 352.
 Campbell, Ex parte, 16.
 Campbell v. Baxter, 823, 828.
 Campbell v. Dunn, 288.
 Campbell v. Hally, 470, 471.
 Campbell v. Roche, 371, 460, 463.
 Campbell v. Royal Canadian Bank, 79.
 Campbell v. Wilson, 686.
 Campbell v. Young, 689.
 Canada Atlantic Ry. Co. v. Hurdman, 152.
 Canada Co. v. Douglas, 679, 680.
 Canada v. Ontario and Quebec, 72.
 Canada Paint Co. v. Trainor, 149.
 Canada Permanent L. and S. Co. v. McKay, 763.
 Canada Permanent L. & S. Co. v. Page, 98, 767.
 Canada Permanent L. & S. Co. v. Teeter, 610.
 Canada Permanent L. & S. Co. v. Traders' Bank, 349.
 Canada Southern Ry. Co. v. Jackson, 64, 69, 146, 150.
 Canada Southern Ry. Co. and Lewis, Re, 688.
 " " v. Niagara Falls, 688.
 Canadian Bank of Commerce v. Woodcock, 784.

- Canadian Colored Cotton Mills Co. v. Ker-
 vin, 849.
 Canadian Cotton Mills Co. v. Talbot, 147.
 Canadian Pacific Ry. Co. and National Club,
 Re, 632, 697.
 Canadian Pacific Ry. Co. and Township of
 York, Re, 53.
 Candler v. Tillett, 387.
 Cannon v. Rimington, 677.
 Cann v. Taylor, 683.
 Cooper v. Herbuck, 689.
 Capell v. Powell, 786.
 Capital and Counties Bank v. Henty, 115.
 Capron v. Capron, 823.
 Carling Brewing and Malting Co. v. Black,
 396, 468.
 Carmichael's case, 300.
 Carnegie v. Federal Bank, 560.
 Caron v. Graham, 250.
 Carpenter v. Deen, 353, 564.
 Carpenter v. Street, 547.
 Carter v. Clarke, 149.
 Carter v. Clarkson, 633.
 Carter v. Drysdale, 153.
 Carter and Kenderline, Re, 465.
 Carter v. Long, 250.
 Carter v. Stone, 467.
 Carter v. Wake, 560.
 Carson v. Veitch, 827.
 Carr, Ex parte, Re Holman, 469.
 Carr v. Fire Insurance Co. 607.
 Carr v. Foster, 691.
 Carr v. London and North Western Ry. Co.
 480.
 Carrick v. Smith, 765.
 Carrique v. Beatty, 542, 546, 548.
 Carritt, Re, 654.
 Carroll v. Beard, 363, 829.
 Carroll v. Fitzgerald, 788.
 Carroll v. Provincial Natural Gas Co., 354.
 Cartwright v. Hinds, 264.
 Case v. McVeigh, 275.
 Casement v. Fulton, 648.
 Casey v. C.P.R. 150.
 Casey v. Jordan, 762.
 Casmore, Re, 647.
 Casner v. Haight, 797.
 Cassidy v. Firman, 308.
 Cassidy v. Stuart, 276.
 Casson v. Dade, 649.
 Castle v. Fox, 655.
 Castle v. Warland, 338.
 Catchcart, Re, 246.
 Caton v. Rideout, 788.
 Caudle v. Seymour, 128, 129.
 Cavanagh v. Park, 153.
 Cawley v. Furnell, 308.
 Central Bank, Re, Canada Shipping Co's case,
 563, 565.
 Central Bank v. Garland, 364, 559.
 Central Bank, Re, Liquidator's case, 398.
 " " , Horton and Block's claims,
 557.
 Central Bank, Re, Nasmith's case, 560.
 Central Vermont Railway v. St. John, 55, 61.
 Centre Wellington, Re, 71.
 Chadwick v. Broadgood, 675.
 Chaffey, Re, 467, 469.
 Chagnon v. Normand, 292.
 Chant v. South Eastern Ry. Co., 159.
 Chaplin, Ex parte, 330, 371.
 Chamber Colliery Co. v. Hopwood, 686.
 Chamberlain v. King, 136.
 Chamberlain v. Sovalis, 606.
 Chamberlain v. Young, 541.
 Chamberland v. Fortier, 291.
 Chamberlin v. Clark, 395.
 Chambers v. Minchin, 387.
 Champion, Re, Dudley v. Champion, 655.
 Chapman v. Beecham, 822.
 Chapman, Re, Cocks v. Chapman 403, 404.
 Chapman v. Guardian of Auckland Union,
 130.
 Chapman v. Rothwell, 153.
 Chapman v. Zealand, 444.
 Chaput v. Robert, 15, 496.
 Chard v. Rae, 297.
 Chartered Bank of India v. Henderson, 444.
 Chasemore v. Richards, 687.
 Chasemore v. Turner, 305.
 Chastey v. Ackland, 689.
 Chaudière Gold Mining Co. v. Desbarats,
 573.
 Cheese v. Lovejoy, 653.
 Chellow v. Martin, 656.
 Cheslyn v. Dalby, 305, 307.
 Chew v. Holroyd, 236.
 Chichester v. Marquis of Donegal, 607.
 Chilcott, Re, 654.
 Childerston v. Barrett, 277.
 Chilliman, Re, 288.
 Chine's Estate Re, 823.
 Chinnery v. Evans, 682, 683.
 Chipchase, Ex parte, 501.
 Chisholm v. Barnard, 398.
 Chisholm v. Emery, 657.
 Chisholm and Oakville, Re, 704, 765.
 Christian, Re, 649.
 Christian v. Field, 606.
 Christie v. Ovington, 390.
 Christy v. Casey, 822.
 Chubb v. Stretch, 783.
 Church v. Appleby, 151.
 Churcher v. Martin, 685.
 Churchill v. Hobson, 387.
 Citizens' Ins. Co. v. Parsons, 51, 54, 55, 56,
 63, 64, 67.
 City Bank v. Barrow, 479, 481, 482.
 Clare, Re, 243.
 Clapham v. Draper, 822.
 Clark, Re, 243, 245, 289.
 Clark v. Adams, 152.
 Clark v. Ashfield, 264.
 Clark v. Bates, 359.
 Clark v. Bellamy, 388, 393.
 Clark v. Bogart, 761.
 Clark v. Carfin Coal Co., 156.
 Clark, Re, Clark v. Randall, 652.
 Clark v. Farrell, 330.
 Clark v. Holmes, 152.
 Clark v. St. Mary's Bury, St. Edmonds, 836.
 Clark v. Torbell, 352.
 Clark v. Western Assee. Co., 565.
 Clarke, Re, 245, 648.
 Clarke and Chamberlain, Re, 765.
 Clarke v. Clarke, 275.
 Clarke v. Cobley, 309.
 Clarke v. Creighton, 783.

- Clarke v. Cretico, 276.
 Clarke v. Hoskins, 390.
 Clarke v. London and County Banking Co., 542, 547.
 Clarke v. McDonnell, 286, 288.
 Clarke v. Proudfoot, 266.
 Clarke v. Samson, 589.
 Clarke v. Spence, 561.
 Clarke v. Atty.-Gen. for Canada, 470.
 Clarkson v. Henderson, 682.
 Clarkson v. McMaster, 349, 350, 351, 359, 462, 470.
 Clarkson v. Musgrave, 130, 153.
 Clarkson v. Ontario Bank, 58, 65.
 Clarkson v. Ryan, 58, 291.
 Clarkson v. Severs, 467.
 Clarkson v. Sterling, 359, 460, 462.
 Claxton v. Mowlem, 149, 150.
 Clay v. Thackrah, 686.
 Clayton v. Blakey, 836.
 Clayton v. Corby, 686, 687, 692.
 Cleaver v. Fraser, 266.
 Cleck v. Laurie, 300.
 Clegg v. Grand Trunk, 69.
 Clegg v. McNabb, 278.
 Clegg v. Rowland, 396.
 Cleland v. Robinson, 129.
 Clements v. Kirby, 276.
 Clements v. London and North Western Ry. Co., 173.
 Clemmow v. Converse, 462.
 Clendenning v. Browne, 277.
 Clerk v. Ward, 948.
 Cleveland v. Melbourne, 64.
 Clifford v. Clifford, 656.
 Clock v. Alfeld, 264.
 Clough v. Bond, 388.
 Clutton v. Attenborough, 541, 546.
 Coatsworth v. Johnson, 588.
 Cobbett, Ex parte, 277.
 Cobbett v. Kilminster, 98.
 Cockayne, Ex parte, 246.
 Cockburn, Re, 686, 691.
 Cockburn v. Edwards, 683.
 Cockburn v. Sylvester, 565.
 Cockerell v. Cholmeley, 591.
 Coffey v. Scane, 264, 275.
 Coffey v. Quebec Bank, 565.
 Coffin v. North American Land Co., 675, 679.
 Cogswell v. Armstrong, 655.
 Cohn v. Werner, 543.
 Colberg, Re, 653.
 Colchester v. Roberts, 692.
 Cole v. Manning, 95.
 Cole v. Miles, 236.
 Cole v. North Western Bank, 443, 479, 481, 482.
 Cole v. Porteous, 14, 465.
 Cole v. Scott, 655.
 Coleby v. Coleby, 658.
 Coleman, Re, 483.
 Coles v. Coles, 96.
 Coles v. Trecothick, 680.
 Collard and Duckworth, Re, 590, 591.
 Colledge v. Horn, 305.
 College of Physicians and Surgeons, Re, 50.
 Collingridge v. Paxton, 329.
 Collins, Re, 647.
 Collins v. Cunningham, 606.
 Collinson v. Margesson, 308.
 Collip v. Phillips, 149.
 Collis v. Stack, 305.
 Collver v. Shaw, 766.
 Colonial Bank v. Cady, 480, 557.
 Colonial Bank v. Hepworth, 557.
 Colonial Building and Investment Assn. v. Atty.-Gen. of Quebec, 52.
 Colquhoun v. Murray, 681, 682.
 Colthart, Re, 287, 798.
 Coltman v. Brown, 98.
 Coltsman v. Coltsman, 657.
 Commercial Bank v. Brega, 97.
 Commercial Bank v. Smith, 804.
 Commercial Bank v. Bank of Upper Canada, 559.
 Commercial Bank v. Watson, 606.
 Commercial Bank of Manitoba, Re, Barkwell's claim, 558.
 Commercial Bank of South Australia, Re, 845.
 Commercial National Bank of Chicago v. Corcoran, 349, 353, 564, 566.
 Commissioners of Cobourg Town Trust, Re, 397.
 Condif v. Condif, 160.
 Condon v. Great Southern and Western Ry. Co., 158.
 Confederation Life Assn. v. Kinnear, 309.
 Conger v. G. T. R., 152, 156.
 Conmee v. Weidman, 116.
 Conn v. Smith, 471, 566.
 Connecticut Passumpsic Ry. Co. v. Morris, 328.
 Connell v. Hickock, 351, 353, 778.
 Connelly v. Murrell, 94.
 Connors v. Darling, 128.
 Conroy v. Peacock, 153.
 Consolidated Bank v. Henderson, 786.
 Constable v. Constable, 286, 823.
 Constable v. Nicholson, 688.
 Constantinople and Alexandria Hotel Co., Re, 309.
 Consterdine v. Consterdine, 402.
 Conway v. Clemence, 148, 149.
 Cook v. Fowler, 249.
 Cook v. Grant, 95.
 Cook v. Lambert, 647.
 Cook's Trust, Re, 396.
 Cooke, Re, 653, 697.
 Cooke v. Paxton, 650.
 Cookson v. Swire, 351.
 Cool v. Mulligan, 250.
 Cooley v. Smith, 763.
 Coombs, Re, 647.
 Cooney v. Sheppard, 781.
 Coope v. Cresswell, 298.
 Cooper v. Bockett, 648.
 Cooper v. Dixon, 466.
 Cooper v. Hamilton, 675.
 Cooper v. Jarman, 658.
 Cooper v. Lloyd, 93.
 Cooper v. Macdonald, 779.
 Coppin v. Coppin, 587.
 Coquillard v. Hunter, 250.
 Corby, Re, 650.
 Corbyn, Doe d. v. Branston, 685.
 Corcoran v. East Surrey Iron Works Co., 148.

- Core v. Ontario Loan and Debenture Co., 763.
 Corham v. Kingston, 607.
 Cornforth v. Smithard, 305.
 Corning v. Burden, 148.
 Cornish v. Abingdon, 480.
 Cornish v. Stubbs, 826.
 Cornwall v. Hawkins, 309.
 Cornwall v. Sanders, 235.
 Corpus Christi College v. Rogers, 675.
 Corwell, Re, Lawton v. Elwes, 472.
 Cosgrave v. Boyle, 544.
 Costello v. Hunter, 94.
 Cote v. Chauveau, 66.
 Cotesworth v. Spokes, 828.
 Cotton v. Beatty, 115.
 Cotton v. Mitchell, 297.
 Cotton v. Wood, 159.
 Coulcher v. Toppin, 544.
 Coulson v. O'Connell, 16.
 County Courts of British Columbia, Re, 65.
 Court v. Holland, 473.
 Court v. Walsh, 674, 681.
 Courtenay, Re, 654.
 Courtney v. Williams, 308.
 Courtney v. Vincent, 330.
 Cousineau v. London Fire Ins. Co., 132.
 Coventry v. McLean, 825, 826, 828.
 Cowan v. Allen, 631, 657.
 Cowans v. Marshall, 149, 849.
 Coward v. Adams, 698.
 Cowler v. Moresby Coal Co., 145.
 Cowley v. Newcastle Local Board, 15.
 Cox v. Bennett, 655, 786.
 Cox v. Great Western Ry. Co., 150.
 Cox v. Hamilton Sewer Pipe Co., 149, 153.
 Coyle v. Great Northern Ry. Co., 156.
 Cozens v. Groat, 652.
 Crafter v. Metropolitan Ry. Co., 148.
 Craig, Re, 698.
 Craig v. Samuel, 543.
 Crain v. Ottawa Collegiate Institute, 16.
 Crapper v. Patterson, 465.
 Crawford v. Boyd, 651.
 Crawford v. Broddy, 657.
 Crawford v. Crawford, 308.
 Crawford v. Curragh, 645.
 Crawford v. Town of Cobourg, 557.
 Crears v. Hunter, 542.
 Creggreen v. Willoughby, 649.
 Creswell v. Jackson, 98.
 Creswell v. Creswell, 652.
 Crew Doe d. v. Clarke, 265.
 Criminal Code Re, 50.
 Cripps v. Davis, 307.
 Cripps v. Judge, 146.
 Croft v. Croft, 650.
 Crombie v. Cooper, 655.
 Crombie v. Jackson, 52, 56.
 Cromie v. Skene, 119.
 Crooks v. Allen, 441.
 Crooks v. Cummings, 653.
 Crooks v. Stroud, 472.
 Crosbie v. Macdonald, 654.
 Croskery, Re, 796, 797.
 Cross v. Jordan, 828.
 Cross v. Goodman, 119.
 Cross v. Lewis, 690.
 Cross v. Wilcox, 129.
 Crown v. Chamberlin, 332.
 Crowter, Re, Crowter v. Hinman 387.
 Cruso v. Bond, 609.
 Cubbitt, Doe d. v. McLeod, 828.
 Culhane v. Stuart, 470.
 Cuming v. Toms, 131.
 Cumming, Re, 244, 245.
 Cummings v. Taylor, 461, 465.
 Cundy v. Lindsay, 249.
 Cunningham, Re, 389.
 Cunningham v. Foot, 684.
 Cunningham v. Peterson, 546.
 Cuno, Re, Mansfield v. Mansfield 646.
 Curran v. G. T. R., 146, 159, 160.
 Currey, Re, Gibson v. Way, 785, 786.
 Cursiter, Re, 398.
 Curwen v. Milburn, 305.
 Curzon, Doe d. v. Edmond, 681.
 Cusick v. McRae, 128.
 Cushing v. Depuy, 52, 56.
 Cuthbert v. North American Life Assoc. Co., 823.
 Cutto v. Gilbert, 653.
- D.**
- Dabbs v. Humphries, 305.
 Dacre v. Patrickson, 658.
 Dain v. Gossage, 15.
 Dale v. Cool, 130.
 Dale v. McGuinn, 657.
 Daley v. Byrne, 120.
 Dalglish v. McCarthy, 370.
 Dalton v. Angus, 685, 686, 687, 688, 690.
 D'Alton v. D'Alton, 289.
 Dalton v. Fitzgerald, 678.
 Dalton v. South Eastern Ry. Co., 157, 158.
 Dalton, Re, 648.
 Daly v. Robinson, 95.
 Dame v. Slater, 779.
 Damer v. Busby, 276.
 Dames and Wood, Re, 696.
 Danaher v. Peters, 62.
 Danby v. Danby, 407.
 Dance v. Goldingham, 392.
 Dancer v. Crabb, 654.
 Dando v. Boden, 545.
 Daniel v. North, 686.
 Daniels v. Daniels, 358.
 Danjou v. Marquis, 66.
 Dansereau, Ex parte, 64, 66.
 Darling, Re, 95.
 Darling v. Hitchcock, 15.
 Darling v. McIntyre, 465.
 Darling v. Magnan, 496.
 Darling v. Rice, 783, 784.
 Darling v. Smith, 266.
 Daun v. Sherwood, 548.
 Dauphinais v. Clark, 822.
 Davenport, Re, Turner v. King, 782.
 Davey v. Lewis, 829.
 David v. Sabin, 590.
 Davidson v. Fraser, 462, 463.
 Davidson v. McKay, 762.
 Davidson v. Reynolds, 328.
 Davidson v. Ross, 16.
 Davies B. & M. Co. v. Smith, 430.
 Davies v. Davies, 309.
 Davies, Re, Ellis v. Roberts, 394.

- Davies v. Gillard, 461.
 Davies v. Jenkins, 785.
 Davies v. Stainbank, 437.
 Davies v. Williams, 119, 679, 691.
 Davis, Re, 286.
 Davis v. Bowes, 489.
 Davis and Cavey, Re, 696, 698.
 Davis v. Davis, 288, 289, 658.
 Davis, Re, Evans v. Moore, 683.
 Davis v. Freethy, 266.
 Davis v. Reilly, 548.
 Davis v. Van Norman, 97.
 Davis v. Wickson, 465.
 Davis v. Williams, 128.
 Davy, Re, 246.
 Davy, Doe d. v. Oxenden, 675.
 Dawkins v. Lord Penrhyn, 674, 677.
 Dawson, Re, 501.
 Dawson v. Bank of Whitehaven, 797.
 Dawson v. Clarke, 387.
 Dawson v. Dumont, 291.
 Dawson v. Moffatt, 782.
 Dawson v. Small, 657.
 Day v. Batchelor, 545.
 Day v. Day, 675.
 Day v. Longhurst, 543.
 Day, Re, Sprake v. Day, 658.
 Day v. Trig, 656.
 Day v. Woolwich Equitable Bldg. Socy. 392.
 Deal v. Potter, 249.
 Dean v. Ontario Cotton Mills Co., 151.
 Dearle, Re, 647.
 Dedrick v. Ashdown, 359.
 Defoe, Re, 675, 678.
 Deighton and Harris, Re, 696.
 Delaney v. C. P. R., 685.
 Delanty, Re, 287.
 Delegal v. Highley, 116.
 Delorne v. Cusson, 291.
 Demill v. Easterbrook, 275.
 Denison v. Denison, 397, 398.
 Denison v. Maitland, 824, 828.
 Denne v. Wood, 652.
 Dennison v. Cunningham, 128.
 Denver T. & G. R. Co. v. Simpson, 147.
 Deputy Coroner of Middlesex, Ex parte, 276.
 D'Errico v. Samuel, 237.
 Derinzy v. Turner, 647.
 De Tastet v. Carroll, 462.
 Devaynes v. Boys, 131.
 De Veber Re, 65.
 Devon's Settled Estates, Re Earl of, 676.
 De Wolf v. Lindsell, 437.
 Dews v. Riley, 128.
 Diamond v. Cartwright, 275.
 Dias v. Livera, 782.
 Dibb v. Walker, 298.
 Dick, Re, 402.
 Dick v. Swinton, 276.
 Dickenson v. Hatfield, 307.
 Dickinson, Re, 471.
 Dickinson v. North Eastern Ry. Co., 156.
 Dickinson v. Teesdale, 684.
 Dickin v. Dickin, 590.
 Dicker v. Angerstein, 610.
 Dickson, Re, 286, 289.
 Dickson v. Crabbe, 128.
 Diederichsen v. Farquharson, 443.
 Digge's Case, 591.
 Dilke v. Douglas, 390, 607, 608, 765.
 Dilkes, Re, 646, 649.
 Dingman v. Austin, 780.
 Dingman and Hall Re, 697, 698.
 Dingman v. Harris, 785.
 Dinnoek v. Hallett, 591.
 Disher v. Disher, 265.
 D'Ivry v. World Newspaper Co., 93.
 Dixon, Ex parte, 479.
 Dixon, Re, Bryan v. Tull, 782.
 Dixon v. Gayfere, 675.
 Dixon, Doe d. v. Grant, 297.
 Dixon v. Saville, 796.
 Dixon v. Snarr Re, 235.
 Doan v. Davis, 797.
 Doan v. Michigan Central Ry. Co., 131.
 Dobbin v. Dobbin, 796, 797.
 Dobie v. Temporalities Board, 57, 58, 72.
 Dobson v. Sootheran, 836.
 Dodson v. MacKey, 305.
 Dodson v. Sammell, 393.
 Doe v. Barford, 651.
 Doe v. Benham, 821.
 Doe v. Birch, 824.
 Doe v. Coombs, 679.
 Doe v. Gladwin, 825.
 Doe v. Hinde, 821.
 Doe v. Horn, 828.
 Doe v. Jackson, 827.
 Doe v. Masters, 823.
 Doe v. Meux, 824.
 Doe v. Paul, 824.
 Doe v. Peck, 824, 825.
 Doe v. Roe, 823.
 Doe v. Wandless, 823.
 Doe v. Woodbridge, 825.
 Doe v. Woodman, 828.
 Dominion Bank v. Cowan, 460.
 Dominion Bank v. Davidson, 442, 563.
 Dominion Bank v. Heffernan, 430.
 Dominion Bank v. Oliver, 560, 562.
 Dominion Bank v. Wiggins, 541, 547.
 Dominion Provident Ass'n, Re, 63, 66.
 Dominion Savings and Investment Co. v. Kilroy, 781.
 Dominion Savings and Investment Co. v. Kittridge, 763.
 Donaldson, Re, 650.
 Donaldson v. Haley, 131.
 Donovan v. Bacon, 331.
 Donly v. Holmwood, 16.
 Donnelly v. Donnelly, 787.
 Donogh v. Gillespie, 483.
 Donohue v. Brooklyn City R. Co., 147.
 Donor v. Ross, 395.
 Donovan v. Herbert, 679.
 Dorchester v. Effingham, 388.
 Dorsey v. Dorsey, 788.
 Douce, Re, 648.
 Dougall v. Cline, 308.
 Dougall v. Turnbull, 331.
 Doughty v. Firbank, 150.
 Douglas v. Ewing, 483.
 Douglas v. Hutchinson, 780.
 Douglas v. Smith, 649.
 Doull v. Kopman, 471.
 Dove v. Dove, 827.
 Dow v. Black, 59, 68.
 Dowera, Re, Dowera v. Faith, 390.

Dowling v. Miller, 249.
 Downe v. Fletcher, 787.
 Doyle v. Bell, 52, 54.
 Dracachi v. Anglo-Egyptian Navigation Co., 443.
 Drake v. Kershaw, 658.
 Drake v. North, 681.
 Dreschel v. Auer Incandescent Light Co., 292.
 Drew v. Nunn, 300.
 Driscoll v. Green, 357.
 Drummond v. Parish, 650.
 Drummond v. Sant, 676.
 Dry v. Boswell, 311.
 Duckworth v. Johnson, 157, 158.
 Duffill v. Erwin, 249.
 Dufresne v. Dufresne, 788.
 Dufresne v. Guevremont, 292.
 Duggan v. Kitson, 825.
 Duggins, Re, 449.
 Dulmage v. Douglas, 60.
 Dumbrell, Re, 246, 468.
 Dumer v. Humberstone, 55.
 Duncan, Ex parte, 66.
 Duncan v. Cashin, 779.
 Duncan, Fox & Co. v. North and South Wales Bank, 437.
 Dunlop v. Dunlop, 658.
 Dunham, Re, 678.
 Dunn v. Devon & Exeter Newspaper Co., 116.
 Dunn v. Flood, 392.
 Dunn v. Regina, 15, 60.
 Dunning, Doe v. Cranston, 655.
 Dunsford v. Carlisle, 93.
 Dunston v. Paterson, 264, 606.
 Dunwick School Trustees v. McBeath, 95.
 Duplex v. DuRoven, 297.
 Duppa v. Mayo, 836.
 Durant v. Abendroth, 488.
 Durnin v. McLean, 235.
 Duthie v. Essery, 545.
 Dutton v. Wilkinson, 828.
 DuVigier v. Lee, 297.
 Dwyer and Port Arthur Re, 14.
 Dyce v. Hay, 687.
 Dyce Sombre, Re, 245.
 Dyer v. Best, 496.
 Dyer v. Evans, 468.
 Dyer v. Pearson, 480.
 Dyke, Re, 654.

E

Eacrett v. Kent, 467.
 Eager v. Furnivall, 657.
 Earl, Ex parte, 396.
 Earl of Sheffield v. London Joint Stock Bank, 558.
 Earle v. Oliver, 304.
 East Tennessee Ry. Co. v. Lilly, 157.
 Eastman v. Richard, 837.
 Eastwood v. Henderson, 115.
 Eaton Estate, Re, 696.
 Eaton v. Swansea Waterworks Co., 686, 687.
 Ecclesiastical Commissioners v. King, 690.
 Ecclesiastical Commissioners v. Rowe, 675.
 Eddel, Re, 657.
 Edgar v. Magee, 131, 548.
 Edge, Re, 654.

Edie and Brown, Re, 697.
 Edinburgh Ballarat Gold Quartz Mine Co. v. Sydney, 541.
 Edison General Electric Co., v. Westminster Tramway Co., 460, 461.
 Edmonds v. Hamilton Provident and Loan Soc'y, 607, 608, 609.
 Edmonds v. Peake, 388.
 Edmonds v. Blaina Furnaces Co., 593.
 Edmunds v. Downes, 306, 307.
 Edmunda v. Waugh, 682.
 Edwards, Re, Ex parte Harvey, 781.
 Edwards v. Carter, 309.
 Edwards v. Cheyne, 788.
 Edwards and Greene, Re, 638.
 Edwards v. Hodges, 131.
 Edwards v. Martin, 783.
 Edwards v. Walters, 545, 548.
 Elderton, Re, 286.
 Elgie v. Butt, 275.
 Ellerby v. Walton, 275.
 Ellis, Ex parte, 58, 66, 464.
 Ellis v. Grubb, 762.
 Elliott v. Queen City Assee Co, 96.
 Elliott v. Brown, 805.
 Elliott v. Bulmer, 679.
 Ellsworth and Tidy, Re, 698.
 Elme v. Da Costa, 407.
 Elston v. Rose, 234.
 Elvidge v. Meldon, 822.
 Elvy v. Norwood, 297.
 Elwell v. Jackson, 547.
 Ely v. Bliss, 677.
 Ely's, (Lord) Case, 243.
 Embury v. West, 357, 462.
 Emerson, Re, 648.
 Emery v. Barnett, 236.
 Emilien Marie, The, 444.
 Emmanuel v. Constable, 651.
 Employers' Liability Corporation v. Skipper, 542.
 Emrick v. Sullivan, 780.
 Engel v. Stourton, 546.
 England v. Wall, 686.
 English Bank of the River Plate, Re 544, 546, 548.
 English v. Mulholland, 236.
 Enyon, Re, 649.
 Erb v. Great Western Ry. Co., 443.
 Erickson v. Brand, 276.
 Ermatinger, Re, 397, 398.
 Esnouf v. Gurney, 363.
 Esquimalt Ry. Co; v. Bainbridge, 71.
 Essex Land and Timber Co., Re, 590.
 Eton College v. Bishops of Winchester 589.
 European North American Railway Co. v. Thomas, 62.
 Euston v. Seymour, 650.
 Evans, Re, 396.
 Evans and Clarke, Re, 470.
 Evans v. Dallow, 653.
 Evans v. Davies, 307.
 Evans v. Simon, 306.
 Evans v. Watt, 120.
 Evening News, Re, 116.
 Everett v. Everett, 655.
 Everett v. Robertson, 308.
 Everett v. Automatic Weighing Machine Co., 607.

Everitt v. Paxton, 784.
 Eversfield v. Newman, 236.
 Eves v. Booth, 798.
 Ewart v. Latta, 437.
 Ewer v. Ambrose, 96.
 Exchange Bank v. Fletcher, 559.
 Exchange Bank v. Regina, 71.
 Eyre, Re, Eyre v. Eyre, 591.
 Eyton v. Jones, 826.

F.

Fabian and Windsor's case, 824.
 Fabian and Winston, Re 824.
 Fahey v. Dwyer, 689.
 Fave v. McCrow, 236.
 Fairchild v. Ferguson, 548.
 Fairweather v. Owen Sound Quarry Co., 145.
 Falkner v. Equitable Reversionary Society, 392.
 Farewell, The, 50.
 Farewell v. Farewell, 651.
 Farlinger v. MacDonald, 355, 356.
 Farlow v. Stevenson, 827.
 Farmer v. G. T. R., 149, 156.
 Farnham, Re, 245.
 Farquhar, Re, 650.
 Farrar v. Winterton, 655.
 Farrell v. Farrell, 656.
 Farwell v. Jameson, 829.
 Fary, Re, 654.
 Faulds v. Harper, 331, 677, 685.
 Faulkner v. Brine, 96.
 Fawkes v. Griffin, 278.
 Fearn v. Lewis, 308.
 Fearnside v. Flint, 677.
 Feaster v. Cooney, 115, 117.
 Felix, The, 441.
 Fell v. Biddolph, 652.
 Fenwick, Re, 652.
 Fenwick v. Clarke, 398.
 Ferguson, Re, 631.
 Ferguson v. Carman, 266.
 Ferguson v. Clayworth, 783, 786.
 Ferguson v. English and Scottish Investment Co., 610.
 Ferguson v. Hill, 762.
 Ferguson v. Whelan, 681.
 Ferguson v. Winsor, 764.
 Ferne, Ex parte, 245.
 Ferrier v. Moodie, 679.
 Fettiplace v. Gorges, 783.
 Field v. Evans, 785.
 Field v. Hart, 328, 353.
 Field v. Livingston, 654.
 Field v. McArthur, 783, 784.
 Fielding v. Corry, 544.
 Fielding v. Thomas, 59, 67, 69.
 Figlia Maggiore, The, 442.
 Fillmore v. Colburn, 65.
 Finch, Re, Finch v. Finch, 95.
 Finch v. Gilroy, 675.
 Fine Art Society v. Union Bank, 557.
 Finlay v. Miscampbell, 147, 148, 150.
 Finn, Re, 285.
 Fischer v. Popham, 650.
 Fisher, Ex parte, 462.
 Fisher v. Roberts, 547.
 Fisher v. Fisher, 292.

Fisher v. Grace, 256.
 Fisher v. Spohn, 765.
 Fisher v. Thames Junction Ry. Co., 131.
 Fisk v. Mitchell, 305.
 Fitzgerald, Re, 246.
 Fitzgerald v. Johnston, 353.
 Fitzgibbon v. Duggan, 331.
 Fitzpatrick v. Fitzpatrick, 287.
 Fitzroy, Re, 652.
 Flack v. Holm, 276.
 Flamante, Re, Wood v. Cook, 788.
 Flatt v. Ferland, 291.
 Flayer v. Bostock, 388.
 Fleming, Re, 245, 397, 398.
 Fleming v. Dollar, 116.
 Fleming v. Livingstone, 235.
 Fleming v. Ryan, 471.
 Fleetwood, Re, 652.
 Fleetwood, Re Sidgreaves v. Brewer, 651.
 Fletcher's Estate, Re, 632.
 Fletcher v. Nokes, 825.
 Fletcher v. Walker, 388.
 Fletcher v. Wilkins, 130.
 Fleury v. Pringle, 797.
 Flick v. Bristol, 53, 57.
 Flight v. Thomas, 690, 691.
 Flood, Re, 786.
 Florence Land Co., Re, Ex parte Moor, 593.
 Flory v. Denny, 356.
 Flower v. Local Board of Low Leyton, 130.
 Flower v. London & North Western Ry. Co., 153.
 Flower and Metropolitan Board of Works, Re, 392.
 Foat v. Earl of Margate, 130.
 Folger v. Minton, 130, 244.
 Forbes v. Jackson, 437.
 Forbes v. Ross, 402.
 Ford v. Allen, 682.
 Ford v. Gourlay, 120.
 Ford v. Grey, 680.
 Ford and Hill, Re, 697.
 Ford v. Lusher, 264.
 Fordam v. Wallis, 306.
 Forest, Re, 652.
 Forest v. Laycock, 797.
 Forrester v. Campbell, 763.
 Forrestal v. McDonald, 363.
 Forster v. Abraham, 389.
 Forster v. Patterson, 685.
 Forsyth v. Bristowe, 298.
 Forsyth v. Bury, 53.
 Forsyth v. Canniff, 501.
 Forsyth v. Galt, 657.
 Forsyth v. Ramage, 149.
 Fortier v. Lambe, 60.
 Forwood v. Mathews, 542.
 Foster v. Banburg, 651.
 Foster v. Beall, 804.
 Foster v. Marchant, 246.
 Foster v. Van Vormer, 472.
 Fournier v. Hogarth, 264.
 Fowke v. Turner, 836.
 Fowler v. Knoop, 442, 443.
 Fox v. Hawkes, 593.
 Fox v. Martin, 557.
 Fox v. Nott, 442.
 France v. Campbell, 329.
 France v. Clark, 557.

Francis v. Grover, 682.
 Francis v. Hawkesley, 308.
 Francis v. Turner, 358.
 Franklin v. South Eastern Ry. Co., 157, 158.
 Fraser and Bell, Re, 697.
 Fraser v. Byas, 560.
 Fraser v. Gore District Mutual Fire Insurance Co., 482.
 Fraser v. Gunn, 256, 684.
 Fraser v. Hood, 146.
 Fraser v. Lazier, 349.
 Fraser v. Sutherland, 766.
 Fraser v. Telegraph Construction Co., 442.
 Frazee v. McFarland, 785.
 Frear v. Ferguson, 275.
 Freed v. Orr, 332, 333.
 Freedom, The, 442.
 Freehold Loan & Savings Co. v. Bank of Commerce, 357.
 Freeman v. Appleyard, 480, 562.
 Freeman v. Cook, 480.
 Freeman v. Freeman, 653.
 Freme v. Clement, 655, 657.
 French's Trusts, Re, 396.
 Freston, Re, 277.
 Frawen v. Phillips, 689.
 Friedlander v. London Assurance, 96.
 Friel v. Ferguson, 129, 130.
 Frisby, Re, Allison v. Frisby, 297.
 Frith, Re, 649.
 Frost v. Bengough, 304, 307.
 Fry v. Chartered Mercantile Bank, 443.
 Fry v. Lane, 592.
 Fry v. Moore, 265.
 Fry v. Tapson, 389, 403, 404.
 Frye v. Ives, 542.
 Fuentes v. Montis, 482, 483.
 Fuller, Re, 647.
 Fuller v. Redman, 306.
 Fullford v. Fullford, 658.
 Furlong v. Carroll, 721.
 Furness v. Mitchell, 780.
 Furnival v. Saunders, 235.
 Fursden v. Clegg, 681.
 Fust, Re, 245.

G.

G., Re, 288.
 Gabriel v. Derbyshire, 98.
 Gadd, Re, 389, 390.
 Gaden v. Newfoundland Savings Bank, 547.
 Gage v. Douglas, 470.
 Galarneau v. Guilbault, 292.
 Gale v. Abbott, 691.
 Galchouse, Doe d. v. Rees, 460.
 Gallagher v. Glass, 465.
 Gallant, Re, 131.
 Galway, Re, 632.
 Gamble v. McKay, 767.
 Gardiner v. Gardiner, 333.
 Gardner v. Brown, 796.
 Gardner v. Kloefer, 466.
 Gardner v. Trechmann, 443.
 Garford v. Moffatt, 689.
 Garland v. Toronto, 145, 150.
 Garnet v. McKewan, 556.
 Garnett, Re, 289.
 Garrett v. Robert, 15.

Gaskin v. Rogers, 652.
 Gasquoine, Re, 387.
 Gaston v. Wald, 821.
 Gatewards Case, 688.
 Gault v. Sheppard, 598.
 Gausden, Re, 647.
 Gausson v. Morton, 300.
 Gaved v. Martyn, 687.
 Gay v. Matthews, 130.
 Geddes v. Wallace, 311.
 George, Re, Francis, v. Bruce, 545, 548.
 George & Richard, The, 156.
 Georgian Bay Ship Canal Co., v. World Newspaper Co., 117.
 Georgian Bay Transportation Co. v. Fisher, 71.
 Gemmill v. Cotton, 306.
 Gemmill v. Garland, 15.
 Gemmill v. Nelligan, 797.
 Gibbins v. Eyden, 658.
 Gibbon v. Bagshott, 465.
 Gibbons v. McDonald, 460.
 Gibbons v. Wilson, 463.
 Gibbs v. Dominion Bank, 564, 565.
 Gibbs v. Great Western Ry. Co., 150.
 Gibson v. Jeyes, 245.
 Gibson v. McDonald, 58, 65.
 Gibson v. Midland Ry. Co., 156.
 Gilbert v. Doyle, 837.
 Gilbert v. Gilman, 292.
 Gilbert v. Stiles, 275.
 Gilchrist, Re, Ex parte Armstrong, 779.
 Gilchrist and Island, Re, 610, 611.
 Gildersleeve v. Ault, 829.
 Gignac v. Iler, 464.
 Gill v. Att'y-Gen., 387.
 Gill v. Thornercroft, 149.
 Gillard v. Bollert, 350.
 Gillard v. Lancashire & Yorkshire Ry Co., 157.
 Gillard v. Milligan, 467.
 Gilleland v. Wadsworth, 763, 765.
 Gillespie, Re, 548.
 Gilliat v. Gilliat, 591.
 Gilmour v. Buck, 250.
 Gilmour & White, Re, 390.
 Gilpen v. Cohen, 277.
 Gilroy v. Stephen, 388.
 Girvin v. Burke, 364.
 Gist, Re, 246.
 Givins v. Darvil, 698.
 Glass v. Grant, 471.
 Glass v. Whitney, 565.
 Glasscock v. Balls, 548.
 Glanvil, Re, Ellis v. Johnson, 786.
 Glanville v. Strachan, 469.
 Glover, Re, 648.
 Glover v. Coleman, 691.
 Glover v. Coles, 250.
 Glyn v. Baker, 557.
 Glyn v. East and West India Dock Co., 442, 443.
 Goate v. Goate, 308.
 Gobind Chunder Sein v. Ryan, 483.
 Goddard v. Harris, 277.
 Goddard v. Parr, 96.
 Godfrey, Re, 402.
 Godfrey, Re, Godfrey v. Faulkner, 403.
 Goff, Re, 678.

Goff v. Lister, 762.
 Goldsmid v. Tunbridge Well Commissioners, 660.
 Good v. Howells, 828.
 Good v. Walker, 543.
 Goodall v. Skerratt, 677.
 Good v. Job, 689.
 Gooderham v. Toronto, 784.
 Gooderham v. Traders Bank, 606.
 Goodfallow, Re, Traders Bank v. Goodfallow 565.
 Goodhue, Re, 15, 64.
 Goodland v. Burnett, 655.
 Goodlock v. Cousins, 330.
 Goodman v. Boyes, 306.
 Goodman v. Saltash, 690.
 Goodwin v. Lee, 658.
 Goodwin v. Lorden, 277.
 Goodwin v. Ottawa and Prescott Ry. Co., 328.
 Goodwin v. Parton, 308.
 Goodwin v. Robarts, 557.
 Gould v. Rich, 328.
 Goorooopersad Khoond v. Juggutchunder, 292.
 Gordon v. Denison, 128, 129.
 Gordon v. Jennings, 501.
 Gordon v. Union Bank, 463.
 Gordon v. Warren, 779, 784.
 Gorgier v. Miville, 556.
 Goring v. London Mutual Ins. Co., 71.
 Gossling v. McBride, 276.
 Gower v. Joyner, 65.
 Gowland v. Garbutt, 560.
 Goulding v. Deeming, 356, 357, 463.
 Goudy v. Duncombe, 276.
 Gough v. Everard, 351, 352.
 Gough v. McBride, 695.
 Gould v. Burritt, 397.
 Gould v. Erskine, 120.
 Gould v. Hope, Re, 328.
 Gould v. Stuart, 15, 60.
 Gracey, and Toronto Real Estate Co., Re, 781.
 Graeme v. Globe Printing Co., 117.
 Graham v. Devlin, 472.
 Graham v. Ingleby, 364.
 Graham v. McArthur, 132.
 Graham v. Nelson, 333.
 Graham v. Spettigue, 236.
 Grand Trunk Ry. Co. v. Hamilton Radial Electric Ry. Co., 53, 60.
 Grand Trunk Ry. Co. v. Jennings, 159.
 Grand Trunk Ry. Co. v. McMillan, 443.
 Grant v. Cameron, 305.
 Grant v. Ellis, 674.
 Grant v. Grant, 829.
 Grant v. La Banque Nationale, 559.
 Grant v. McDonald, 307.
 Grant v. Norway, 443.
 Grant v. Van Norman, 462.
 Grant v. West, 468, 473.
 Grantham v. Powell, 308.
 Gray, Re, 287.
 Gray v. Bond, 688.
 Gray v. Carr, 443.
 Gray v. Coughlin, 761, 766.
 Gray v. Hatch, 389.
 Gray and Metropolitan Ry. Re, 696, 697.
 Gray v. Richford, 657, 674, 676, 678.

Gray v. Richmond, 391.
 Graydon and Hammill, Re, 697.
 Gravenor v. Watkins, 656.
 Great Northern Ry. Co. v. Sanderson, 690, 697.
 Great Western Ry. Co. v. Hodgson, 565.
 Great Western Ry. Co. v. Lutz, 679.
 Green v. Carill, 788.
 Green v. Castleman, 357.
 Green v. Dunn, 655.
 Green v. Humphreys, 306, 307.
 Green v. Hutt, 131.
 Green v. McLeod, 85.
 Green v. Ponton, 767.
 Green v. Tribe, 654.
 Green v. Wright, 119.
 Greene v. Provincial Insurance Co., 114.
 Greenough v. Eccles, 96.
 Greenwell v. Davison, 656.
 Greenwood, Re, 653.
 Greenwood v. Francis, 438.
 Greaves v. West India Co., 443.
 Gregg v. Wells, 480.
 Gregory v. Hurrill, 297.
 Gregory v. Parker, 306.
 Grenfell v. Girdlestone, 306.
 Grenville v. Tylee, 654.
 Grey, Re, Acason v. Greenwood 785.
 Grey v. Ball, 763, 766.
 Greystock v. Barnhart, 767.
 Griffin v. Patterson, 782, 787.
 Griffith v. Brown, 679.
 Griffith v. Crocker, 560.
 Griffith v. Hughes, 392.
 Griffith v. St. Catharines Dock Co., 145.
 Griffith v. Taylor, 130.
 Griffiths v. Earl Dudley, 152.
 Griffiths v. Griffiths, 649.
 Grimes, Re, 289.
 Grimwood v. Moss, 824.
 Grindley, Re, Clews v. Grindley, 393.
 Grogan v. London and M. Ins. Co., 264.
 Groves v. Wimborne, 151.
 Guardians of Nottingham v. Tomkinson, 94.
 Guinane, Re, 472.
 Gundry v. Johnston, 466.
 Gunn v. Bolckow, 481.
 Gunn v. Burgess, 349.
 Gunston, Re, 648.
 Gurney, Re, Mason v. Mercer, 394.
 Gurofski v. Harris, 463, 468.
 Gutierrez, Ex parte, 275, 276.
 Gwiney v. Gwiney, 652.

H.

Haacke v. Adamson, 128, 132.
 Habergham v. Vincent, 651.
 Hackett, Re, 651.
 Hadley v. Hadley, 547.
 Haggart v. Town of Brampton, 354.
 Hague, Re, Traders' Bank v. Murray, 472, 797.
 Haight v. Royal Mail Steam Packet Co., 156.
 Haisley v. Somers, 592.
 Haldan v. Beatty, 407.
 Hale v. Oldroyd, 692.
 Hale v. Tokelove, 654.
 Hales v. Stevenson, 305, 306.

- Halfpenny v. Pennock, 357.
 Halifax v. Jones, 60.
 Halifax v. Western Assce. Co., 60.
 Halkett, Re, 246.
 Hall, Ex parte, 245, 461.
 Hall v. Brand, 96.
 Hall v. Brush, 275.
 Hall v. Caldwell, 685.
 Hall v. Collin's Bay Rafting Co., 350, 351.
 Hall v. Fortye, 466.
 Hall v. Gowanlock, 93.
 Hall v. Great Western Ry. Co., 159.
 Hall Mfg. Co. v. Hazlitt, 363, 364.
 Hall v. Hufian, 391.
 Hall, Doe d. v. Mouldsdales, 676.
 Hall v. Swift, 691.
 Hallas v. Robinson, 359.
 Halleran v. Moon, 95.
 Halstead v. Bank of Hamilton, 563.
 Halwell v. Wilmot, 462.
 Hamill v. Henry, 781.
 Hamilton, Re, 696.
 Hamilton v. Cousineau, 129.
 Hamilton v. Groesbeck, 151.
 Hamilton v. Harrison, 351, 355.
 Hamilton v. Hector, 286.
 Hamilton v. Mackie, 443.
 Hamilton Powder Co. v. Lambe, 63.
 Hamilton v. Royse, 766.
 Hamilton v. Tighe, 398.
 Hammersmith and City Railway v. Brand, 15.
 Hammond, Re, 647.
 Hammond v. Keachie, 784.
 Hammond v. McLay, 250.
 Hammond v. Smith, 306.
 Handley v. Franchi, 275.
 Hankey v. G.T.R., 236.
 Hanmer v. Chance, 687.
 Hannev v. McEntire, 276.
 Hannigan v. Burgess, 250.
 Hanns v. Johnston, 117, 131, 152.
 Hanson v. Lancashire v. Yorkshire Ry. Co., 148.
 Harbidge v. Warwick, 686.
 Harbin v. Darby, 389.
 Harcourt, Ex parte, 501.
 Harding, Re, 287.
 Harding v. Ambler, 587.
 Harding v. Knowlson, 355.
 Hardman v. Booth, 481.
 Hardman v. Child, 696.
 Hardy v. Ryle, 131.
 Hare v. Hyde, 277.
 Hargraft v. Keegan, 658.
 Hargrave v. Elliott, 470.
 Hargreave v. Spink, 479.
 Hargreaves and Thompson, Re, 696, 698.
 Harkin v. Rabidon, 278.
 Harkness and Allsopp, Re, 778.
 Harley's Estate, Re, 396.
 Harlock v. Ashberry, 683.
 Harman and Uxbridge, etc., Ry. Co., Re, 608.
 Harmer v. Priestly, 609.
 Harn v. Harn, 276.
 Harnden, Re, Harden v. Harnden, 472.
 Harnwell v. Parry Sound Lumber Co., 311.
 Harpelle v. Carroll, 822.
 Harper v. Cuthbert, 438, 610.
 Harrington v. Churchward, 311.
 Harris, Re, 647, 653.
 Harris, Ex parte, 830.
 Harris v. Arnott, 116.
 Harris v. Canada Permanent L. & S. Co., 828.
 Harris v. Commercial Bank, 349, 356.
 Harris v. De Pinna, 689.
 Harris v. Hamilton, 61.
 Harris v. Mudie, 678, 680.
 Harris v. Tinn, 145.
 Harrison, Re, Ex parte Sheriff of Essex, 431.
 Harrison v. Armour, 763.
 Harrison v. Brega, 767.
 Harrison v. Bush, 97.
 Harrison v. Elvin, 649.
 Harrison v. Harrison, 573, 784, 785.
 Harrison v. London & North-Western Ry. Co., 159.
 Harrison v. Patterson, 397.
 Harrison v. Paynter, 329.
 Harrison v. Prentice, 119.
 Hart v. McQuesten, 607.
 Hart v. Ruttan, 265.
 Hartcup v. Bell, 822.
 Harter v. Coleman, 587.
 Hartley v. Maycock, 805.
 Hartley v. Wharton, 307.
 Harty v. Appleby, 762, 766.
 Harvey, Re, Harvey v. Gillow, 657.
 Harvey v. McNaughton, 464.
 Harvey v. McNeil, 430.
 Harvey v. Smith, 593.
 Harvey v. Walters, 689.
 Haskill v. Fraser, 796.
 Hasluck v. Pedley, 823.
 Hassell v. Synte, 651.
 Hastings, Re Hallett v. Hastings, 788.
 Haston v. Edinburgh St. Tramways Co., 146.
 Hatfield v. Philips, 482.
 Hatfield v. Thorpe, 651.
 Hawkes v. Hulback, 785.
 Hawkins v. Rutter, 286.
 Hawkins v. Troup, 543.
 Hawksley v. Bradshaw, 115.
 Hawksworth v. Hawksworth, 289.
 Hay v. Burke, 544.
 Haydon v. Williams, 306, 307.
 Hayes, Re, 650.
 Haylock v. Sparke, 128.
 Hayn v. Culliford, 444.
 Head v. Gould, 390.
 Headford v. McClary Mfg. Co., 147, 148.
 Healey v. Crummer, 119.
 Heaman v. Seale, 460.
 Hearn v. Phillips, 153.
 Heaslip v. Heaslip, 132.
 Heath v. Brewer, 130.
 Heath v. Pugh, 684.
 Heaton v. Flood, 350, 351, 353, 359.
 Heawood v. Bone, 830.
 Hebblethwaite v. Hebblethwaite, 94.
 Hedges v. Tagg, 119.
 Height v. Wortman, 152.
 Helby v. Matthews, 363.
 Helene, The, 441.
 Helliwell v. Taylor, 128.
 Heming v. Burnett, 689.

- Hemingway v. Braithwaite, 783.
 Hemming v. Blanning, 676.
 Hemming v. Maddick, 96.
 Henderson v. Bank of Hamilton, 556.
 Henderson v. Comptoir d'Escompte de Paris, 443.
 Henderson v. Dickson, 278.
 Henderson v. Henderson, 676.
 Henderson v. Spencer, 696.
 Henderson and Toronto, Re, 762, 764.
 Henderson v. Wilde, 330.
 Henderson v. Williams, 480.
 Hendry v. Turner, 496.
 Henry v. Cook, 250.
 Hensler, Re, Jones, v. Hensler, 658.
 Hepburn v. Skirving, 655.
 Herbart and Chaytor, Re, 697.
 Herbert v. Herbert, 650.
 Hermando, Re Hermando v. Sawtell, 656.
 Hermann v. Seneschal, 129.
 Heseltine v. Siggers, 562.
 Heske v. Samuelson, 146, 148.
 Hesketh v. Blanchard, 311.
 Hesketh v. Ward, 97.
 Hetherington v. Groome, 356.
 Hetherington v. North Eastern Ry. Co. 158.
 Hetling and Merton's Contract, Re, 392.
 Heward v. O'Donohue, 678.
 Heward v. Wolfenden, 329, 332.
 Hewett v. Jermyn, 632.
 Hewish, Re, 796.
 Hewitt, Re, 784.
 Hewitt, Re, Ex parte Levine, 787.
 Hewson, Re, 246.
 Heyhoe v. Burge, 311.
 Heyman v. Flewker, 481, 482.
 Heywood v. Hay, 53.
 Hiatt v. Hillman, 610.
 Hibbard, Re, 287.
 Hick v. Raymond, 115, 542.
 Hickerson v. Parrington, 371, 460.
 Hickey v. Stover, 678.
 Hickin, Ex parte, 501.
 Hickman, Re, 652.
 Hickman v. Upsall, 407.
 Hicks v. Faulkner, 128, 129.
 Hicks v. Godfrey, 278.
 Hicks v. Newport, Abergavenny and Hereford Ry. Co. 159.
 Hicks v. Ross, 119.
 Hicks v. Williams, 685, 805.
 Higgins v. Brady, 264.
 Higgins and Hitchman Re, 698.
 Higginbottom, Re, 389.
 Higgins v. Burton, 481.
 Hill, Re, 650.
 Hill v. Ashbridge, 680.
 Hill v. Hill, 289.
 Hill v. Tupper, 687.
 Hilliard v. Eiffe, 97.
 Hillock v. Sutton, 674.
 Hinkley v. Simmons, 652.
 Hindmarsh, Re, 396.
 Hindmarsh v. Charlton, 648, 649.
 Hoppins v. Harrison, 437.
 Hirsch v. Coates, 266.
 Hoare v. Niblett, 785.
 Hoare v. Silverlock, 116.
 Hobbs Hardware Co. v. Kitchen, 351.
 Hobbs v. Hudson, 93.
 Hobbs v. Knight, 653.
 Hobbs v. Ontario Loan and Debenture Co., 608, 609.
 Hobbs v. Scott, 472.
 Hobbs v. Wade, 677, 680.
 Hobbs v. Bell, 392.
 Hobson v. Gorringe, 352, 354, 364.
 Hobson, Re, Webster v. Richards, 781.
 Hodge v. Reg. 51, 55, 61, 62.
 Hodges v. Croyden Coal Co. 682.
 Hodges v. Hodges, 785.
 Hodgins v. Johnston, 350, 359.
 Hodson v. Dancer, 656.
 Hogaboom v. Graydon, 353.
 Hogan v. Aikman, 119.
 Hoig v. Gordon, 798.
 Holbird v. Anderson, 461.
 Holbyn, Re, 243.
 Holford v. Hankinson, 692.
 Holgate, Re, 649.
 Holland v. Clark, 681.
 Holland v. Hodgson, 354.
 Holleran v. Bagnell, 158, 160.
 Holliday v. Jackson, 544.
 Hollingshead, Re, 308.
 Hollins v. Verney, 691.
 Hollyoak, Ex parte, 501.
 Hollywood v. Waters, 766.
 Holman v. Green, 55, 61.
 Holmes, Re, 244.
 Holmes v. Durkee, 545.
 Holmes, Re Fallows v. Holmes, 785.
 Holmes v. Mackrell, 305, 307.
 Holmes v. Millage, 462.
 Holmes v. Moore, 762.
 Holt v. Carmichael, 353.
 Holt v. Genge, 648.
 Holt v. Holt, 658.
 Holthy v. Hodgson, 784, 787.
 Holton v. McDonald, 333.
 Holyland v. Lewin, 656.
 Homan v. Andrews, 683.
 Hone v. Boyle, 557.
 Honsberger, Re, 398.
 Hood-Barrs v. Cathcart, 785, 786.
 Hood-Barrs v. Heriot, 785.
 Hood v. Sangster, 291.
 Hoofstetter v. Rooker, 762.
 Hooker v. Morrison, 679, 681.
 Hoole v. Smith, 606.
 Hooper, Re, 396.
 Hooper v. Columbia R. R. Co., 146.
 Hooper v. Holme, 150.
 Hoover v. Craig, 234, 250.
 Hoover v. Wilson, 397, 398.
 Hope, Re, 277.
 Hope v. Grant, 464.
 Hope v. Hope, 286, 780.
 Hope v. May, 359, 462, 471.
 Hope v. White, 822, 829.
 Hopkins, Re, 389.
 Hopkins, Re Barnes v. Hopkins, 797.
 Hopkins v. Hopkins, 651, 676, 688.
 Hopkinson v. Lovering, 822, 823.
 Hopper, Re, 246.
 Horne, Ex parte, Re Horne, 788.
 Horne v. Featherstone, 648.
 Horner v. Kerr, 779, 785.

Horner v. Swann, 591.
 Hornsby v. Lee, 778.
 Hornsey Local Board v. Monarch Invest.
 Bldg. Socy., 683.
 Horsey v. Steiger, 824, 825.
 Horsfall v. Boisseau, 353, 354.
 Horsford, Re, 647, 653.
 Horton v. Humphries, 679.
 Horton v. Leeds, 650.
 Hoskins, Re, 470.
 Hotchkin, Re, 402.
 Houghton v. Bell, 685.
 House v. House, 305.
 Houston, Re, 245.
 Houston, Re, Houston v. Houston, 609.
 How v. Earl Winterton, 393, 394.
 Howard, Re, 97.
 Howard v. Bennett, 150.
 Howard v. Castle, 591.
 Howard v. Harris, 606.
 Howard v. Herrington, 128.
 Howe, Re, 55.
 Howe v. Finch, 149.
 Howell, Re, 823.
 Howell v. Armour, 130.
 Howell v. Listowel B. & P. Co., 829.
 Howells, Re, Ex parte Mandelberg & Co., 822.
 Howereen v. Bradburn, 297.
 Howes v. Lee, 332.
 Howe's Trusts Co., 658.
 Howitt v. Gzowski, 352.
 Howkins v. Howkins, 276.
 Hubbard, Ex parte, 352.
 Hubbard v. Goodlsey, 235.
 Hubbard v. Lees, 650.
 Hubbersty v. Ward, 443.
 Huber v. Crookall, 115.
 Huckvale, Re, 647.
 Hudson v. McRae, 235.
 Huggins v. Law, 287.
 Hughes, Re, 646.
 Hughes, Re, Ex parte Hughes, 466.
 Hughes v. Coles, 677, 682.
 Hughes v. Field, 266.
 Hughes v. Little, 356.
 Hughes v. Pake, 128.
 Hughes v. Rees, 389.
 Hulme v. Hulme, 389.
 Hulme v. Tenant, 778, 785.
 Humble v. Mitchell, 562.
 Hume, Re, Forbes v. Hume, 573.
 Hume v. Lopes, 402.
 Humphreys v. Jones, 305.
 Hunt, Re, 648.
 Hunt v. Bishop, 589.
 Hunt v. Goodlake, 115.
 Hunt v. Hespeler, 690, 691.
 Hunt v. Hunt, 647, 787.
 Hunt v. Taplin, 291.
 Hunnings v. Williamson, 93.
 Hunter v. Gilkison, 129.
 Hunter v. Mountjoy, 276.
 Hunter v. Nockolds, 682.
 Hunter v. Patterson, 390, 404.
 Hunter v. Young, 396.
 Huntingdon v. Attrill, 94.
 Hurst v. Parker, 304.
 Huskinson v. Lawrence, 249.
 Hutcheson v. Hammond, 655.

Hutchings to Burt, Re, 785.
 Hutchinson v. Lowndes, 129.
 Hutchison v. Powes, 489.
 Hutton v. Brown, 827, 836.
 Hutton v. Federal Bank, 313.
 Hyde v. Watts, 825.
 Hyden v. Williamson, 333, 588.
 Hyden v. Lindsay, 289.
 Hyman v. Cuthbertson, 464.
 Hyman v. Howell, 473.

I.

Ibbotson v. Henry, 130, 249, 250.
 Imperial Land Co., Re, 533.
 Imperial Land Co., Re, Ex parte Colborne,
 557.
 Inch v. Simon, 355.
 Ind Coops v. Emerson, 610.
 Inglis v. Haigh, 297.
 Ingraham v. Cunningham, 275.
 Ingram v. Inglis, 307.
 Innes v. Ferguson, 686.
 Institute of Patent Agents v. Lockwood, 15.
 Irish Land Commission v. Grant, 674.
 Irvine v. Macauley, 676.
 Irving v. Wilson, 130.
 Irwin v. Bank of Montreal, 407.
 Irwin v. Dennystown Forge Co., 146.
 Irwin v. Toronto General Trusts Co., 394.
 Israel v. Leith, 589, 761, 762, 764.
 Isaacs v. Chinery, 246.
 Isaacson, Re, Ex parte Mason, 364.
 Island v. Pitcher, 132.
 Ivens v. Butler, 283.
 Ivey v. Knox, 461, 462.

J.

Jackson, Ex parte, 609.
 Jackson, Re, 311.
 Jackson v. Ogg, 808.
 Jackson v. Petrie, 276.
 Jackson, Re, Smith v. Sibthorpe, 608.
 Jackson v. Thomson, 96.
 Jackson and Woodburn, Re, 696.
 Jacobs v. Jacobs, 277.
 Jacques Cartier Bank v. Reg. 557.
 James v. Hawkins, 119.
 Jamieson v. Coulter, 688.
 Jamieson v. Russell, 146.
 Jarman v. Hale, 675.
 Jarvis v. Clark, 313.
 Jarvis v. Toronto, 763.
 Jaullery v. Britten, 491.
 Jay v. Budd, 265.
 Jay v. Robinson, 784.
 Jefferys v. Boosey, 50.
 Jellett v. Wilkie, 761.
 Jenkins v. Jones, 589.
 Jenkins v. Miller, Re, 535.
 Jenkins v. Osborne, 481.
 Jenkyns v. Gaisford, 648.
 Jenner v. Finch, 648.
 Jennings v. Moss, 465.
 Jephson, Re, 244.
 Jermyn v. Tew, 291.
 Jessel v. Bath, 443, 444.
 Jewan v. Whitworth, 483.

Jobson v. Palmer, 389.
 Jochumsen v. Suffolk Savings Bank, 404.
 Johnson, Re, 650.
 Johnson v. Credit Lyonnaise Co., 480, 481.
 Johnson v. Ewart, 115.
 Johnson, Ex parte, 607, 608.
 Johnson, Ex parte, Re Chapman, 464.
 Johnson v. Gallagher, 779, 783.
 Johnson v. Hope, 460, 463.
 Johnson v. Johnson, 657.
 Johnson v. Martin, 543.
 Johnston v. Newton, 388.
 Johnson v. Oliver, 680, 684.
 Johnson, Re, Sly v. Johnson 298.
 Johnson v. Consumers' Gas Co., 15.
 Johnson v. Dulmage, 474.
 Johnston v. Great Western Ry. Co., 159, 160.
 Johnston v. Henderson, 463.
 Johnston v. Jones, 446.
 Johnston v. Ogg, 395.
 Johnston v. Poyntz, 66.
 Johnaton v. Reid, 763.
 Johnston v. Sowden, 332.
 Johnston v. Stear, 560.
 Johnstone v. Mitchell, 147.
 Jones, Re, 246, 469, 647.
 Jones v. Burford, 149.
 Jones v. Bright, 680, 681.
 Jones v. Brown, 304.
 Jones v. Canada Central Ry. Co., 64.
 Jones v. Carter, 824.
 Jones v. Cowden, 761.
 Jones v. Foley, 837.
 Jones v. Gallow, 93, 94, 95.
 Jones v. Gooday, 131.
 Jones v. Grace, 129.
 Jones, Re Greene v. Gordon, 656.
 Jones v. Gress, 275.
 Jones v. Henderson, 349.
 Jones v. Jones, 93.
 Jones v. Lewis, 403.
 Jones v. McGrath, 588, 593.
 Jones v. Mackie, 116.
 Jones v. Mills, 836.
 Jones v. Mitchell, 655.
 Jones v. Montgomery, 822.
 Jones v. Rose, 277.
 Jones v. Ware, 349, 354.
 Jordan, Re Kino v. Picard, 785, 786.
 Joseph v. Lyons, 359.
 Joy v. Campbell, 387.
 Joyce v. Hart, 292.
 Julius v. Oxford, 14.
 Junkin v. Davis, 97.
 Jupp, Re, Jupp v. Buckwell, 782.
 Jupp v. Powell, 308.
 Jury v. Jury, 276.

K.

Kaatz v. White, 826.
 Kaines v. Stacey, 313.
 Kaltenbach v. Lewis, 483.
 Kalus v. Hergert, 464.
 Kane v. Mulvains, 116.
 Kay, Re, Mosley v. Kay, 393.
 Kearney v. Nichols, 145.
 Kearsley v. Philips, 609.
 Keefe v. McLennan, 64.

Keen v. Codd, 633.
 Keen v. Millwall Dock Co., 153.
 Keenan, Re, 331.
 Keffer v. Keffer, 675.
 Keith v. Burke, 544.
 Keith v. National Telephone Co., 825.
 Kelly, Re, 245, 471.
 Kelly v. Archibald, 130.
 Kelly v. Bull, 119, 120.
 Kelly v. Glebe Sugar Co., 151.
 Kelly v. Wolff, 828.
 Kellar v. Tache, 287.
 Kelsey v. Rogers, 349.
 Kem v. Falk, 442.
 Kendall v. Hamilton, 391, 493, 496.
 Kennedy, Re, 287.
 Kennedy v. Burness, 128.
 Kennedy v. Green, 588, 607.
 Kennedy v. Hall, 130.
 Kennedy v. May, 286.
 Kennedy v. Patterson, 330.
 Kennedy v. Purcell, 66, 472.
 Kennedy v. Thomas, 548.
 Kennedy v. Toronto, 64.
 Kennett, Re, 654.
 Kennin v. Macdonald, 250.
 Kent v. Kent, 677, 779.
 Kerr v. Little, 692.
 Kerner v. Toronto, Hamilton & Buffalo Ry. Co., 69.
 Kerr v. Roberts, 358.
 Kerr v. Stripp, 785, 787.
 Kerr v. Styles, 331.
 Kerry v. James, 359, 464, 471.
 Kershaw, Re, 574.
 Kershaw's Trusts Re, 396.
 Kervin v. Canadian Cotton Mills Co., 147.
 Kesterman v. McLellan, 264, 276.
 Kettlewell v. Watson, 587, 588.
 Keys v. Kirkpatrick, 471.
 Kibble v. Fairthorne, 683.
 Kidd, Re Brooman v. Withall, 658.
 Kiddle v. Lovett, 149.
 Kiely v. Kiely, 15.
 Kilber v. Sneyd, 388.
 Killick, Re, 648.
 Kimball v. Smith, 119.
 Kimber v. Press Ass'n, 116.
 Kimpton, Re, 648.
 Kinloch v. Neville, 687.
 King, Re, 798, 305.
 King, Ex parte, 464.
 King v. Duncan, 461.
 King v. Dupus, 291.
 King v. Hamlet, 592.
 King v. Hilton, 387.
 King v. Hoare, 496.
 King v. Lucas, 783.
 Kingan v. Hall, 278.
 Kingsford v. Merry, 480, 481.
 Kingsford v. Oxenden, 542.
 Kingsmill v. Bank of Upper Canada, 561.
 Kingsmill v. Warriner, 265.
 Kingston Building Society v. Rainsford, 763, 765.
 Kinnaird v. Trollope, 606.
 Kinnard v. Webster, 437.
 Kinnear v. Aspden, 822, 823.
 Kinney v. Deidman, 52, 56.

Kinsman v. Rouse, 685.
 Kirby v. Simpson, 130.
 Kirk v. Long, 119.
 Kirkland v. Briancourt, 824.
 Kirkwood v. Smith, 541, 547.
 Kitchen v. Murray, 761.
 Kitching v. Hicks, 349.
 Kite v. London Tramway Co., 148.
 Kleinworth v. Comptoir National D'Es-
 compte de Paris, 542, 547.
 Klink v. Ontario Industrial Loan & Invest-
 ment Co., 608.
 Kloeffer v. Gardner, 466.
 Knight, Re, 236.
 Knight v. Barber, 562.
 Knight v. Medora, 236.
 Knott v. Farren, 307.
 Knox v. Gye, 297.
 Knox v. Mackinnon, 387, 402, 403.
 Knox v. Meldrum, 354.
 Koch v. Wideman, 632, 697.
 Konkle, Re, 779.
 Kops v. Reg., 93.
 Kough v. Price, 357.
 Kraemer v. Glass, 351, 779.
 Kraemer v. Waysmark, 160.
 Kyle v. Barnes, 264.

L.

La Banque de Hochelaga v. Waterous En-
 gine Works Co., 363.
 La Banque du Peuple v. Troitier, 291, 292.
 Labatt v. Bixell, 461, 462, 465.
 Labelle v. Barbeau, 291.
 Laberge v. Equitable Life Assce. Society, 291.
 Lacave v. Credit Lyonnais, 542, 547.
 Lachance v. La Societe de Piets du Place-
 ments de Quebec, 291.
 Ladower and Salter, Re, 264.
 Ladyman v. Grave, 686, 691.
 Lafone v. Smith, 115.
 Laing v. Ontario Loan and Savings Co., 608.
 Laird v. Briggs, 692.
 Laird v. Eaton, 761.
 Lake v. Bemis, 119.
 Lake v. Biggar, 250.
 Lake v. Brutton, 437.
 Lakin v. Lakin, 407.
 Lamb v. Attenborough, 481.
 Lamb v. Munster, 93.
 Lambert, Re, 647.
 Lambert's Estate, Re, Stanton v. Lambert,
 779.
 Lambton, Ex parte, 561.
 Lambton v. Collingwood, 291.
 Lamley v. Mayor of East Retford, 131.
 Lampman v. Davis, 306.
 Lampman v. Gainsborough, 160.
 Lancaster v. Ryckman, 115, 117.
 Lancaster S. S. v. Sharp, 443.
 Lander and Bayley, Re, 696, 697.
 Lands Allotment Co., Re, 392, 393.
 Lane, Re, 287, 463.
 Lang v. Smyth, 556, 557.
 Lang v. Thompson, 497.
 Langdale v. Briggs, 655.
 Langford v. Gascoyne, 387.
 Langford v. Kirkpatrick, 131.

Langley v. Meir, 470.
 Lanwarne, Re, 244.
 Lariviere v. School Commissioners for Three
 Rivers, 292.
 Larken's Trust, Re, 396.
 Larkin v. Marshall, 783.
 Larsen v. Nelson and Fort Sheppard R'y.
 Co., 69.
 Latch v. Bright, 763.
 Latham v. Barber, 562.
 Latimer v. Neate, 607.
 Lavery and Kirk, Re, 697.
 Lawlor, Re, 244.
 Lawrance v. Norreys, 674, 677.
 Laws, Re, Laws v. Laws 95, 788.
 Lawson v. Laidlaw, 779, 780, 783, 787.
 Lawson v. Langley, 691.
 Lawson v. McGeoch, 462.
 Lay, Re, 650.
 Laybourn v. Fridley, 675.
 Lazier v. Henderson, 470.
 Lea v. Charrington, 129.
 Leach, Re, 653.
 Leach v. Shaw, 256.
 Leacocke, Re, 245.
 Leak v. Driffield, 783.
 Learoyd v. Robinson, 483.
 Learoyd v. Whitely, 402, 403.
 Leask v. Scott, 444.
 Leatt v. Vine, 235.
 Lebel v. Tucker, 546.
 Lichmere v. Fletcher, 307.
 Leduc v. Ward, 442.
 Lee v. Butler, 363.
 Lee v. Hopkins, 786.
 Lee v. Howes, 332.
 Lee v. Wilmut, 304, 305.
 Leech v. Leech, 761.
 Leeds Bank v. Walker, 546.
 Lees v. Sanderson, 387.
 Lee's Trust, Re, 396.
 Leese, Re, 650.
 Leeson v. License Commissioners, 128.
 Leete v. Hart, 129.
 Legg v. Evans, 330.
 Leggott v. Great Northern Ry. Co., 157.
 Le Heup, Ex parte, 245.
 Leigh, Re, 653.
 Leighton v. Medley, 825.
 Leitch v. McLellan, 796.
 Leitch v. Molson's Bank, 396.
 Leishman v. Cochrane, 97.
 Leirim v. Enery, 246.
 Lellis v. Lambert, 788.
 Lemon v. Lemon, 472.
 Lempiere v. Lange, 309.
 Lennox v. Star Printing Co., 117.
 Lenoir v. Ritchie, 65.
 Lepard v. Vernon, 300.
 Leprohon v. Ottawa, 58.
 Les Ecclesiastiques de St. Sulpice de Mon-
 treal v. Montreal, 292.
 L'Esperance v. Duchene, 119.
 Lett v. St. Lawrence and Ottawa Ry. Co.,
 157, 158, 159.
 Leveille, Ex parte, 62.
 Leverington, Re, 649.
 Levy v. Abercorris Co., 593.
 Levy v. Lawson, 116.

Lewin v. Wilson, 683, 684.
 Lewis, Re, 653, 654.
 Lewis v. Brown, 464.
 Lewis v. Clay, 542, 543.
 Lewis v. Clement, 116.
 Lewis v. Davis, 607.
 Lewis v. Lewis, 649.
 Lewis v. McKee, 442, 443.
 Lewis v. Price, 690.
 Lewis v. Teale, 130, 249.
 Lewis v. Thomas, 677.
 Lewis and Thorne, Re, 391, 697.
 Lewis v. Walter, 116.
 Ley v. Peter, 680.
 License Commissioners of Frontenac v. County of Frontenac, 61, 68.
 License Commissioners of Prince Edward v. County of Prince Edward, 68.
 Life Assn. of Scotland v. Siddal, 684.
 Life Assn. of Scotland v. Walker, 397.
 Light v. Hawley, 351, 467.
 Lightfoot v. Cameron, 277.
 Lilford v. Keck, 655.
 Lilley v. Harvey, 236.
 Lindsay v. Robertson, 837.
 Lindsey, Re, 561.
 Lindsay v. Toronto, 767.
 Linfoot v. Pockett, 313.
 Linford v. Fitzroy, 128.
 Linsell v. Bonsor, 307.
 Linton v. Imperial Hotel Co., 470, 823, 824.
 Liquidators Estate Co. v. Willoughby, 607.
 Liquidators of Maritime Bank v. Receiver General of New Brunswick, 72.
 Liquor Prohibition Appeal, 63.
 Lister v. Northern Ry. Co., 330.
 Lister v. Perryman, 129.
 Lister v. Pickford, 684.
 Little v. Aikman, 651.
 Little v. Billings, 657.
 Little, Re, Harrison v. Harrison, 785.
 Llado v. Morgan, 565.
 Lloyd v. Attwood, 763.
 Lloyd v. Banks, 766.
 Lloyd v. Jones, 235.
 Lloyd v. Maund, 304, 307.
 Lloyd v. Roberts, 649.
 Lock v. Pearl, 826.
 Lockart v. Hardy, 560.
 London and Canadian Loan and Agency Co. v. Duggan, 558.
 London and Canadian Loan and Agency Co. v. Graham, 561.
 Londe Chartered Bank of Australia v. Leprie, 333, 779.
 London Corporation v. Pewterers Co., 690.
 London and County Banking Co. v. Goddard, 390.
 London Joint Stock Bank v. Simmons, 558, 593.
 London and River Platte Bank v. Bank of Liverpool, 542, 543.
 London and Southern Counties Co. v. Clamp, 645.
 Long v. Carter, 470.
 Long v. Hancock, 464.
 Longhie v. Sanson, 836.
 Longueuil Navigation Co. v. Montreal, 55, 60.
 Lorenz, Re, 396.

Loucks v. McGloy, 359.
 Lough v. Coleman, 130.
 Loughead v. Knott, 655.
 Lovegrove, Ex parte, 473.
 Lovell v. Beauchamp, 467.
 Lovell v. Gibson, 333.
 Low v. Gemley, 388.
 Lowe v. Carpenter, 690, 691.
 Lowe v. Fox, 788.
 Lowell v. Bank of Upper Canada, 329.
 Lowndes v. Garnett and Moxley Gold Mining Co., 308.
 Lowry v. Derham, 784, 785.
 Lowry v. Fulton, 388.
 Lowther v. Heaver, 588.
 Lucas, Re, 823.
 Lucas v. Denison, 691.
 Lucas v. Dixon, 307.
 Lucas v. Hamilton Real Estate Assn., 698.
 Luckhardt, Re, 796, 797.
 Lumley Re, Ex parte Hood-Barrs, 785.
 Lumley v. Timms, 779.
 L'Union St. Jacques de Montreal v. Belisle, 56, 57, 68, 68.
 Lutscher v. Comptoir de Escompte de Paris, 443.
 Lyell v. Kennedy, 675, 681.
 Lyman v. Bank of Upper Canada, 559.
 Lynch v. Canada N. W. Land Co., 56, 60, 61.
 Lynch v. O'Hara, 796.
 Lyon and Carroll, Re, 698.
 Lyon v. Tiffany, 305.
 Lynes, Re, Ex parte Lester, 787.
 Lynes v. Snaith, 675.

M.

MacArthur v. MacDougall, 543.
 Macaulay v. Rumball, 266.
 MacDonald, Re, 308.
 MacDonald v. Balfour, 467, 473.
 MacDonald v. Bullivant, 607.
 MacDonald v. Crombie, 461.
 MacDonald, Re Dick v. Fraser, 306.
 MacDonald v. Elliott, 16.
 MacDonald v. Galivan, 291, 292.
 MacDonald v. Gaunt, 351.
 MacDonald v. Georgian Bay Lumber Co., 466.
 Macdonald v. McCall, 464.
 Macdonald v. Macdonald, 16, 297, 333, 682, 683.
 MacDonald v. World Newspaper Co., 117.
 Macdonell v. Purcell, 654.
 MacDougall v. Knight, 116.
 Macdougall v. Paterson, 264.
 Macfie v. Hutchinson, 501.
 Macfie v. Pearson, 266, 431.
 MacGregor v. Galworthy, 131.
 MacKay v. Goodson, 277.
 MacKay v. Manchester Press Co., 116.
 MacKenzie Trusts, Re, 402.
 Mackintosh v. Pogose, 464.
 Macleod v. Att'y Gen. New South Wales, 50, 57.
 Macnamara v. McLay, 767.
 MacNaughton v. Wigg, 827.
 Macnee v. Gorst, 483.
 Macrae v. Clarke, 278.
 McAlmon v. Pine, 66.

- McArthur v. Eagleson, 678.
 McArthur v. Northern and Pacific Junction Ry. Co., 53, 54.
 McAuley v. Allen, 358.
 McAuliffe v. Fitzsimmons, 675.
 McBean v. Bell, 351.
 McBride v. Gore District Mutual Fire Ins. Co., 565.
 McCabe v. Thompson, 331.
 McCall v. Macdonald, 471.
 McCall v. Wolff, 353, 564.
 McCann v. Chisholm, 688.
 McCarter v. McCarter, 387.
 McCauley, Re, 574.
 McClanaghan v. St. Ann's Mutual Bldg. Socy., 53.
 McCombie v. Davies, 482.
 McColl v. Black, 146.
 McCord v. Cammell, 150.
 McCormack v. Bervey, 308.
 McCrae v. Molsens Bank, 564.
 McCrae v. White, 461.
 McCready v. Higgins, 780.
 McCullough v. Sykes, 297.
 McDiarmid v. Hughes, 560, 573, 675.
 McDonagh v. Jephson, 430.
 McDonald, Re, 287.
 McDonald v. Cummings, 371, 461.
 McDonald v. Davidson, 397.
 McDonald v. Elliott, 683.
 McDonald v. Forrestal, 249.
 McDonald v. McDonell, 331.
 McDonald v. McKinnon, 95.
 McDonald v. Peck, 825, 828.
 McDonald v. Reynolds, 329, 332.
 McDonald, Doe d., v. Twigg, 98, 804.
 McDonnell v. Bldg. and Loan Assn., 608.
 McDonnell v. Kelly, 275.
 McDougall v. Campbell, 54.
 McDougall v. Peterson, 128.
 McDougall v. Union Navigation Co., 55, 63.
 McDowell v. McDowell, 330.
 McDowell and Palmerston, Re, 51, 65.
 McEvoy v. Clune, 332.
 McEwan v. Smith, 481.
 McGann v. Keyes, 95.
 McGarry v. White, 787.
 McGee v. Smith, 355.
 McGiffin v. Palmer's Ship Bldg. Co., 148.
 McGill v. Peterborough, 14.
 McGill v. Walton, 129.
 McGloherly v. Gale Mfg. Co., 147.
 McGoey v. Leamy, 291.
 McGrath, Re, 288.
 McGregor v. Keiller, 678, 679.
 McGregor v. McNeil, 249.
 McGregor v. Thwaites, 116.
 McGuinness v. Dafos, 128, 129, 130.
 McGuire v. Cairne, 147.
 McIlmurray and Jenkins, Re, 764.
 McIntosh v. Tyhurst, 119.
 McIntosh v. Wood, 796.
 McIntyre, Re, 277.
 McIntyre v. Brown, 275.
 McIntyre v. Canada Co., 681.
 McIntyre v. Crocker, 256.
 McIntyre v. Union Bank of Lower Canada, 355.
 McKay v. Bruce, 674, 688, 781.
 McKay v. Cummings, 130.
 McKay v. Burley, 120.
 McKay v. Martin, 14, 235.
 McKechnie v. McKeyes, 689, 690, 691.
 McKenzie v. Reed, 275.
 McKenzie v. Russell, 264.
 McLachlin v. Usborne, 389, 390.
 McLaren v. Fraser, 763.
 McLaren v. Kerr, 824.
 McLaughlin v. Moore, 94.
 McLaughlin v. Schaefer, 234, 235.
 McLean v. Ainslie, 120.
 McLean v. Allen, 430.
 McLean v. Buffalo & Lake Huron Ry. Co., 444.
 McLean v. Burton, 762.
 McLean, Doe d. v. Manahan, 762.
 McLean v. Fleming, 443.
 McLean v. Pinkerton, 15, 351, 356.
 McLeish v. Howard, 130.
 McLellan v. McKinnon, 129.
 McLennan v. Howard, 397.
 McLennan v. McDonald, 766.
 McLeod v. Enigh, 787, 788.
 McLeod v. McNab, 654.
 McLeod v. Noble, 71.
 McLeod v. Truax, 765.
 McLeod v. Power, 496.
 McLeod v. Wadland, 761, 765.
 McMahon v. McDougall, 352.
 McManamy v. Sherbrooke, 62.
 McManns v. Hay, 149.
 McMartin v. Hurlburt, 328.
 McMartin v. McDougall, 357, 358.
 McMaster v. Clare, 461.
 McMaster v. Demmery, 606.
 McMaster v. Garland, 352, 353.
 McMaster v. Phipps, 762, 763.
 McMichael v. Wilkie, 784.
 McMicking v. Gibbons, 297, 682.
 McMillan v. McMillan, 391.
 McMillan, Re McMillan v. McMillan, 632.
 McMillan v. Munro, 766.
 McMullen v. Vannatto, 824, 825.
 McMurdo, Re, 650.
 McMurty v. Monro, 234, 235.
 McMyn, Re Lightbourn v. McMyn, 438.
 McNab, Re, 646, 697.
 McNab v. Adamson, 688.
 McNabb v. Oppenheimer, 276.
 McNally v. Church, 804.
 McNaughton v. Webster, 330.
 McNeil v. Haines, 236.
 McPhaden v. Bacon, 275, 387.
 McPherson v. McPherson, 95.
 McQuade v. Dixon, 148.
 McQuarrie v. Brand, 542.
 McRoberts v. Steinfoff, 460.
 McShane v. Baxter, 147.
 McTavish v. Rogers, 471.
 McVeagh, Re, 397.
 McVean v. Ridler, 275, 276.
 McVicar, Re, 652.
 McWhinney v. McQuaid, 95.
 Macara v. Dines.
 Macara v. Moorish, 236.
 Macklin v. Dowling, 608, 695.
 Madden v. Hamilton Iron Forging Co., 149.
 Madden v. Kensington Vestry, 131.
 Maddocks, Re, 648, 649.

- Madell v. Thomas, 352.
 Mader v. McKinnon, 371.
 Magann v. Bonner, 837.
 Magann v. Ferguson, 468, 470.
 Magdalen Hospital v. Knotts, 675.
 Magee v. Gilmour, 836.
 Magees, Re, 289.
 Maher v. Portland, 66.
 Mahon v. Nicholls, 237.
 Mail Printing Co. v. Clarkson, 468.
 Mair v. Cully, 95.
 Malcolm v. Hunter, 687.
 Malcolm v. Leys, 235.
 Malen, Re, 649.
 Maley, Re, 653.
 Mallette v. Montreal, 55, 62.
 Mallindine, Re, 632.
 Mander v. Royal Canadian Bank, 558.
 Mandeville v. Nicholl, 765.
 Manitoba Statutes, Re, 70.
 Mann, R., 648.
 Mann v. Perry, 472.
 Manning v. Mills, 95.
 Manning v. Wasdale, 688.
 Mansfield v. Baddeley, 152.
 Mara, Re, 765.
 Mara v. Brown, 392, 394, 402.
 March, Re, Mander v. Harris, 782.
 Marcus, Re, Marcus v. Marcus, 652.
 Margary v. Robinson, 646.
 Markham v. Stanford, 364.
 Markwell's case, 396.
 Markwick v. Cardingham, 681.
 Marlborough v. Osborn, 821.
 Marley v. Osborne, 150.
 Marsden v. Wardle, 236.
 Marseilles Extension Ry. & Land Co., Re 546.
 Marsh v. Boulton, 128.
 Marsh v. Conquest, 264.
 Marsh v. Deves, 235.
 Marsh, Doe d. v. Scarborough, 655.
 Marsh and Earl Granville, Re, 695, 697.
 Marsh v. Webb, 588.
 Marshall, Re, 648.
 Marshall v. Gingell, 657.
 Marshfield, Re, Marshfield v. Hutchings, 682.
 Marshall v. Taylor, 679.
 Martin, Re, 631, 632.
 Martin v. Bearman, 587, 611.
 Martin v. Connah's Quay Alkali Co., 151.
 Martin v. Hall, 606.
 Martin v. Hutchinson, 821.
 Martin v. McAlpine, 465.
 Martin v. McMullen, 468, 469.
 Martin v. Magee, 631.
 Martin v. Reid, 560.
 Martin v. Sampson, 351, 355.
 Martin v. Travellers Insee. Co., 96.
 Martin v. Treacher, 93.
 Marthison v. Patterson, 350, 351, 353, 355.
 Martindale v. Clarkson, 796, 797.
 Martins v. Upcher, 130, 131.
 Masnard v. Welford, 389.
 Mason, Re, 657.
 Mason v. Bertram, 162, 153, 158.
 Mason v. Bibby, 131.
 Mason v. Bickle, 363, 480.
 Mason v. Bishop, 649.
 Mason v. Cooper, 430.
 Mason v. Great Western Ry. Co., 565.
 Mason v. Hatton, 564.
 Mason v. Johnson, 249.
 Mason v. Johnstone, 683.
 Mason v. Macdonald, 473.
 Mason v. Mason, 632, 658.
 Mason v. Mogridge, 497.
 Mason v. Peterborough, 391.
 Mason v. Shrewsbury Ry. Co., 686, 687, 689.
 Mason v. Thomas, 356.
 Massey v. Rowen, 779.
 Massie v. Toronto Ptg. Co., 822.
 Masters v. Stanley, 330.
 Masuret v. Stewart, 465.
 Mathers, Re, 288.
 Mathers v. Lynch, 354, 357.
 Mathieu, Re, 285, 286.
 Matthewman's case, 783, 787.
 Matthews v. Bouchard, 147.
 Matthews v. Brown, 547.
 Matthews v. Matthews, 656.
 Maund v. Monmouthshire Canal Co., 131.
 Maxwell v. Scarfe, 430.
 May v. Security L. and S. Co., 349, 357, 364.
 May v. Standard Fire Ins. Co., 329.
 May v. Woodward, 391.
 Mayhew v. Suttle, 836.
 Maynes v. Hazleton, 653.
 Meades, Re, 288, 289.
 Meagher v. Coleman, 822.
 Medland, Re, Eland v. Medland, 404.
 Meekins v. Smith, 277.
 Mehary v. Lumbers, 466.
 Mein, Re, 244, 245.
 Mein v. Short, 333.
 Mellow v. Watkins, 826.
 Membry v. Great Western Ry. Co., 151.
 Mercer and Moore, Re, 698.
 Mercer v. Neff, 391, 632.
 Merchant Banking Co. v. Phoenix Bessemer Steel Co., 481.
 Merchants Bank v. Bell, 544, 788.
 Merchants Bank v. Bostwick, 560.
 Merchants Bank of Halifax v. Gillespie, 50.
 Merchants Bank of Canada v. Henderson, 548.
 Merchants Bank of Halifax v. McNutt, 544.
 Merchants Bank v. Moffatt, 560.
 Merchants Bank v. Montreal, 50.
 Merchants National Bank v. Ontario Coal Co., 543.
 Merchants Bank v. Smith, 54, 562, 565, 566.
 Meriden Britannia Co. v. Braden, 351, 465.
 Meriden Silver Co. v. Lee, 461.
 Metropolitan District Ry. Co. and Cash, Re, 608.
 Metropolitan Loan and Savings Co. v. Mara, 278, 472, 788.
 Mette v. Mette, 652.
 Mews v. Mews, 779.
 Meyer v. Bell, 119.
 Meyer v. Decroix, 541.
 Meyer Rubber Co. v. Rich, 276.
 Meyerhoff v. Froehlick, 304, 306.
 Meyers v. Campbell, 265.
 Meyers v. Doyle, 680.
 Meyers v. Meyers, 395.
 Meyerstein v. Barber, 250.
 Moxborough v. Whitwood Urban District Council, 93.

- Michie v. Allen, 276.
 Michie v. Reynolds, 328.
 Mickleburgh v. Parker, 387.
 Midgley v. Midgley, 307, 394.
 Midland Loan Co. v. Cowieson, 355.
 Middlesex v. Smallman, 787.
 Milford Haven Ry. and Estate Co. v. Mowatt, 590.
 Millar, Re, 786, 788.
 Millar v. Smith, 761, 766.
 Miller, Re, 245.
 Miller v. Brown, 681, 763.
 Miller v. Caldwell, 307.
 Miller v. Cook, 593.
 Miller v. Harewood, 309.
 Miller v. McTaggart, 93.
 Miller v. Ostrander, 309.
 Miller v. Reid, 464.
 Miller v. Ryerson, 160.
 Miller v. Wiley, 332, 588.
 Milligan v. McAlpine, 147.
 Milligan v. Sutherland, 354.
 Millington, Re, 246.
 Millissich v. Lloyds, 116.
 Milne, Re, 244.
 Milne v. Moore, 395.
 Milner, Re, Milner v. Milner, 785.
 Milroy v. Kerr, 562, 563.
 Mills v. Capel, 684.
 Mills v. Colchester, 636.
 Mills v. Millward, 653.
 Milward v. Midland Ry. Co., 149.
 Minhinnick v. Jolly, 354.
 Miuna Craig Steamship Co. v. Chartered Mercantile Bank, 352.
 Mitchell v. Cantrill, 688, 689.
 Mitchell v. Coffee, 829.
 Mitchell v. Holdsworth, 146.
 Mitchell v. Macauley, 470.
 Mitchell v. Richey, 288.
 Mitchell v. Weir, 779.
 Mitchell's claim, 304, 305, 308.
 Mitchison v. Thompson, 826.
 Mittleberger v. Clarke, 277.
 Moase v. White, 656.
 Moberly v. Collingwood, 236.
 Mockett, Re, 396, 397.
 Moffatt v. Coulson, 350.
 Moffatt v. Grover, 332.
 Moffatt v. Prentice, 95.
 Molony v. Molony, 678.
 Molson v. Lambe, 62.
 Molsons Bank v. Girdlestone, 565.
 Molsons Bank v. Halter, 465.
 Monaghan, Re, 245.
 Moncton v. Gilzean, 698.
 Monk v. Benjamin, 606.
 Monk v. Farlinger, 804.
 Monk v. Whittenbury, 481.
 Monkhouse v. G.T.R., 57, 63, 146.
 Monmouth Canal Co. v. Harford, 686, 687.
 Monroe v. Twistleton, 94.
 Montague, Re, 289.
 Montague v. Harrison, 277.
 Montgomery v. Corbit, 462.
 Montgomery v. Graham, 97.
 Monteith, Re, Merchants Bank v. Monteith, 563, 566.
 Montreal, Bank of v. Stewart, 763.
 Montreal Rolling Mills Co. v. Corcoran, 149, 151.
 Moodie v. Bannister, 297.
 Moody v. Canadian Bank of Commerce, 473.
 Moor v. Raisbeck, 655.
 Moorehouse v. Bostwick, 467.
 Moore v. Doherty, 678.
 Moore v. Gidley, 130.
 Moore v. Gillies, 837.
 Moore v. Holditch, 131.
 Moore v. Jackson, 778, 779, 780, 787, 804.
 Moore v. Jimson, 149.
 Moore v. Knight, 394.
 Moore v. Mellish, 391.
 Moore v. Moore, 278.
 Moore v. Morris, 785.
 Moore v. Wallace, Re, 265.
 Moravian, Re, 389.
 Morey v. Totten, 592.
 Morgan v. Dodson, 545.
 Morgan v. Hesketh, 542.
 Morgan v. Hutchins, 146.
 Morgan v. London General Omnibus Co., 145.
 Morgan v. Morgan, 684.
 Morgan v. Palmer, 128, 130.
 Morgan v. Swansea Urban Sanitary Authority, 390.
 Morley v. Great Western R'y Co., 160.
 Morrell v. Frith, 305, 307.
 Morrell v. Morrell, 650.
 Morris, Re, 797.
 Morris, James, Re, v. London and County Banking Co., 468.
 Morris v. Martin, 797.
 Morris v. Morris, 657.
 Morris (Township) v. Huron (County), 15.
 Morrison v. Arnold, 649.
 Morrison v. Baird, 145.
 Morrison v. Morrison, 655.
 Morrison v. Watts, 471, 474.
 Morrow v. Rorke, 356.
 Morse, Re, 782.
 Morse v. Lamb, 764, 767.
 Mortimer v. Bell, 591.
 Morton, Re, 653.
 Morton v. Cowan, 329.
 Morton v. Lewis, 592.
 Morton v. Palmer, 830.
 Morton and St. Thomas, Re, 765.
 Morton v. Woods, 608.
 Moss v. Harter, 656.
 Moule, Doe d. v. Campbell, 592.
 Mountjoy v. Collier, 236.
 Mowat, A.-G., v. Casgrain, 56.
 Mower v. Orr, 657.
 Moyle v. Jenkins, 153.
 Moyle v. Moyle, 388.
 Muckleroy v. Burham, 119.
 Mucklow v. Mangles, 561.
 Muggerridge, Re, 396, 397, 460.
 Muir v. Carter, 292.
 Muir v. Dunnett, 610, 766.
 Mulcahy v. Collins, 784.
 Mulligan v. Thompson, 119.
 Munro v. Munro, 286.
 Munro v. Smart, 645.
 Munro v. Waller, 470.
 Munsie v. Lindsay, 592.
 Munster v. Cox, 496.

Murdock v. Windsor and Annapolis Ry. Co., 58.
 Murietta v. South American, 330.
 Murphy, Re, 652.
 Murphy v. Wilson, 150.
 Murray v. Barber, 783.
 Murray v. Brown, 94.
 Murray v. Watkins, 684.
 Murray v. Westmount, 291.
 Musgrave v. Sandeman, 785.
 Music Hall Block, Re, 765.
 Musurus Bey v. Gadban, 297.
 Muttlebury v. King, 764.
 Muttlebury v. Taylor, 606.
 Myers v. Gibson, 650.
 Mykel v. Doyle, 674.
 Myles v. Burton, 779.

N.

Nash v. De Freville, 548.
 Nash v. Hill, 308.
 Nash v. Sharp, 836, 837.
 Natal Land Co. v. Good, 766.
 National Bank of Australia v. Cherry, 559.
 National Bank of Australia v. Morris, 460.
 National Bank v. Silke, 546, 547.
 Navulshaw v. Brownrigg, 482.
 Naylor, Re, 244.
 Naylor and Spendla, Re, 606.
 Neau v. McMillan, 236.
 Neal, Ex parte, 501.
 Neale's case, 246.
 Neesom v. Clarkson, 788.
 Neill v. McMillan, 130.
 Neill v. Ridley, 443.
 Nelles v. Maltby, 466, 467.
 Nelson v. Hopkins, 656.
 Nelson v. Page, 658.
 Nepean v. Doe, 677.
 Nesbitt, Re, 244.
 Nesbitt v. Armstrong, 784, 787.
 Ness v. Stephenson, 830.
 Neston v. Newcome, 131.
 Neville, Re, 651.
 Nevills v. Ballard, 53.
 Nevitt v. McMurray, 764, 766, 796.
 Newberry, Re, 288.
 Newbould v. Smith, 308, 683, 684.
 New Brunswick Ry. Co. v. Kelly, 766.
 Newcombe v. Anderson, 830.
 Newfoundland v. Newfoundland Ry. Co., 473.
 Newland (or Newton) v. Harland, 277.
 Newlands v. Paynter, 778.
 New London Credit Syndicate v. Neale, 542.
 Newman, Re, 244, 245.
 Newmarch v. Store, 658.
 New, Prance and Garrard's Trustee v. Hunting, 462.
 Newton, Re, 288.
 Newton v. Chorlton, 437.
 Newton v. Constable, 277.
 Newton v. Newton, 654.
 Newton v. Reid, 388.
 Newton v. Sherry, 395.
 Nichol v. Allenby, 606.
 Nicholls v. Cummings, 16.
 Nichols v. Regent's Canal Co., 306.

Nicholson v. Field, 390.
 Nickells v. Goulding, 120.
 Nickle v. Douglas, 328.
 Nisbet v. Cook, 355, 356.
 Noel v. Corporation of Richmond, 68.
 Noel v. Redruth Foundry Co., 152.
 Nolan, Re, 805.
 Nolan v. Donnelly, 354, 466, 467.
 Nordheimer v. Robinson, 249, 363.
 Norfolk v. Arbuthnot, 690.
 Norris, Re, 650.
 North British and Mercantile Ins. Co. v. Lambe, 60.
 North v. Fisher, 297.
 Norton v. Frecker, 394.
 North London Land Co. v. Jacques, 826.
 North Ontario's Election, Re, 15.
 North Perth, Re, 52, 71.
 North of Scotland Mortgage Co. v. German, 607.
 North of Scotland Mortgage Co. v. Udell, 607.
 North West Transportation Co. v. McKenzie, 442.
 North Western Bank v. Poynter, 442.
 Nowery v. Connolly, 721.
 Nudell v. Williams, 827, 836.
 Nugent, Re, 244.
 Nunes v. Carter, 461.

O.

Obernier v. Robertson, 116, 131.
 O'Brien v. Clarkson, 465.
 O'Brien v. Sanford, 151.
 O'Connell, Re, 837.
 O'Connor v. Dafee, 333.
 O'Connor v. Hamilton Bridge Co., 147, 151.
 O'Connor v. Majoribanks, 94.
 O'Connor v. Nova Scotia Telephone Co., 14.
 O'Dell v. Gregory, 292.
 O'Donohue v. Whitty, 610.
 Offay v. Offay, 264, 265.
 Ogden v. McArthurs, 804.
 Ogg v. Shuter, 564.
 Ogle, Ex parte, 243, 244, 245.
 O'Grady v. McCaffray, 592.
 Ohlsen v. Terrers, 97.
 Oldham, Ex parte, 501.
 Oliphant v. Leslie, 130.
 Olive, Re, Olive v. Westerman, 403.
 Oliver v. Lockie, 687.
 Oliver v. McLaughlin, 460, 462.
 Oliver v. Mowat, 822.
 Olney v. Bates, 657.
 O'Meagher v. O'Meagher, 649.
 O'Neill v. Owen, 648, 653, 654, 765.
 Olney v. Gardiner, 691, 692.
 Onslow, Plowden v. Gayford, 782.
 Ontario v. Dominion, 72.
 Ontario Bank, Re, 328.
 Ontario Bank v. Lamont, 465, 473.
 Ontario Bank v. Newton, 566.
 Ontario Bank v. Wilcox, 357.
 Ontario Forge and Bolt Co., Re; Townsend's Case, 501.
 Ontario Industrial Loan Co. v. Lindsey, 762, 767.
 Orange v. Pickford, 650.

Orange and Wright, Re, 697.
 Ormrod, Re, 389.
 O'Rourke v. Bolingbroke, 592.
 O'Rourke v. Lee, 249.
 Orton v. Brett, 546.
 Osborn v. Gillett, 156.
 Osborn v. London Dock Co., 93.
 Osborne, Ex parte, 264.
 Osborne v. Jackson, 145.
 Osborne v. Kerr, 825.
 Osborne v. London and North Western Ry. Co., 151.
 Osborne v. Rowlett, 696, 698.
 O'Shaughnessy v. Ball, 250.
 Osler v. Mutter, 328.
 Ostrom v. Benjamin, 235.
 Otley and Ilkley Ry. Co., Re, 655.
 Outram v. Maude, 686, 692.
 Overend, Gurney & Co. v. Oriental Financial Corporation, 437.
 Overton v. Banister, 309.
 Owen v. Wolley, 308.
 Oxley v. Wilkes, 116.

P.

Pacquette, Re, 468.
 Paddon v. Richardson, 402.
 Page, Re, 393.
 Page v. Griffith, 66.
 Page v. Midland Ry. Co., 590.
 Paget v. Foley, 682.
 Paget v. Paget, 785, 786.
 Paladino v. Gustin, 116, 117.
 Paley v. Garnett, 146.
 Palk v. Skinner, 692.
 Palliser v. Gurney, 784.
 Palmer, Ex parte, 96.
 Palmer v. Hendry, 560.
 Palmer v. Mail Printing Co., 825.
 Palmer v. Rogers, 276.
 Palmer v. Wallbridge, 822.
 Palmes v. Danby, 606.
 Pannell v. Taylor, 276.
 Pannell v. London Brewing Co., 826.
 Papin, Ex parte, 67.
 Pardo v. Bingham, 297.
 Parfitt v. Jephson, 591.
 Park v. Taylor, 330.
 Parke v. Riley, 331.
 Parker, Re, 653, 657.
 Parker and Beech's Contract, Re, 608.
 Parker v. Gossage, 460.
 Parker v. Mitchell, 690, 691.
 Parker, Morgan v. Hill, 438.
 Parker v. Parker, 95.
 Parker's Trust, Re, 389.
 Parkes v. St. George, 350, 355, 358.
 Parkinson, Re, 244.
 Parkinson v. Hanbury, 609, 610.
 Parks v. Cahoon, 678.
 Parks v. St. George, 470.
 Parkyn v. Staples, 130.
 Parmiter v. Coupland, 115.
 Parr v. Montgomery, 331, 332.
 Parsons v. Gooding, 395.
 Parsons v. Queen Ins. Co., 565.
 Parsons, Re, Stockley v. Parsons, 781.
 Partington v. Butcher, 305.

Pass v. Dundas, 387.
 Patch v. Shore, 656.
 Patch v. Ward, 607.
 Patchim v. Davis, 95.
 Patching v. Bull, 590.
 Patrick v. Simpson, 684.
 Paterson v. Tash, 482.
 Paterson v. Wilcox, 120.
 Patterson v. Gillies, 357.
 Patterson v. Holland, 489.
 Patterson v. King, 822.
 Patterson v. Kingsley, 352.
 Patterson v. Maughan, 356.
 Patterson v. Richmond, 822.
 Patterson v. Thompson, 829.
 Patton, Re, 244, 245, 246.
 Pawson v. Hall, 275.
 Payne v. Little, 788.
 Peacock v. Colling, 397.
 Peakin v. Peakin, 678.
 Pearce, Re, 243.
 Pearce v. Graham, 657.
 Pearce v. Lansdowne, 145.
 Pearce v. Pearce, 390.
 Pearce and Waller, Re, 787.
 Pearson, Re, 403.
 Pearson v. Essery, 788.
 Pearson v. Glayebrook, 236, 337.
 Pearson v. Pears, 648.
 Pearson v. Spencer, 589.
 Pearl v. Deacon, 437.
 Pearn, Re, 647.
 Pease v. Gloahco, 479.
 Peck and Galt, Re, 764.
 Peck and London School Board, Re, 590.
 Peck v. Powell, 313.
 Pedder v. Hunt, 676.
 Peek v. Derry, 403.
 Pegg v. Howlett, 545.
 Pegg v. Plank, 95.
 Pegge v. Metcalfe, 329.
 Pegram v. Dixon, 148.
 Pelley v. Bascombe, 678.
 Pelton v. Harrison, 784.
 Pembroke v. Friend, 658.
 Perny v. Allen, 684.
 Pentell v. Harborne, 825.
 Pentington v. Brownlee, 681.
 Penton v. Barnett, 826.
 People v. Molyneux, 16.
 Peoples Loan and Deposit Co. v. Dale, 472.
 Peoples Loan and Deposit Co. v. Grant, 313.
 Percy, Re, Stewart v. Percy, 797.
 Perkins, Re, Poyser v. Beyus, 466.
 Perrins v. Bellamy, 393.
 Perrin v. Davies, 356.
 Perrott v. Perrott, 654.
 Perry v. Brass, 149.
 Perry, Doe d. v. Henderson, 678.
 Perry v. Eames, 692.
 Perry v. Perry, 610.
 Persee, Ex parte, 243.
 Pery, Re, 650.
 Peterkin v. Macfarlane, 593, 763, 766.
 Pettinger v. Ambler, 656.
 Peuchen v. Imperial Bank, 564.
 Phelan, Re, 287.
 Phillips v. Beal, 307.
 Phillips v. Cayley, 656.

Phillips v. Dickson, 437.
 Phillips v. Evans, 607.
 Phillips v. Halliday, 690.
 Phillips v. Henson, 830.
 Phillips v. Huth, 482.
 Phillips v. Phillips, 304, 788.
 Phipps, Re, 650.
 Phipps v. Hale, 646, 649.
 Picard v. Hine, 783.
 Pickard v. Anderson, 402.
 Pickard v. Sears, 480.
 Picker v. London and County Banking Co., 557.
 Pickerel River Improvement Co. v. Moore, 93.
 Pickering v. Busk, 480.
 Pickersgill, v. Rodger, 658.
 Pierce v. Canada Permanent, 763, 765.
 Piers, Re, Ex parte Piers, 469.
 Pigeon v. Recorder's Court, Montreal, 62.
 Piggott and Great Western Ry. Co., Re, 697.
 Pigot v. Cubley, 560.
 Pike v. Fitzgibbon, 779, 783.
 Pillow, Ex parte, 61, 68.
 Pilgrim v. Knatchbull, 264.
 Pine v. Warden, 441.
 Pink, Re, 245.
 Pitt v. Coombs, 277.
 Platt v. Grand Trunk Ry. Co., 765.
 Plasterer's Co. v. Parish Clerks' Co., 692.
 Pledge v. Buss, 437.
 Plenderleith, Re, 245.
 Plenty v. West, 653.
 Plimmer v. Wellington, 824.
 Plumb v. McGannon, 655.
 Plumb v. Steinboff, 592.
 Poll v. Hewitt, 151.
 Pollard, Re, 785.
 Polson v. Degeer, 364.
 Ponton v. Bullen, 472.
 Ponton and Swanston, Re, 695.
 Pooley, Re, 652.
 Pooley v. Hicks, 147.
 Pope v. Griffith, 66, 67.
 Popple, Re, 696, 697.
 Portalis v. Tetley, 482, 483.
 Porter v. Flintoft, 358.
 Porteus v. Watney, 443.
 Portman v. Patterson, 235, 236.
 Pott v. Clegg, 308.
 Potter v. Carroll, 265.
 Potter v. North, 685.
 Potts v. Bovine, 589.
 Potts v. Leask, 438.
 Potts v. Myers, 796.
 Poulett (Earl) v. Hood, 396.
 Poulin v. Quebec, 61, 68.
 Pountain, Re, 244.
 Powell, Re, 647, 656.
 Powell v. Apollo Candle Co., 51.
 Powell v. Calder, 461, 464, 467.
 Power v. Ellis, 93.
 Prance v. Sympton, 305.
 Pratt v. Bunnell, 797.
 Prendergast, Re, 650.
 Prescott v. Barker, 656.
 Presland v. Bingham, 691.
 Pressey v. Trotter, 587, 611.
 Previste v. Gatti, 147, 153.

Price v. Brady, 593.
 Price v. Guinane, 836, 837.
 Price v. Manning, 96.
 Price v. Price, 653.
 Price, Re, Stafford v. Noble, 784.
 Prince, Re, Stafford v. Stafford, 646, 784.
 Prince v. Oriental Banking Corporation, 566.
 Pritchard v. Lang, 147.
 Pritchard v. Pritchard, 278.
 Prittie, Re, 398.
 Prosser v. Wagner, 407.
 Provincial Fisheries, Re, 53, 59, 61.
 Prynne, Re, 787.
 Pryor v. Pryor, 649.
 Prytherch, Re, Prytherch v. Williams, 606.
 Puddephatt, Re, 647.
 Pugh v. Heath, 676.
 Pulling v. Great Eastern Ry. Co., 157.
 Punnett, Ex parte, 608, 609.
 Purcell v. Burgin, 652, 654.
 Pye v. Mumford, 692.
 Pym v. Great Northern Ry. Co., 152, 156, 157, 159.

Q.

Quarm v. Quarm, 656.
 Quebec Fire Assce. v. Anderson, 292.
 Quebec, Montgomery and Charlevoix Ry. Co. v. Mathieu, 292.
 Queddy River Boom Co. v. Davidson, 55, 62.
 Queen Victoria Park v. Colt, 592.
 Queen's case, 93.
 Queen's College v. Claxton, 606.
 Queen's Counsel, Re, 60, 61, 65, 69.
 Quincey v. Sharpe, 304.
 Quinlan v. Gordon, 313.
 Quinsey Doe d. v. Caniffe, 678.
 Quinton v. Frith, 677.
 Quirt v. The Queen, 52, 55, 56, 63.

R.

Raby v. Ridehalgh, 402.
 Race v. Harrison, 149.
 Radcliffe, Re, Radcliffe v. Bewes, 591.
 Radford v. Macdonald, 95.
 Radford v. Mercantile Bank, 558.
 Rae v. Meek, 387, 413.
 Railton, Re, 245.
 Railton v. Wood, 470.
 Rainbow v. Juggins, 438.
 Rainey v. Buxton, 675, 677, 679.
 Rainy Lake Lumber Co.; Re, Stewart v. Union Bank of Lower Canada, 558, 560.
 Rameshar Pershad Narain Singh v. Koonji Behari Pattuk, 689.
 Ramsden v. Dyson, 824.
 Ramus v. Dow, 632, 633.
 Randall v. Stephens, 690.
 Randfield v. Randfield, 652.
 Ranjely v. Midland Ry. Co., 687.
 Raphael v. MacLaren, 292.
 Ratcliffe v. Winch, 395.
 Rathbone v. White, 697.
 Rathbun v. Cuthbertson, 332, 762.
 Ratt v. Parkinson, 128.
 Ravenhill v. Upcott, 115.
 Raw v. Cutten, 389.
 Read v. Fairbanks, 562.
 Read v. Great Eastern Ry. Co., 156.

- Read v. Whitehead, 761.
 Reburn v. Ste. Anne, 292.
 Reddan, Re, 633.
 Redding, Re, 648.
 Redfield v. Corporation of Wickham, 69.
 Redman v. Broers, 95.
 Reece v. Millar, 236.
 Reed, Doe d. v. Harris, 653.
 Reed v. King, 96.
 Reed v. Lamb, 97.
 Reed v. Wilson, Re, 762.
 Rees, Re, 650.
 Rees v. Davies, 837.
 Reeves v. Butcher, 683.
 Reg. v. Smith, 286.
 Reid, Re, 652.
 Reid v. Barnes, 145.
 Reid v. Gowans, 330, 430.
 Reid v. Macdonnell, 249.
 Reid v. Reid, 304, 781.
 Reille v. Reid, 465.
 Renaud, Ex parte, 69.
 Rennie v. Frame, 679.
 Restitution S.S. Co. v. Pirie, 443.
 Rex v. Scammonden, 587.
 Reynolds, Ex parte, 83.
 Reynolds v. Clarke, 689.
 Reynolds v. Williamson, 357.
 Rice, Re, 647.
 Rice v. Fletcher, 275.
 Rice v. Howard, 96.
 Rice v. Rice, 487, 788.
 Richards, Re, 244.
 Richards v. Fry, 690.
 Richardson, Re, 610.
 Richardson v. Armitage, 370.
 Richardson v. Barry, 306.
 Richardson v. Buswell, 328.
 Richardson v. Horton, 391.
 Richardson v. Ranson, 61, 65, 68.
 Richardson v. Richardson, 276.
 Richardson v. Trinner, 822.
 Richer v. Voyer, 557.
 Rickett v. Gwiney, 277.
 Riddell, Doe d. v. Gwinnell, 256.
 Ridgway v. Darwin, 245.
 Riel v. Reg, 57.
 Rielle v. Wood, 463.
 Right d. Carter, v. Price, 648.
 Rimington v. Cannon, 684.
 Ripper v. Popperhausen, 488.
 Risk Allah Bey. v. Johnstone, 115, 116.
 Risk v. Sleeman, 356.
 Ritson, Re, Ritson, v. Ritson, 658.
 Rivers Estate, Re, (Lord) 397.
 River Stave Co., v. Sill, 352.
 R. v. Adey, 93.
 R. v. Bank of Montreal, 543, 644.
 R. v. Bank of Nova Scotia, 71.
 R. v. Becker, 94.
 R. v. Bennett, 61, 65.
 R. v. Binney, 128.
 R. v. Bittle, 59.
 R. v. Boardman, 67.
 R. v. Boyes, 93.
 R. v. Bradshaw, 52, 65.
 R. v. Brierly, 50.
 R. v. Bunting, 69, 218.
 R. v. Burah, 51.
 R. v. Buscowitz, 55.
 R. v. Bush, 61, 65.
 R. v. Chandler, 58.
 R. v. Clifford, 98.
 R. v. Coote, 64.
 R. v. Currie, 16.
 R. v. Davenport, 822.
 R. v. Davidson, 236.
 R. v. Ditchheat, 836.
 R. v. Douglas, 277.
 R. v. Everett, 235.
 R. v. Foley, 65.
 R. v. Frawley, 67.
 R. v. Grand Trunk Ry. Co., 313.
 R. v. Halliday, 59, 62.
 R. v. Hammond, 106, 264.
 R. v. Harden, 236.
 R. v. Hart, 94.
 R. v. Hendershot, 106.
 R. v. Henry, 461.
 R. v. Hodge, 57, 58, 59, 67, 68.
 R. v. Horner, 61, 65.
 R. v. Howard, 62.
 R. v. Hughes, 129.
 R. v. Lawrence, 59.
 R. v. Lee, 61, 65.
 R. v. Levinger, 58, 65.
 R. v. Lowe, 97.
 R. v. McDonald, 236.
 R. v. McDougall, 62.
 R. v. McMillan, 62.
 R. v. Mainwaring, 97.
 R. v. Mohr, 53.
 R. v. Moss, 61.
 R. v. North Curry, 264.
 R. v. O'Rourke, 65.
 R. v. Parsons, 96.
 R. v. Plowman, 50.
 R. v. Potter, 330.
 R. v. Poynder, 836.
 R. v. Priest, W. N., 236.
 R. v. Reason, 501.
 R. v. Rene, 61, 65.
 R. v. Robertson, 53, 54, 55.
 R. v. Roddy, 59.
 R. v. Rowland, 97.
 R. v. Sandford, 236.
 R. v. Sheriff of Leicestershire, 278.
 R. v. Smith, 286, 762.
 R. v. Spurrell, 836.
 R. v. Stewart, 264, 265.
 R. v. Stone, 52, 57, 64.
 R. v. Taylor, 236.
 R. v. Toland, 58, 66.
 R. v. Washington, 16.
 R. v. Watson, 57, 59, 64, 66, 67.
 R. v. Weaver, 97.
 R. v. Williams, 106.
 Roach v. McLachlan, 430.
 Roach v. Wadham, 590.
 Robarts v. Robarts, 308.
 Robb v. Murray, 235.
 Robbins, Re, 95.
 Roberts, Ex parte, 244.
 Roberts, Re, 393.
 Roberts v. Hall, 286.
 Roberts v. Orchard, 129.
 Roberts v. Phillips, 649.
 Robertson v. Burrill, 306.

- Robertson v. Coulton, 275.
 Robertson v. Daley, 678.
 Robertson v. Danganeau, Re, 696.
 Robertson v. Davies, 541, 545, 547.
 Robertson v. Holland, 465.
 Robertson v. Laroque, 781.
 Robertson v. Lonsdale, 545.
 Robertson, Re, Robertson v. Robertson, 797.
 Robertson v. Ross, 95.
 Robinet v. Pickering, 256, 592.
 Robins, Re, 246.
 Robins v. Clarke, 359.
 Robinson v. Bergin, 265.
 Robinson v. C. P. R., 156.
 Robinson v. Grange, 328.
 Robinson v. Harkin, 388, 393.
 Robinson v. Peace, 329.
 Robinson v. Pickering, 783, 788.
 Robinson v. Preston, 608.
 Robinson v. Purdom, 689.
 Roblin v. McMahon, 304, 306.
 Robson v. Carpenter, 762.
 Robson v. Edwards, 689.
 Roche v. Ryan, 764.
 Rochfort v. Ely, 244.
 Rockport v. Seaton, 388.
 Roddam v. Morley, 298.
 Roderigas v. East River Bank, 407.
 Rodger v. Moran, 631.
 Rodgers v. Hamilton Cotton Co., 151.
 Rodier v. Lapiere, 291, 292.
 Rodocanachi v. Milburn, 443.
 Roe v. Braden, 766.
 Roe v. Davis, 823.
 Roe v. Jones, 333, 588.
 Roe v. Siddons, 686.
 Rogers v. Carroll, 356, 462.
 Rogers and Farewell, Re, 473.
 Rogers v. Goodenough, 654.
 Rogers v. Hull Docks Co., 836.
 Rogers v. Jones, 132.
 Rogers v. Knowles, 275.
 Rogers v. Ontario Bank, 829.
 Rogers v. Quinn, 306.
 Rogers v. Rice, 826.
 Rogers v. Ullman, 311.
 Rogers v. Wilson, 606.
 Rolfe v. Perry, 658.
 Rolland v. La Caisse d'Economie de Quebec, 471, 560.
 Rollason, Re, Rollason v. Rollason, 330.
 Romberg v. Steenbock, 276.
 Rooker v. Hoofstetter, 761.
 Rose, Re, 632.
 Rose v. Bartlett, 656.
 Rose v. Hope, 354.
 Rose v. Peterkin, 763, 766.
 Rose v. Zimmerman, 332, 588.
 Rosebatch v. Parry, 473.
 Ross, Re, 95, 265, 288, 395.
 Ross v. Clifton, 131.
 Ross v. Cross, 149.
 Ross v. Dunn, 350, 351, 464.
 Ross v. Hunter, 763.
 Ross v. Hurd, 275.
 Ross v. McKindsey, 97.
 Ross v. McLay, 128, 767.
 Ross v. Parkyns, 311.
 Ross v. Ross, 655.
 Ross v. Simpson, 329.
 Rossin v. Joslin, 825.
 Routledge v. Law, 50.
 Routledge v. Ramsay, 308.
 Rowland v. Witherden, 388.
 Rowley v. London and North Western Ry. Co., 157, 158.
 Rowley v. Unwin, 788.
 Rowson, Re, 394.
 Rowth v. Howell, 388.
 Royal Bank of Scotland v. Tottenham, 542.
 Royal Canadian Bank v. Brown, 98.
 " v. Carruthers, 444, 565.
 " v. Cummer, 559.
 " v. G. T.R., 441.
 " v. Kelly, 608.
 " v. Lockman, 472.
 " v. Miller, 565, 566, 567.
 " v. Mitchell, 779, 780.
 " v. Ross, 563, 567.
 Royal Canadian Insurance Co. v. Montreal Warehousing Co., 63.
 Roys v. Roys, 403.
 Roynance, Doe d v. Lightfoot, 676, 683.
 Royle v. Harris, 646.
 Ruby, Re, Trusts Corporation v. Ruby, 67.
 Rumball v. Metropolitan Bank, 557.
 Rumohr v. Marx, 330.
 Russell, Re, 653.
 Russell v. Niemann, 443.
 Russell v. The Queen, 52.
 Russell v. Robertson, 297.
 Russell v. Russell, 761, 762.
 Russell, Russell v. Shoolbred, 438.
 Rattan v. Winans, 688.
 Ryan v. Clarkson, 467.
 Ryan v. Devereux, 651.
 Ryan v. Ryan, 676, 678.
 Ryberg v. Ryberg, 96.
 Ryckman v. Canada Life Ass. Co., 610.
 Ryerson, Re, 395.
 Rykert v. Miller, 765.
 Rylands v. Fletcher, 786.
 Sackville v. Smyth, 658.
 Saderquist v. Ontario Bank, 557.
 Sadler v. Henlock, 501.
 Sage v. Duffy, 128.
 St. Catharines Milling Co. v. Reg, 56, 61.
 St. Catharines and Niagara Central Ry. Co. and Barbeau, Re, 69.
 St. Hyacinthe v. St. Hyacinthe, 15.
 St. John v. Boughton, 680.
 St. John v. Rykert, 313.
 Salisbury, Re Marquis of, 696.
 Sallery, Re, 657.
 Salmon, Re, Priest v. Uppley, 403, 404.
 Salmon v. Swand, 823.
 Salt v. Cooper, 218.
 Salter v. Cavanagh, 684.
 Samis v. Ireland, 332.
 Samuel v. Coulter, 358.
 Sandars v. Barker, 146.
 Sandbach and Edmondson, Re, 696.
 Sanders v. Annesley, 675.
 Sanders v. Maclean, 441.
 Sanders v. Malsburg, 593, 779, 804.
 Sanders v. Sanders, 674, 680, 681.
 Sanderson v. Sanderson, 160.
 Sandford v. Porter, 389, 473.

- Sands to Thompson, Re, 676, 684.
 Sanguinetti v. Messier, 542.
 Sargents' Policy, Re, 330.
 Sass, Re, 468.
 Saul v. Pattinson, 591.
 Saunders, Re, 650.
 Saunders v. Latham, 687.
 Saunders v. Mills, 116.
 Saunders v. Wiel, 93.
 Savoy, Re, 648.
 Sawyer, Re, 785.
 Sawyer v. Thomas, 544.
 Sayles v. Brown, 765.
 Scales v. Jacobs, 305.
 Scane v. Coffey, 276.
 Scanlan, Re, 288, 289.
 Scarf v. Jardine, 496.
 Scarlet, Re, 244.
 Schaffer v. Dumble, 250.
 Scholey v. Walton, 306.
 Schofield and wife, 779.
 Scholfield v. Earl of Lonsborough, 546.
 Scot v. Scot, 824.
 Scot, Re, 245.
 Scott v. Crerar, 95.
 Scott v. Duncan, 657.
 Scott v. Jones, 307, 396.
 Scott v. McRae, 250.
 Scott v. Mitchell, 264, 275.
 Scott v. Morley, 783, 786, 787.
 Scott v. Reburn, 128, 130.
 Scott v. Scott, 648.
 Scott v. Supple, 632, 658.
 Scott v. Wye, 14.
 Scottish Ontario and Manitoba Land Co., Re, 837.
 Scribner v. Kinlock, 353.
 Scripture v. Gordon, 438.
 Seagrave, Re, 785.
 Seal v. Claridge, 355.
 Seath v. Moore, 561.
 Seaton v. Taylor, 333.
 Secord v. Great Western Ry. Co., 158.
 Seddon v. Bank of Bolton, 692.
 Sedgwick v. Thomas, 786.
 Segsworth v. Anderson, 474.
 Seidler v. Sheppard, 606.
 Selmes v. Judge, 129.
 Selwyn v. Garfit, 610.
 Semayne's case, 250.
 Senior v. Ward, 156.
 Serle, Re, Gregory v. Serle, 825.
 Seroka v. Kattenburg, 786.
 Serrains v. Campbell, 443.
 Severn v. Campbell, 443.
 Severn v. McLellan, 766.
 Severn v. Reg., 59, 62.
 Sewell v. Burdick, 441, 442.
 Sewell v. Jones, 236.
 Shaffers v. General Steam Navigation Co., 145.
 Shakespeare, Re, Deakin v. Lakin, 784.
 Shallow v. Vernon, 160.
 Shannon v. O'Brien, 828.
 Sharman, Re, 652.
 Sharp v. Fowle, 830.
 Shaver and Hart, Re, 782.
 Shaw v. Crawford, 246.
 Shaw v. Johnson, 682.
 Shaw v. McCreary, 786.
 Shaw v. McKenzie, 129, 264, 275.
 Shaw v. Shaw, 680.
 Shaw v. Thorne, 654.
 Shaw v. Tims, 332.
 Sheddon v. Goodrich, 651.
 Sheffield v. Harrison, 352, 354.
 Shelley v. Nash, 592.
 Shelley v. Westbrooke, 288.
 Shenton v. Smith, 15, 60.
 Shepherd v. Berger, 824.
 Shepherd v. Harrison, 441.
 Shepherdson v. McCullough, 679.
 Sheppard v. Sheppard, 797.
 Sheppard v. Union Bank of London, 482, 483.
 Sherboneau v. Jeffs, 766.
 Sherk v. Evans, 236.
 Sherlock, Re, 396.
 Sherratt v. Merchants Bank, 782.
 Sherren v. Pearson, 679.
 Sherwood v. Sanderson, 244.
 Shields v. Peek, 50, 52, 56, 57.
 Skimmin v. Bellew, 591.
 Shoolbred v. Clarke, 52, 53, 56.
 Short v. McCarthy, 304.
 Short v. Ruttan, 762.
 Short v. Simpson, 441, 442.
 Shropshire Union Railway v. Canal Co. v. Reg, 587.
 Shuttleworth v. Le Fleming, 687.
 Sibbald v. G.T.R., 160.
 Sibeth, Ex parte, Re, Sibeth, 778.
 Sickles v. Asseltine, 333.
 Sidebotham v. Holland, 827.
 Sidwill v. Mason, 305, 307.
 Sieveweight v. Leys, 397.
 Sillick v. Booth, 407.
 Simmons, Re, 467.
 Simmons, Ex parte, 501.
 Simmons v. London Joint Stock Bank, 556, 557.
 Simper v. Foley, 689.
 Simpson and Chafferty, Re, 468, 473.
 Simpson v. Godmanchester, 688.
 Simpson v. Margitson, 827, 836.
 Simson, Re, 396.
 Sinclair v. Bell, Re, 496.
 Sinclair v. Brown, 632, 655.
 Sinclair v. Dewar, 300.
 Sinclair v. Jackson, 682.
 Sinden v. Brown, 128, 129, 130.
 Singer v. Elliott, 545.
 Skeat, Re, 389.
 Skeet v. Lindsay, 304.
 Skinner v. Ainsworth, 590.
 Skinner v. Orde, 289.
 Skinner's Co. v. Knight, 826.
 Sklitzsky v. Cranston, 764.
 Skull v. Glenister, 689.
 Slanning v. Style, 779.
 Slater v. Badenach, 465.
 Slater v. Oliver, 461.
 Slattery v. Dunn, 115.
 Slattery v. Turney, 266.
 Sloan v. Holliday, 689.
 Sloan v. Maughan, 357.
 Small v. Thompson, 784.
 Smart v. Hay, 119.
 Smart v. McKewan, 610.

- Smart v. Sandars, 300.
 Smart v. Smart, 285, 286.
 Smart v. Sorenson, 797.
 Smell v. Bryer, 646.
 Smethurst v. Hastings, 402.
 Smiles v. Bedford, 50, 56.
 Smith, Re, 243, 287, 652.
 Smith, Ex parte, 52.
 Smith v. Antipitsky, 467.
 Smith v. Baker, 145, 146, 151, 152.
 Smith v. Beal, 473.
 Smith v. Bedouin Steam Navigation Co., 444.
 Smith, Re, Bilke v. Roper, 646.
 Smith and Bustard's case, 823.
 Smith v. Cobourg and Peterboro Ry. Co., 329.
 Smith v. Critchfield, 330.
 Smith v. Crooker, 119.
 Smith v. Doyle, 471.
 Smith v. Everett, 394.
 Smith v. Fair, 358, 359.
 Smith v. Foster, 278.
 Smith v. Hill, 682.
 Smith v. Jamieson, 94.
 Smith v. Keown, 676.
 Smith v. Lawrence, 463.
 Smith v. Lloyd, 675.
 Smith v. Lomas, 655.
 Smith v. Low, 309.
 Smith v. McGowan, 98.
 Smith v. Merchants Bank, 52, 56.
 Smith v. Merriam, 654.
 Smith v. Moffatt, 370.
 Smith v. Moreton, 658.
 Smith v. Morton, 370.
 Smith v. Nethersole, 276.
 Smith v. Norton, 796.
 Smith v. Onderdonk, 151.
 Smith v. Poole, 304, 306.
 Smith v. Pritchard, 130.
 Smith v. Rogers, 551.
 Smith and Shenston, Re, 765.
 Smith v. Smith, 275, 648.
 Smith, Re, Smith v. Smith, Re, 658.
 Smith, Smith v. Thompson, 402.
 Smith and Stott, Re, 697.
 Smith v. Turnbull, 331.
 Smith v. Wallbridge, 692.
 Smith v. Whitlock, 784.
 Smith v. Williamson, 473.
 Smithett v. Heskeith, 607.
 Smurthwaite v. Simpson, 442.
 Smyth v. Stephenson, 117.
 Snarr v. Smith, 353.
 Sney v. Abdy, 265.
 Snell v. Heighton, 352.
 Snell v. Toronto Ry. Co., 849.
 Snook, Ex parte, 244.
 Snowden v. Baynes, 149.
 Solicitor, Re, 98.
 Solomon v. Davis, 543.
 Solomon and Megher's Contract, Re, 610.
 Solomon v. Solomon, 15.
 Soltykoff, Re, Ex parte Margrett, 542.
 Somerville v. Mirehouse, 128.
 Somes, Re, Smith v. Somes, 591.
 Soubner v. MacLaren, 352.
 South Wales, etc., Coal Co. v. Underwood, 543.
 Southcote, Ex parte, 245.
 Southwick v. Hare, 117.
 Sovereign v. Sovereign, 387.
 Squair v. Fortune, 329, 355.
 Spahr v. Bean, 788.
 Spalding v. Parker, 308.
 Spalding v. Ruding, 442.
 Sparkes v. Bell, 783.
 Sparkes v. Wolff, 656.
 Speight v. Gaunt, 387, 388, 389.
 Spence v. Stuart, 277.
 Spencer v. Newton, 277.
 Sperling, Re, 649.
 Spickernell v. Hotham, 307.
 Spiller, Re, 396.
 Spilsbury, Doe d v. Burdett, 650.
 Spong v. Wright, 307.
 Spooner, Re, 656.
 Spooner v. Sandilands, 300.
 Spratt v. Wilson, 388.
 Springett v. Balls, 159.
 Sproule, Re, 66.
 Sproule v. Wilson, 235.
 Sprung v. Anderson, 130.
 Spry v. McKenzie, 249.
 Spry v. Mumby, 128.
 Sugden v. Crossland, 390.
 Sulte v. Three Rivers, 62.
 Sun Fire Office v. Hart, 62.
 Sunbolf v. Alford, 250.
 Surman v. Wharton, 779, 788.
 Sutcliffe v. Cole, 655.
 Suter v. Merchants Bank, 563.
 Sutton v. Blakey, 546.
 Swain, Re, 393.
 Swain v. Ayers, 588.
 Swain v. Mail Printing Co., 117.
 Swainson v. Swainson, 658.
 Swainston v. Clay, 562.
 Swansea Bank v. Thomas, 822.
 Swansea, Mayor of v. Thomas, 823.
 Sweeny v. McGillvray, 149.
 Sweeting v. Pearce, 482.
 Sweetland v. Neville, 784.
 Sweetland v. Sweetland, 646.
 Swift v. Swift, 286.
 Swinfen v. Swinfen, 388.
 Swinford, Re, 650.
 Sykes, Re, 778.
 Sykes v. North Eastern Ry. Co., 157, 158.
 Symonds v. Hallett, 787.
 Symons v. Leaker, 692.
 Symons v. Rees, 234.
 Stackpoole v. Stackpoole, 676.
 Staebler v. Zimmerman, 95.
 Staffordshire Canal Co. v. Birmingham Canal Nav. Co., 686.
 Stagg v. Broderick, 545.
 Stair, Re, 246.
 Stairs v. Allen, 66.
 Stamford v. Dunbar, 692.
 Standard Bank v. Boulton, 779, 783.
 Standard Bank v. Frind, 496.
 Stanford, Ex parte, 607.
 Stanley v. Grundy, 609.
 Stansfield, Re, Stansfield v. Stansfield, 657.
 Stanton v. Scrutton, 146.
 Stark v. Reid, 606.
 Starr-Bowkett Building Socy. and Sibun Re, 696, 698.
 Stickie v. Byers, 330.

- Stedham, Re, 654.
 Steele, Re, 654.
 Steele v. Brennan, 116.
 Steele v. Great Northern Ry. Co., 160.
 Steele v. McKinlay, 545.
 Steens v. Shaw, 678, 679.
 Steinhoff v. McRae, 349.
 Stephen v. Simpson, 765.
 Stephens, Re, 306.
 Stephens v. Beatty, 393.
 Stephens v. Boisseau, 463, 473, 564.
 Stephens v. Girth, 291.
 Stephens v. McArthur, 461.
 Stephens v. Taprell, 654.
 Stephens, Re, Warburton v. Stephens, 676.
 Stevens, Re, 245.
 Stevens v. Barfoot, 354, 355.
 Stevens v. Biller, 479.
 Stevenson v. Montreal, 292.
 Stewart v. Cowan, 130.
 Stewart v. Gage, 472.
 Stewart v. Lees, 97.
 Stewart v. Rowsom, 610.
 Stewart v. Snyder, 393, 394, 395.
 Stewart v. Stewart, 649.
 Stickney v. Sewell, 403.
 Stimpson v. Wood, 157.
 Stinson v. Pennock, 607.
 Stinson v. Stinson, 398, 657.
 Stoakes, Re, 647.
 Stockton Iron Furnace Co., Re, 609.
 Stoesser v. Springer, 249, 479.
 Stogdale v. Wilson, 234.
 Stogdon v. Lee, 784, 785.
 Stokoe v. Cowan, 330.
 Stolworthy v. Powell, 234.
 Stone v. Hyde, 153.
 Stone v. Knapp, 781.
 Stone v. Press Association, 117.
 Stone's Settlement, Re, 396.
 Stoness v. Lake, 128.
 Story v. Johnston, 309.
 Stothard v. Hilliard, 686, 689, 692.
 Stott v. Lord, 394.
 Stott v. Milne, 389.
 Stott v. Spain, 829.
 Stourton v. Stourton, 289.
 Stovel v. Gregory, 679.
 Strachan v. Ruttan, 474.
 Strackell v. Charlton, 822.
 Strange v. Fooks, 437.
 Straughan v. Smith, 120.
 Streatley, Re, 649.
 Street v. Faulkner, 95.
 Stretton v. Ashmall, 402.
 Strevens v. Bayley, 655.
 Stride v. Diamond Glass Co., 149.
 Strong v. Dickenson, 277.
 Strong v. Stringer, 588, 825.
 Stroud v. Kane, 825.
 Struthers v. Green, 237.
 Struthers v. Struthers, 655.
 Stuart, Re, 243.
 Stuart v. Evans, 145, 152.
 Stuart, Re, Smith v. Stewart, 393, 403.
 Stuart v. Spence, 692.
 Stuart v. Thomson, 460.
 Stuart v. Tremain, 465.
 Stubbins, Ex parte, 462.
 Sturges v. Bridgman, 687.
 Sturgis v. Corp, 783.
 Sturgis v. Moore, 679.
 Sturla v. Freccia, 97.
 Styles v. Fokes, 116.
- T.**
- T—, Re, 397.
 Talbot, Re, 244, 246.
 Talbot v. Stainforth, 592.
 Tallman v. Smart, 350.
 Tamplin v. Miller, 785.
 Tanner v. Smart, 305, 306.
 Tanqueray, Re, 391.
 Tapling v. Jones, 690.
 Tarn v. Turner, 606.
 Tarrant v. Baker, 130.
 Tate v. Latham, 146, 147, 148, 150.
 Tatham v. Haslar, 543.
 Taylor, Re, 678.
 Taylor, Ex parte, 462.
 Taylor v. Ainslie, 351.
 Taylor v. Bank of New South Wales, 437.
 Taylor v. Brodie, 395.
 Taylor v. Cummings, 465.
 Taylor, Doe d., v. Mills, 651.
 Taylor v. Leitch, 276.
 Taylor v. Kymer, 483.
 Taylor v. McEwan, 278.
 Taylor v. Meads, 645, 650, 778, 779, 783.
 Taylor v. Nesfield, 130.
 Taylor v. Nicholl, 264.
 Taylor v. Regis, 95.
 Taylor v. Steele, 305.
 Teasdale v. Brady, 278, 788.
 Teevan v. Smith, 606.
 Temperance Ins. Co. v. Coombe, 328.
 Tempest v. Tempest, 652.
 Tennant, Re, 785.
 Tennant, Ex parte, 311.
 Tennant v. Gallow, 465.
 Tennant v. MacEwan, 474.
 Tennant v. Union Bank of Canada, 52, 54, 55, 556, 562, 563.
 Tenute v. Walsh, 632.
 Tetley v. Griffith, 784.
 Tench v. Roberts, 311.
 Tew v. Toronto Savings and Loan Co., 470.
 Thacker v. Key, 590.
 Thackwray and Young, Re, 697.
 Theberge v. Landry, 59, 66.
 Thibaudeau v. Garland, 463, 473.
 Thibaudeau v. Paul, 349, 471.
 Thomas, Re, 649.
 Thomas, Re, Ex parte Sheriff of Middlesex, 431.
 Thomas v. Latham, 828.
 Thomas v. Quartermaine, 151, 152.
 Thomas v. Thomas, 677, 689.
 Thompson, Re, 430, 431.
 Thompson v. Bennett, 71.
 Thompson v. Clarkson, 474.
 Thompson and Curzon, Re, 697.
 Thompson v. Eede, 235.
 Thompson v. Fairbairn, 394.
 Thompson v. Freeman, 397.
 Thompson v. Moleons Bank, 564.
 Thompson v. McCarthy, 606.

Thompson, Re, and Registrar of Wellington, 762, 764.
 Thompson v. Ringer, 698.
 Thompson v. Simpson, 656.
 Thompson v. Waithman, 308.
 Thompson v. Warwick, 606.
 Thompson v. Wright, 147, 151, 330.
 Thomson v. Quirk, 354, 357.
 Thomson v. Thomson, 786.
 Thorn v. Woolcombe, 823.
 Thorne, Re, 650, 651.
 Thorne v. Cann, 607.
 Thorne v. Heard, 393, 394.
 Thornton v. France, 676, 677.
 Thornton v. Stokill, 403.
 Thorpe v. Bestwick, 652.
 Thorpe v. Richards, 796.
 Thrussell v. Handyside, 147, 151, 152.
 Thuresson v. Thuresson, 591, 676.
 Thwaites v. Wilding, 830.
 Tickle v. Brown, 686, 692.
 Tilbury v. Davis, 688.
 Tilbury v. Silva, 691.
 Till v. Till, 788.
 Tillie v. Springer, 632.
 Tilsonburg, Lake Erie and Pacific Ry. Co., Re, 389, 397.
 Tilton v. McKay, 97.
 Timmerman v. St. John, 58.
 Tinker v. Rodwell, 677, 678.
 Tippet and Newbould, Re, 696, 785.
 Tobey, Re, 653.
 Tobin v. New Glasgow Iron Co., 152.
 Todd v. Liverpool, London and Globe Ins. Co., 566.
 Toft v. Stephenson, 680.
 Toleman v. Portbury, 824.
 Tolton v. C. P. R., 763.
 Tomkins v. Pincet, 824.
 Tomkins v. Saffery, 460, 461.
 Tomlinson, Ex parte, 243, 244.
 Toms v. Wilson, 823.
 Tone v. Preston, 687.
 Tooke v. Bergeron, 148.
 Tooth v. Frederick, 275.
 Topham v. Booth, 683.
 Topping, Ex parte, 308.
 Toronto, City of v. Virgo, 16.
 Toronto Dental Co. v. McLaren, 496.
 Toronto General Trusts Co. v. Irwin, 658.
 Toronto General Trusts Co. v. Quin, 632, 798.
 Toronto Harbor Commissioners, Re, 397.
 Toronto Hospital Trustees v. Denham, 826.
 Toronto v. Jarvis, 763.
 Toronto Ry. Co. v. Reg. 16.
 Torrance v. Chewett, 397.
 Totten v. Bowen, 461, 779.
 Totten v. Douglas, 610.
 Tottenham, Re, 245.
 Townsend, Re, Townsend v. Townsend, 652.
 Tozer, Re, 654.
 Traders' Bank v. McConnell, 431.
 Trainor v. Holcombe, 235.
 Travis v. Illingworth, 389.
 Treleven and Horner, Re, 698.
 Trench's Trusts, Re, 781.
 Trerice v. Buckett, 437.
 Tribe v. Tribe, 649.

Triggs v. Newnham, 305.
 Trimble v. Hill, 16.
 Trimmell, Re, 649.
 Tripp v. Armitage, 661.
 Tristram v. Hardy, 681.
 Trotter v. Chambers, 779.
 Truax v. Dixon, 15.
 Truesdell v. Cook, 678.
 Trulock v. Robey, 681.
 Truman v. Rudolph, 150, 152.
 Truscott v. Merchant Tailor's Co., 690.
 Trust and Loan Co. v. Gallagher, 786.
 Trust and Loan Co. v. City of Hamilton, 557.
 Trust and Loan Co. v. Lawrason, 608.
 Trust and Loan Co. v. Shaw, 765.
 Trust and Loan Co. v. Stephenson, 683, 684.
 Trusts Corporation and Boehmer, Re, 697.
 Trusts Corporation v. McCue, 782.
 Trusts Corporation and Medland, Re, 697.
 Tuck v. Fryson, 470.
 Tucker v. Chaplin, 156.
 Tucker, Re, Emanuel v. Parfit, 781.
 Tucker v. McMahon, 95.
 Tucker v. Morris, 330.
 Tucker v. Sanger, 651.
 Tucks v. Kayess, 655.
 Tuck's Trusts, Re, 396.
 Tufts v. Mottashed, 250.
 Tullett v. Armstrong, 779, 785.
 Tullis v. Jackson, 311.
 Tullock v. Dunn, 306.
 Tully v. Farrell, 333.
 Turnbull v. Forman, 14.
 Turner, Re, 468, 654.
 Turner, Re, Barker v. Ivimey, 393.
 Turner v. Hancock, 389.
 Turner v. Lucas, 460.
 Turner and Skelton, Re, 697.
 Turner v. Sullivan, 116.
 Turner v. Wills, 358.
 Tweedale, Re, 650.
 Tweedlie v. Bogie, 120.
 Twynes' case, 461.
 Tyas v. MacMaster, 356.
 Tyles v. Deal, 631.
 Tyre v. Wilkes, 95.
 Tyrwhitt v. Denison, 657.

U.

Udy v. Stewart, 120.
 Uhrig v. Uhrig, 472.
 Union Assurance Co., Re, 607.
 Union Bank v. Munster, 591.
 United Club and Hotel Co., Re, 822.
 United States Express Co. v. Donohue, 403.
 Unitt and Prot, Re, 466.
 Usill v. Hales, 116.

V.

Valieri v. Boyland, 444.
 Valin v. Langlois, 52, 66.
 Vancouver v. Canadian Pacific Railway, 51, 55.
 Van Cutsem, Re, 654.
 Van Every v. Grant, 249.
 Vance v. Cummings, 762.

Vane v. Vane, 677.
 Van Natter v. Buffalo and Lake Huron Ry. Co., 131.
 Vannorman v. McCarty, 331.
 Vansickle v. Boyd, 275.
 Vansickle v. Vansickle, 655.
 Vansittart, Re, 465.
 Vansittart v. Vansittart, 286.
 Vanstaden v. Vanstaden, 330.
 Van Velsor v. Hughson, 695.
 Vavasour, Re, 246.
 Vardon v. Vardon, 95.
 Venables v. Baring, 557.
 Venn and Furze, Re, 391.
 Venning v. Steadman, 128, 130.
 Vera Cruz, The, 156.
 Vernon v. Smith's Falls, 15.
 Verratt v. McAulay, 130.
 Vickers v. Hertz, 432.
 Victoria Mutual v. Freel, 438.
 Vincent v. Going, 682.
 Viney v. Chaplin, 588.
 Vinnicombe v. Butler, 649, 650.
 Violet v. Brookman, 655.
 Viveash v. Becker, 276.
 Vogt v. Boyle, 235.
 Voisey, Ex parte, 608, 609.

W.

Wadsworth v. Boulton, 276.
 Wadsworth v. Murphy, 128.
 Wagstaff v. Lowerre, 398.
 Wagstaffe v. Wagstaffe, 655.
 Wakefield v. Bruce, 264.
 Wakefield v. Hamilton Whip Co., 467.
 Wainford v. Heyl, 786.
 Wait v. Sagar, 430.
 Waldie and Burlington, Re, 764, 765.
 Waldie v. Grange, 353.
 Walker, Re, 403, 647.
 Walker, Ex parte, 501.
 Walker v. Allen, 632.
 Walker v. Hirsch, 311.
 Walker v. Hyman, 249, 363, 480.
 Walker v. Jones, 560.
 Walker v. Niles, 851, 463.
 Walker v. Olding, 330.
 Walker v. South Eastern Ry. Co., 129.
 Walker v. Walker, 649.
 Walkerton v. Erdman, 156.
 Wallace v. Cook, 300.
 Wallace Huastis Grey Stone Co., Re, 63.
 Wallace v. Moore, 256.
 Wallbridge v. Brown, 235.
 Waller v. Laoy, 305.
 Walpole v. Alexander, 277.
 Walrond v. Hawkins, 824.
 Walsh v. Lonsdale, 588.
 Walsh v. Whitcomb, 300.
 Walsh v. Whitely, 146, 148.
 Walson v. Wilson, 277.
 Walters v. Woodbridge, 389.
 Walton v. Henry, 826.
 Want v. Campaign, 393.
 Warburton v. Parke, 686.
 Ward v. Day, 824.
 Ward v. Reed, 52.
 Ward v. Robins, 690.

Ward v. Sinfield, 96.
 Ward v. Ward, 472.
 Warde v. Warde, 285, 286.
 Ware, Re, 146.
 Warin v. London and Canadian Loan Co., 686, 688.
 Warner v. Murray, 788.
 Warnock v. Kleopfer, 460, 462.
 Warr, De La v. Miles, 686, 688, 691.
 Warren, Re, 394, 786.
 Warren v. Deslippes, 97.
 Warren v. Murray, 675, 676.
 Warrington v. Warrington, 782.
 Warter v. Warter, 652.
 Wassell v. Leggatt, 394, 788.
 Washington v. Grand Trunk Ry. Co., 14, 64, 69, 146, 849.
 Waterhouse v. Bank of Ireland, 557.
 Watrous Engine Works Company v. McCann, 607.
 Waters, Re, 244.
 Waters v. Donnelly, 592.
 Waters v. Shade, 766.
 Waters v. Thanet, 306.
 Watkins, Re, 245.
 Watkins, Ex parte, 277.
 Watson Re, Ex parte, Official Receiver, 352.
 Watson v. Bradshaw, 95.
 Watson v. Charlton, 275.
 Watson v. Henderson, 329.
 Watson v. Ontario Supply Co., 278, 788.
 Watson v. Row, 339.
 Watson v. Severn, 95, 235.
 Watson v. Spratley, 562.
 Watson v. Woodman, 308.
 Watts, Re, 244, 389.
 Watts, Ex parte; Re Attwater, 562.
 Watts v. Jefferyes, 330.
 Watts v. Kelson, 589.
 Watts v. Neilson, 147.
 Watts v. Taft, 489.
 Weaver v. Vandersen, 607.
 Webb, Re, 244, 246.
 Webb v. Bird, 687, 689.
 Webb v. Russell, 823.
 Webb v. Stenton, 822.
 Webber v. McLeod, 129.
 Weblin v. Ballard, 146.
 Webster v. Crickmore, 461, 462, 464.
 Webster v. Foley, 145, 147.
 Webster v. Le Hunt, 390.
 Webster v. Southey, 573.
 Wegener v. Smith, 443.
 Weiser v. Heintzman, 93.
 Welby v. Beard, 277.
 Welch v. Ellis, 501.
 Weld v. Scott, 678.
 Weld v. Tew, 246.
 Weldon v. De Bathe, 787.
 Weldon v. Neal, 788.
 Weldon v. Winslow, 788.
 Wellbanks v. Heney, 463.
 Weller v. Ker, 591.
 Wellesley v. Beaufort, 286.
 Wellesley v. Wellesley, 288.
 Wellington v. Whitechurch, 264.
 Wenman's case, Lord, 245.
 West, Re, 647.
 West v. Berney, 591.

- West of England and South Wales District
Bank v. Murch, 389, 394.
West v. Fritch, 608.
West London Commercial Bank v. Reliance
Perm. Bldg. Socy., 560.
West Riding Banking Co., Ex parte, 469.
West Toronto Election, Re, 15.
Westacott v. Powell, 119, 120.
Westacott v. Smalley, 545.
Western National Bank v. Perez, 496.
Weston, Re, 653.
Weston v. Sneyd, 132.
Westzinthus, Re, 442.
Wetherell and Jones, Re, 52, 98.
Wettlaufer v. Scott, 363.
Whalls v. Learn, 805.
Wharton v. Naylor, 830.
Whateley v. Whateley, 655.
Whatley v. Holloway, 150.
Wheatley v. Williams, 306.
Wheaton v. Maple, 689, 692.
Wheeldon v. Burrows, 580.
Wheeler, Re, 653.
Wheeler v. Howell, 682.
Whelan v. Reg., 14.
Whipsell v. Gifford, 358, 359.
Whistler, Re, 391.
Whitaker, Re, 543.
White v. Bastedo, 797.
White v. Bayley, 836.
White v. Finnis, 442.
White v. Garden, 249, 470.
White and Hindle, Re, 697.
White v. Hunt, 466, 470.
White v. Morris, 130.
White v. Parker, 152, 156.
White v. Repton, 650.
White Sewing Machine Co. v. Belfry, 235.
White v. Wakefield, 587.
Whitehead v. Howard, 304.
Whitehead v. Whitehead, 593.
Whitehouse v. Partridge, 276.
Whiteley v. Edwards, 785, 786, 787.
Whitfield v. Todd, 119.
Whiting v. Hovey, 353, 354, 467.
Whiting v. Sharples, 236.
Whitman v. Union Bank of Halifax, 465.
Whitney v. Toby, 461.
Whittaker, Re, 244, 246.
Whittaker v. Cohen, 787.
Whittaker v. Kershaw, 784, 786.
Whittemore v. Macdonald, 488, 489.
Whitty, Re, 396.
Wickham v. Lee, 236.
Widmeyer v. McMahon, 236.
Widmore v. Jay, 156.
Wiedman v. Walpole, 94.
Wigan v. Rowland, 652.
Wigle v. Settrington, 763.
Wigle v. Stewart, 297.
Wigle v. Williams, 496.
Wilby v. Elgee, 305.
Wild v. Waygood, 145, 149.
Wilding v. Bean, 265.
Wilkie v. Toronto, 827.
Wilkins, Re, 246.
Wilkins v. Day, 159.
Wilkins v. Hogg, 387.
Wilkinson, Ex parte, Re Berry, 464.
Wilkinson v. Conklin, 765.
Wilkinson v. King, 479.
Wilkinson v. Proud, 687.
Wilkinson v. Unwin, 545.
Wilks v. Groom, 388.
Wilhelm v. Schmidt, 441.
Willets v. Watt, 148.
Williams, Re, 389, 394, 396, 468, 543, 647.
Williams, Ex parte, 699.
Williams v. Allsop, 358.
Williams v. Barton, 480.
Williams, Doe d. v. Evans, 588.
Williams, Re, Foulkes v. Williams, 656.
Williams v. Griffith, 308.
Williams v. Hathaway, 590.
Williams v. James, 688, 689.
Williams v. Leonard, 353, 354.
Williams v. McDonald, 680, 681.
Williams v. Pott, 676.
Williams v. Roy, 397.
Williams v. Shadbolt, 543.
Williams v. Webb, 277.
Willins v. Smith, 306.
Willis v. Howe, 677.
Willis v. Watney, 589.
Willis v. Willis, 333.
Wills v. Carroll, 266.
Wills v. Northern Ry. Co., 695.
Wilson, Re, 287, 823.
Wilson, Ex parte, 305.
Wilson v. Baird, 97.
Wilson v. Beddard, 648.
Wilson v. Campbell, 313.
Wilson v. Eden, 656.
Wilson and Houston, Re, 697.
Wilson v. Kerr, 354.
Wilson v. Kyle, 587, 611.
Wilson v. McGuire, Re, 65.
Wilson and Toronto Electric Light Co., Re,
782.
Wilson and Toronto Incandescent Light Co.,
Re, 632.
Wilson and Stevens, Re, 696.
Wilson-Stewart, Re, Keown-Boyd v. Gil-
mour, 785.
Wilson v. West Hartlepool, 14.
Wimbledon and Putney Conservators v.
Dixon, 689.
Windsor and Annapolis Ry., Re, 64.
Windsor v. Commercial Bank, 56, 60.
Winfield v. Fowlie, 590.
Winkle, Re, 245.
Winslow, Re, 395.
Winter v. Bartholomew, 330.
Wisden v. Wisden, 656, 657.
Witt v. Banner, 353, 564.
Witt v. Witt, 286.
Witten, Re, 285.
Wittrock v. Halliman, 822.
Witty v. Marshall, 289.
Wolfe v. Great Northern Ry. Co., 158.
Wolmerhausen, Re, 308.
Wood, Re, 244.
Wood v. Bell, 561, 562.
Wood v. Brunt, 350.
Wood and Chiver's case, 823.
Wood v. Darrall, 147.
Wood v. Dixie, 370, 461.
Wood v. Joselin, 467.

Wood v. Leadbitter, 826.
 Wood v. Reesor, 463.
 Wood v. Rowcliffe, 481.
 Wood v. Waud, 686.
 Wood v. Wood, 329, 330, 331, 787, 788.
 Woodham v. Hollis, 306.
 Woodhouse v. Balfour, 649.
 Woodley, Re, 647.
 Woodley v. Metropolitan Ry. Co., 151.
 Woodroffe v. Doe, 680.
 Woods, Re, 785.
 Woods and Lewis Re, 697.
 Woods v. Russell, 561.
 Woodward, Re, 653.
 Wookey v. Pole, 556.
 Wooley v. Atty.-Gen. of Victoria, 71.
 Wortman v. Robb, 679.
 Worms, Ex parte, 50.
 Worrall v. Harford, 387, 389.
 Worsley v. Demattos, 370.
 Worsam v. Vadenbrande, 680.
 Worthington, Re, 652.
 Wottom, Re, 646, 647.
 Wragg, Ex parte, 245.
 Wrathwell v. Bates, 333.
 Wray, Re, 648.
 Wright, Re, 647.
 Wright v. Bell, 685.
 Wright v. Collier, 153.
 Wright v. Dewes, 830.
 Wright, Doe d. v. Manifold, 649.
 Wright v. Garden, 779, 780.
 Wright v. Hollingshead, 328.
 Wright v. Leonard, 786.
 Wright v. Midland Ry. Co., 156.

Wright v. Robotham, 695.
 Wright v. Rogers, 649.
 Wright v. Williams, 690, 692.
 Wulff v. Jay, 437.
 Wyatt v. Berry, 648, 650.
 Wykeham, Re, 244.
 Wyld v. Clarkson, 469.
 Wylie v. Frampton, 780.
 Wyoming v. Bell, 764.

Y.

Yarmouth v. France, 145 146, 149, 151, 152.
 Yarwood v. Hart, 94.
 Yewens v. Noakes, 501.
 Yielding and Westbrook, Re, 698.
 Yorkshire Guarantee Co., Re, 60.
 Young, Re, 286, 468.
 Young v. Adams, 15.
 Young v. Davies, 651.
 Young v. Harris, 678.
 Young v. Harston, 698.
 Young v. Higgon, 131.
 Young v. Hobson, 680.
 Young v. Moore, 308.
 Young v. Morden, 235.
 Young v. O'Rielly, 837.
 Young v. Parker, 496.
 Young v. Smith, 470.
 Young v. Spiers, 468, 763.
 Young v. Ward, 430, 431, 781.

Z.

Zimmer v. G. T. R., 152, 156.

Additional Notes.

The Following Notes are Printed on one side of the Page only, for Convenience of Insertion in their Proper Places, if so Desired.

Constitutional Law.

Dominion Jurisdiction Exclusive. Page 51. The abstinence of the Dominion Parliament from legislating to the full limit of its power, has not the effect of transferring to any Provincial Legislature, the legislative power assigned to the Dominion; *Union Colliery Co. v. Bryden* (1899) A. C. 580, 588. A Provincial Legislature has no power to supplement the provisions which the Dominion Parliament has made in a matter within its exclusive jurisdiction; *Madden v. Nelson and Fort Sheppard Ry.* (1899) A. C. 626, 628. Though the Dominion Parliament may not have exercised its powers, legislation falling strictly within any of the classes enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures; *Attorney-General for Canada v. Attorney-General for Ontario, Quebec and Nova Scotia* (1898) A. C. 700, 715.

Harbors. S. 91 (16). Schedule 3. Page 55. A small bay in Lake Simcoe, at which there is a wharf for vessels, but no mooring ground and little shelter, except from wind off the land is not a public harbor and a grant by the Province of a water lot is valid; *McDonald v. Lake Simcoe Ice Co.* (1889) 26 A. R. 411.

Naturalisation and Aliens. S. 91 (25). Page 56. A Provincial Legislature has no power to pass, an Act prohibiting Chinamen whether aliens or naturalized subjects, from working in any employment in the Province; *Union Colliery Co. v. Bryden* (1899) A. C. 580.

Discretion of Legislatures. Page 57. The discretion committed to the respective Parliaments, whether of the Dominion or the provinces is unfettered. It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not; *Union Colliery Co. v. Bryden* (1899) A. C. 580, 585.

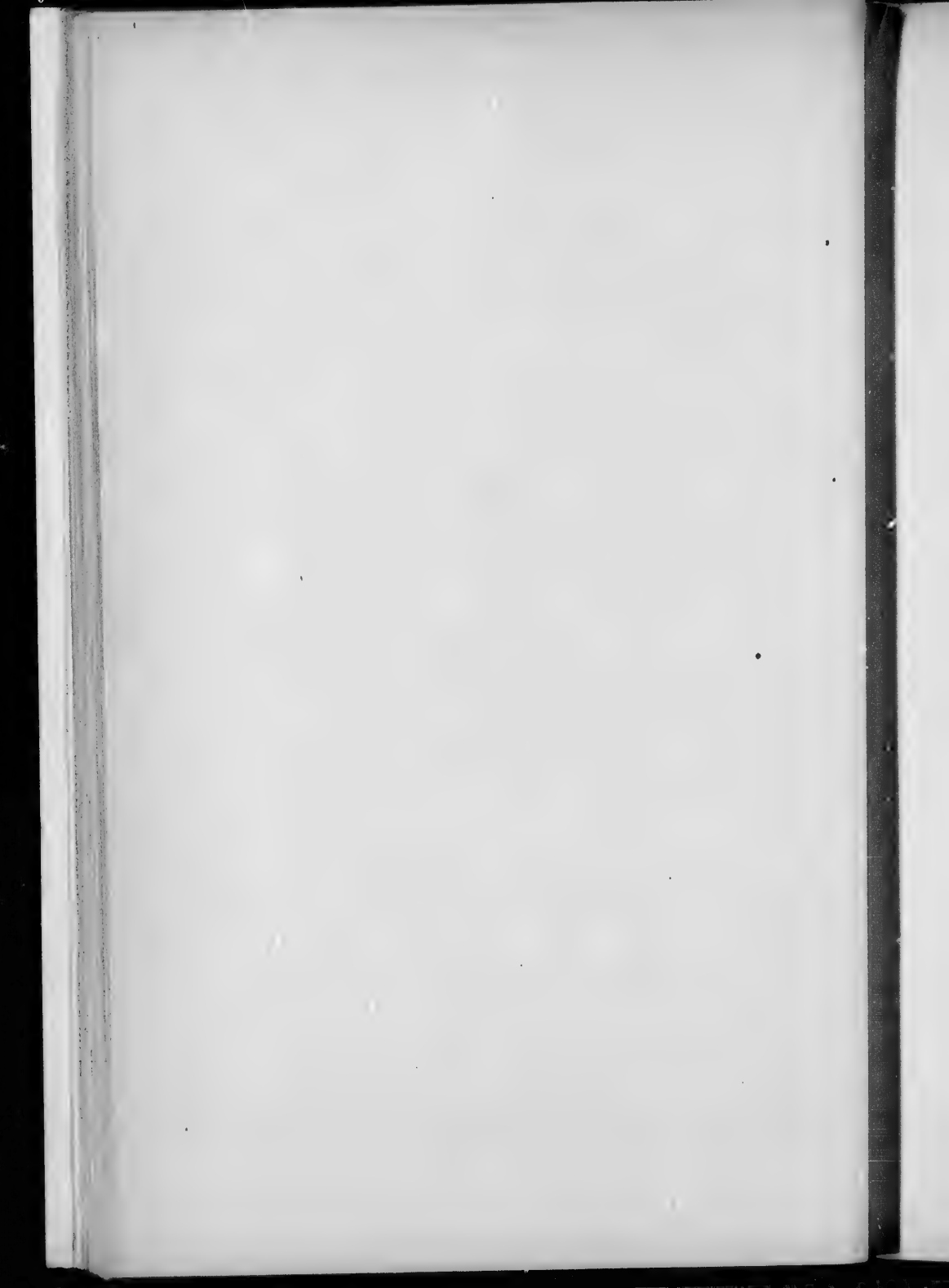
Lord's Day Act. S. 91 (27). Page 58. Enactments for the punishment of a violation of the Lord's Day are part of the Criminal Law and *ultra vires* of a Provincial Legislature; *R. v. Halifax Electric Ry. Co.* (1898) 30 N. S. R. 469.

Taxation. Page 59. Provincial Legislation requiring a Registrar of Deeds to pay a proportion of his fees to a Municipality is *intra vires*. If a tax at all it is a direct tax; *Hastings v. Ponton* (1880) 5 A. R. 543.

Provincial Companies. S. 92 (10). Page 62. Regulations in a provincial act relating to provincial undertakings such as Coal Mines are *intra vires* of a provincial legislature, except to the extent they trench upon the exclusive powers of the Dominion Parliament under s. 91; *Union Colliery Co. v. Bryden* (1899) A. C. 580.

Property and Civil Rights. S. 92 (13). Page 63. Regulations respecting Coal Mines in a province may also fall within s. 92 (13) and are *intra vires* except so far as obnoxious to the powers of the Dominion Parliament under s. 91; *ibid*.

Railways. Page 69. The British North America Act whilst it gives the legislative control of certain railways, *qua* railways, to the Dominion Parliament, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall in other respects be exempted from the



jurisdiction of the provincial legislatures. The Parliament of Canada has exclusive right to prescribe regulations for the construction, repair and alteration of the railway, and for its management and to dictate the constitution and powers of the Company; but it is *inter alia* reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the province in order to the raising of a revenue for provincial purposes. Any provincial legislation whether described as Municipal or not, attempting to regulate the structure of a ditch forming part of the work of a Dominion Railway, would be *ultra vires*. If on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of it becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the municipality, it should be cleaned out by the Railway Company, it would be *intra vires* as municipal legislation; Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours (1899) A. C. 367. Upon the same principle provincial legislation imposing responsibility upon a Dominion Railway Company for cattle killed on its railway unless proper fences are erected is *ultra vires*; Madden v. Nelson and Fort Sheppard Railway (1899) A. C. 626; 5 B. C. R. 541.

Evidence.

Action for Penalties. Pages 93, 94, 106. In an action under a Dominion Statute for penalties, the defendant may be examined for discovery; R. v. Fox (1899) 18 P. R. 343.

Libel and Slander.

Notice of Action. Page 116, line 8, for "sufficient" read "insufficient."

Seduction.

Guardian. Page 118. By 62 V. c. 13 the following section is added to c. 69.

4. In case the father and mother of any unmarried female who has been seduced are both dead, and such unmarried female is under the age of twenty-one, any person who, at the time of the birth of the child which is born in consequence of the seduction, was the legal guardian of, or stood *in loco parentis* to such unmarried female, may maintain an action for the seduction, notwithstanding that such unmarried female was, at the time of her seduction, serving or residing with another person upon hire or otherwise.

Justices of the Peace.

Notice of Action. Pages 128, 130. Notice is not necessary where the act complained of was not done in the performance of a public duty; Davidson v. Garrett (1899) 30 O. R. 653. A Sheriff is an officer within the Act; see 62 V. c. 7, s. 3.

Workmen's Compensation for Injuries.

Page 149. Kervin v. Canadian Cotton Mills Co., cited p. 147, was reversed in the Supreme Court, *sub nom.* Canadian Colored Cotton Mills Co., v. Kervin (1899) 29 S. C. R. 478, upon the ground that in the absence of evidence that the negligence charged caused the injury, the plaintiff could not recover. Where an injury was caused by an explosion, and the plaintiff proved the absence of something, which might have caused the injury, either an automatic safety valve, or care on the part of a person in the service of the employer, whose duty it was to adjust an escape pipe, the negligence was held to be sufficiently proved; Wilson v. Boulter (1899) 26 A. R. 184.

Damages to Parent. The mother of an infant is not in the legal relationship of a master to him, or under legal liability to maintain him, and she cannot recover damages for her services in attending upon him during his illness or moneys expended and liabilities incurred by her for nursing, medical attendance or supplies; Wilson v. Boulter (1899) 26 A. R. 184.

Factories Act. Page 151. Where the legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty in the general interest of the public at large, *prima facie* and if there be nothing to the contrary, an action by a person injured by failure to perform the duty im-

posed does not lie; *Tompkins v. Brockville Rink Co.*, (1899) 31 O. R. 124. The employment of a child in violation of The Factories Act, though it may subject the employer to a penalty, does not give rise to a civil action for damages unless there is evidence to connect such violation with the accident; *Roberts v. Taylor* (1899) 31 O. R. 10.

Lord Campbell's Act.

Parents Expectations. Page 158. A parent cannot recover damages for the death of his child, unless there is evidence to justify the conclusion that there is reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated; *Rombough v. Balch* (1900) 20 C. L. T. 60.

Inappreciable Damage. No damages can be allowed where the jury find that the death was not accelerated by an illegal act to any appreciable extent; *Kerry v. England* (1898) A. C. 742.

County Courts.

Liquidated Claims. Page 235. Where by the terms of a contract to indemnify against loss the utmost extent of the defendants' liability is fixed at \$200, the amount is ascertained by the act of the parties; *Thompson v. Pearson* (1899) 18 P. R. 420.

Arrest and Imprisonment for Debt.

Cause of Action for \$100. Page 275. If judgment has been recovered for part of the claim in a Division Court and the remainder of the claim is less than \$100, an order will not be made; *Ward v. Brown* (1899) 19 C. L. T. 135.

Intent to Defraud. Page 275. A departure from the Province for a temporary purpose is insufficient to show an intent to defraud; *Palmer v. Scott*, (1899) 18 P. R. 368. Even where the intention is to leave permanently some other fact or circumstance must be shown which, coupled with the intention to quit Ontario, points to an intent to defraud; *Phair v. Phair* (1900) 20 C. L. T. 34; and if the defendant believes the plaintiff has no claim, he cannot be said to be intending to defraud him; *ib.* The Divisional Court dissented from the opinions of *Hagarty C. J. O.* and *Osler, J. A.* in *Coffee v. Scane*, and from the case of *Robertson v. Coulton*, cited on p. 275.

Foreigner. Page 275. *Elgie v. Butt* is reported in 26 A. R. 13.

Infants.

Religious Faith. Page 289. In *Re O'Reilly* (1899) 19 C. L. T. 323 the custody of an infant was given to the mother to be brought up in the religion of the father. Where the father had been indifferent as to the religion of an infant, the Court refused to interfere with the faith in which the infant had been brought up; *Re Marshall* (1899) C. L. T. 364.

Limitations.

Penalties. Page 297. S. 1 (g) of R. S. O. c. 72, refers to actions for penalties or damages or sums of money in the nature of penalties, and does not apply to an action against a Director for an untrue statement in a prospectus under R. S. O. c. 216; *Thompson v. Clanmorris* (1899) 2 Ch. 523.

A person suing for a penalty, in pursuance of a public duty, is not a party aggrieved within the sub-section (g); *Robinson v. Currey* (1881) 7 Q. B. D. 465.

Mortgages. There is no Statute of Limitations applicable to foreclosure of a mortgage of personal property; *London and Midland Bank v. Mitchell* (1899) 2 Ch. 161; but if the debt is secured also by a mortgage of real estate which is barred the case is probably different; *Charter v. Watson* (1899) 1 Ch. 175.

Interest.

Recovery Back of Over-Payments. Page 313. The excess of payments of interest on a mortgage after maturity beyond the rate recoverable cannot be recovered back or applied on the principal; *Stewart v. Ferguson* (1899) 31 O. R. 112.



Execution.

Contingent Interests. Page 332. The interest of a tenant by entireties in real estate cannot be sold by the Sheriff while the husband and wife are both living; *Griffin v. Patterson* (1881) 45 U. C. R. 536.

Chattel Mortgages and Bills on Sale.

Persons Entitled to the Benefit of the Act. Page 350. A purchaser who neglects to comply with s. 6 cannot invoke the provisions of the Act against a subsequent purchaser in good faith and the latter, though he has not complied with the act, obtains priority; *Winn v. Snider* (1899) 26 A. R. 384.

Affidavits. Page 356. *Rogers v. Carroll* is reported, 30 O. R. 328. Advantage cannot be taken of the fact that a statement in an affidavit of *bona fides* is technically incorrect; *Bernhart v. McCutcheon* (1899) 19 C. L. T. 97.

Trustees and Executors.

Liability for Acts of Co-Trustees. Page 387. A trustee who entrusts his co-trustee with a cheque, payable to an alleged borrower on a mortgage investment, is not liable for loss caused by his co-trustee forging the payee's endorsement of the cheque; *Re McLatchie, Preston v. Leslie* (1899) 30 O. R. 179.

Joint Debtors. Page 391. The effect of s. 15 was not considered in *Campbell v. Farley* (1894) 18 P. R. 97; see 19 C. L. T. 122.

Relief of Trustees. Page 393. *Perrins v. Bellamy* was affirmed on appeal (1899) 1 Ch. 797. It is not necessary to plead s. 31 (a) specially, though it is advisable to do so; *Singlehurst v. Tapscott* (1899) W. N. 133.

Limitations. Page 394, line 11, add, "or not accounted for"; *Briggs v. Wilson* (1897) 24 A. R. 521.

Actions Against Representatives. S. 35. Where notice is given under s. 35 that a claim against an estate is rejected, the action must be commenced within the six months prescribed, and that period cannot be extended even though by reason of the death of an administrator during the six months, and the non-appointment of an administrator *de bonis non* within that time, the due commencement of an action has become impossible; *Gooderham v. Moore* (1899) 31 O. R. 86.

Compensation—Appeal. Page 398. An appeal lies to a Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor; *Re Alexander* (1899) 31 O. R. 167.

Bills of Lading.

Where No Property Passes by Indorsement. Page 441. *Cahn v. Pockett's Bristol Channel Packet Co.* was reversed (1899) 1 Q. B. 643.

Assignments and Preferences.

Pressure. Page 461. A trustee who without the knowledge of and without any pressure or request by his *cestui que trust* conveys property to them to make good breaches of trust does not act voluntarily, but under pressure, if he believes and apprehends that he may be prosecuted criminally; *Sharp v. Jackson* (1899) A. C. 419.

Negating Intent. Page 462 (1). Add, after *Webster v. Crickmore*, reference to *Jones v. Kinney* (1885) 11 S. C. R. 708. Where a mortgage to secure a *bona fide* advance to a person believed to be solvent was not registered, because the mortgagee objected to appearing in the trade sheets as a money lender, and not with the object of protecting the debtor, the security was upheld; *Morris v. Morris* (1895) A. C. 625.

Re New Prance and Garrard's Trustee v. Hunting was affirmed by the House of Lords, *sub nom.* *Sharp v. Jackson* (1899) A. C. 419; see above.

Priority over attachments.—Page 468, line 4, *Re Dyer v. Evans* is reported, 30 O. R. 637.

Claims of Creditors.—Page 468. A guarantee by an insolvent of notes not yet due cannot form the basis of a claim which may be proved against his estate; *Clapperton v. Mutchmoor* (1899) 30 O. R. 595.

Unsatisfactory Answers.—Page 472. A County Court Judge has no power to commit for unsatisfactory answers; *Re Rochon* (1899) 31 O. R. 122.

Inspectors.—Page 474. Inspectors must be wholly disinterested and will not be allowed to purchase the estate; *Gastonguay v. Savoie* (1899) 29 S.C.R. 613.

Registration of Co-Partnerships.

Suing Partners Individually. Page 496. Add reference to *Dueber Watch Case Co. v. Taggart* (1899) 26 A. R. 205.

Bills of Exchange.

Holder in Due Course. Page 543. Where a creditor obtained from his debtor a promissory note for the debt after an attachment had been issued against the creditor, and the creditor indorsed the note to the plaintiff after maturity, the plaintiff's title was bad as against the attaching creditor; *Clay v. Gill* (1899) 12 Man. L. R. 465, 19 C. L. T. 154.

Stranger Signing Bill. Page 535. To make a stranger liable to the payee, the latter must have indorsed the bill before the stranger indorsed it, so as to make the bill complete; *Canadian Bank of Commerce v. Perram* (1899) 31 O. R. 116; *Small v. Henderson* (1899) 19 C. L. T. 267.

Measure of Damages. Page 545. See *Jenkins v. Arnold-Fortescue* (1899) 19 C. L. T. 42.

Cheque. Page 547. *Bavins v. London and South Western Bank* was affirmed on appeal (1900) 1 Q. B. 270.

Law of Transfer of Property.

Release of Powers. Page 591. See *Re Davenport, Turner v. King* (1895) 1 Ch. 361.

Improvements Under Mistake of Title. Page 592. A mortgagee from the person who makes improvements under a mistake of title is an assign and has a lien on the land to the extent of the improvements, against which the costs, which have been awarded against other persons, of an action to recover the land cannot be set-off, but mesne profits prior to the date of the mortgage will be set off; *McKibbin v. Williams* (1897) 24 A. R. 122; *Thuresson v. Thuresson* (1899) 18 P. R. 414. There can be no mistake of title where a contract of sale is obtained from a locatee of a free grant lot in direct violation of an express statutory provision; *Meek v. Parsons* (1899) 31 O. R. 54.

Purchases of Reversions. A mortgage of a reversionary interest at 60 per cent. interest was held to be unconscionable in *Rae v. Joyce* (1892) 29 L. R. Ir. 500.

Mortgages of Real Estate.

Making Unnecessary Costs. Page 610. A sale of a distress may be allowed under s. 31 pending a notice of sale; *Plaxton v. Barrie Loan Co.* (1899) 19 C. L. T. 315.

Wills.

Presumption of Due Execution. Page 650, line 5. Where a will in the handwriting of the testator appeared to be duly executed but the witnesses could not be found or their handwriting proved, an action to establish the will was dismissed; *Williamson v. Williamson* (1889) 17 O. R. 734.

Gifts to Witnesses. Page 632. Evidence is admissible to shew that the mistake of having a legatee witness the will has been remedied by a subsequent acknowledgment by the testator and due attestation by two other witnesses, and although the name of the legatee is not struck out, the legacy is valid; *Re Sturgis, Webbing v. Van Every* (1889) 17 O. R. 342.

Death of Beneficiary. Page 657. Where a residue was bequeathed to the testator's children and their issue, and one of the children was dead at the date



of the will, leaving issue, the issue of such child were declared to be entitled to the share of the parent, if not under the terms of the will, by virtue of s. 36; *Koch v. Henry* (1894) 26 O.R. 87.

Locke King's Act. Page 658. A direction that trade debts shall be paid out of personal estate shows a sufficient intention that a devisee of property comprised in a mortgage, given as collateral security for a trade debt, shall be freed from the encumbrance; *Re Fleck, Colston v. Roberts* (1888) 37 Ch. D. 677.

Limitation of Actions.

Title to Realty Extinguished. Page 674. The effect of extinguishment is not equivalent to a conveyance; *Re Jolly, Gathercole v. Norfolk* (1900) 1 Ch. 292.

Tenant at Will. Page 675. Where a plaintiff lived on a farm with his father and mother, whom he covenanted to maintain until July, 1888, when he went away with no definite agreement or understanding, but with the expectation that they would remain, the father was said to have become tenant at will at the time the plaintiff went away; *Cope v. Crichton* (1899) 30 O.R. 603.

Adverse Possession. Page 677. The owner must lose his right to land either by being dispossessed of it, or by having discontinued his possession. When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all important. Where a person who is entitled to a right of way over the land of another erects gates at each end of the way and keeps them locked, the acts are merely equivocal, and as they may be done merely with the intention of protecting the right of way from invasion by the public, they are not a dispossession of the owner of the land; *Littledale v. Liverpool College* (1900) 1 Ch. 19. Acts of user committed upon land, which do not interfere, or are consistent, with the purpose to which the owner intends to devote it, do not amount to a dispossession, and are not evidence of discontinuance of possession; *Leigh v. Jack* (1879) 5 Ex. D. 264.

Possession by Trespasser. Page 678. Where a building on a farm in possession of a trespasser is destroyed by fire, and during its rebuilding the trespasser does not actually live upon the farm, but stays in the neighborhood, and the work of the farm goes on as usual, the possession is a visible one by reason of the building operations and the farm work; *Hartley v. Maycock* (1897) 28 O.R. 508.

Entry. Page 680. Staying on the land as a guest of the party in possession is not an entry as owner; an entry by one tenant in common is not an entry by his co-tenant; *Hartley v. Maycock* (1897) 28 O.R. 508.

Express Trusts. Page 682. A conveyance of land to trustees for a term of years upon trust to raise specific sums is an express trust within s. 24 and the title of the persons for whose benefit the money is to be raised will be extinguished at the same time as if no trust existed, i.e., generally after 10 years; *Williams v. Williams* (1900) 1 Ch. 152.

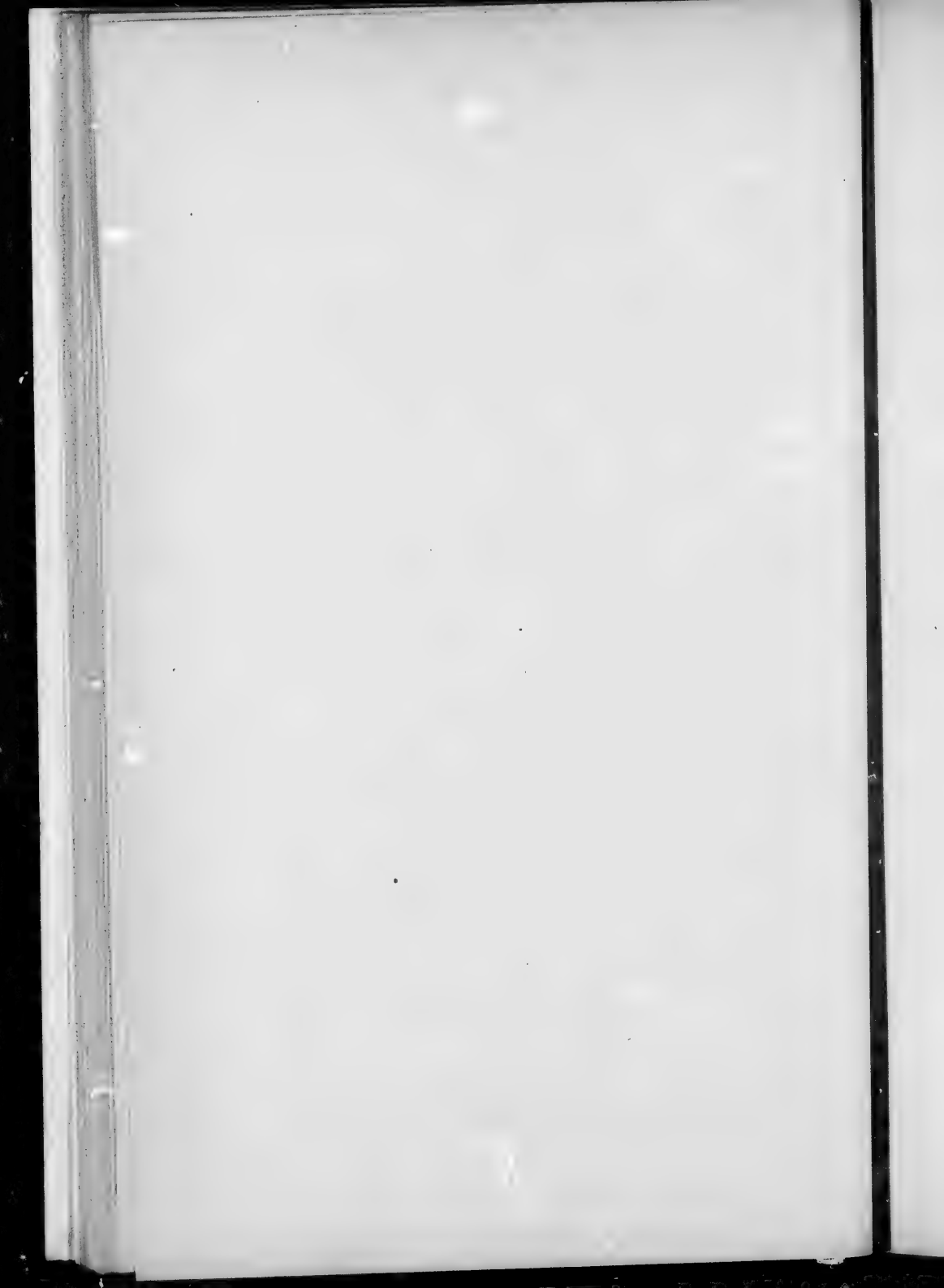
Execution. Page 683. The right of an execution creditor under a *fi. fa.* lands is a "lien," and the money mentioned in the writ is "money charged on land" within s. 23, and although the writ is duly renewed the lien is extinguished after the writ has been ten years in the Sheriff's hands, unless there has been a payment or acknowledgment in the meantime; *Neil v. Almond* (1897) 29 O.R. 63.

Vendor and Purchaser.

Consequential Relief. Page 698. Where an order was made under s. 4 referring all questions and matters arising out of an agreement for a lease to a Referee, an action brought by the intending lessors for rent, before the lease was settled or the reference completed, was perpetually stayed; *Toronto v. Canadian Pacific Ry. Co.* (1899) 18 P.R. 374, 451.

Registration of Deeds.

Registration as Notice. Page 761. Registration of an Assignment of a contract of sale is notice to a purchaser from the assignor, although the latter after the assignment received the conveyance from the original vendor; *Cope v. Crichton* (1899) 30 O.R. 603.



Discharges of Mortgage. Page 765. The execution and registration of a discharge of mortgage in fee simple made by a tenant in tail, reconveys the land to the mortgagor barred of the entail, *i.e.*, the whole estate held by the mortgagee is conveyed to the mortgagor: *Lawlor v. Lawlor* (1882) 10 S.C.R. 194.

Property of Married Women.

Liability for Torts. Page 786. See *Earle v. Kingscote* (1900) 1 Ch. 203.

Commitment to Gaol. Page 788. An order for payment into Court by a married woman of moneys received by her as trustee, but which order is not made on the basis of a *devastavit*, is a personal order and may be enforced by attachment; *Re Turnbull, Turnbull v. Nichols* (1900) 1 Ch. 180.

Death of Wife. Page 788. In the absence of a contract by her husband the funeral expenses of a married woman were ordered to be paid out of her estate; *Re Gibbons* (1899) 19 C.L.T. 346.

Landlord and Tenant.

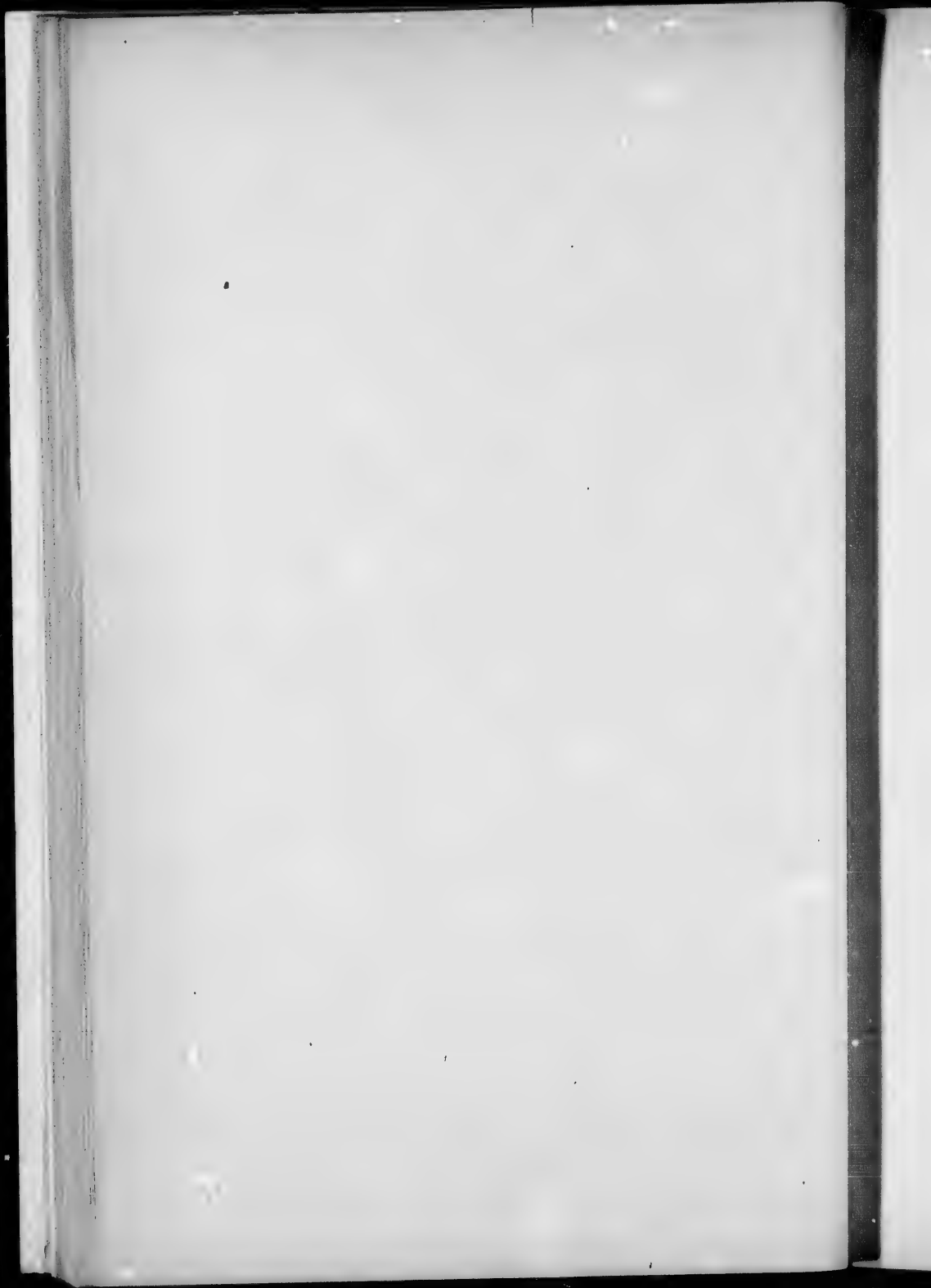
Taxes. Page 827. *Farlow v. Stevenson* is reported (1900) 1 Ch. 128.

Notice to Quit. Page 827. A notice given on March 24th, 1898, to quit on June 24th, 1898, or "at the end of your current year's tenancy," is a good notice for March 25th, 1899, when the next year's tenancy expired, as it could not be understood by the tenant that the words "current year" applied to the few hours of the year which had still to run; *Wride v. Dyer* (1900) 1 Q.B. 23.

Overholding Tenants.

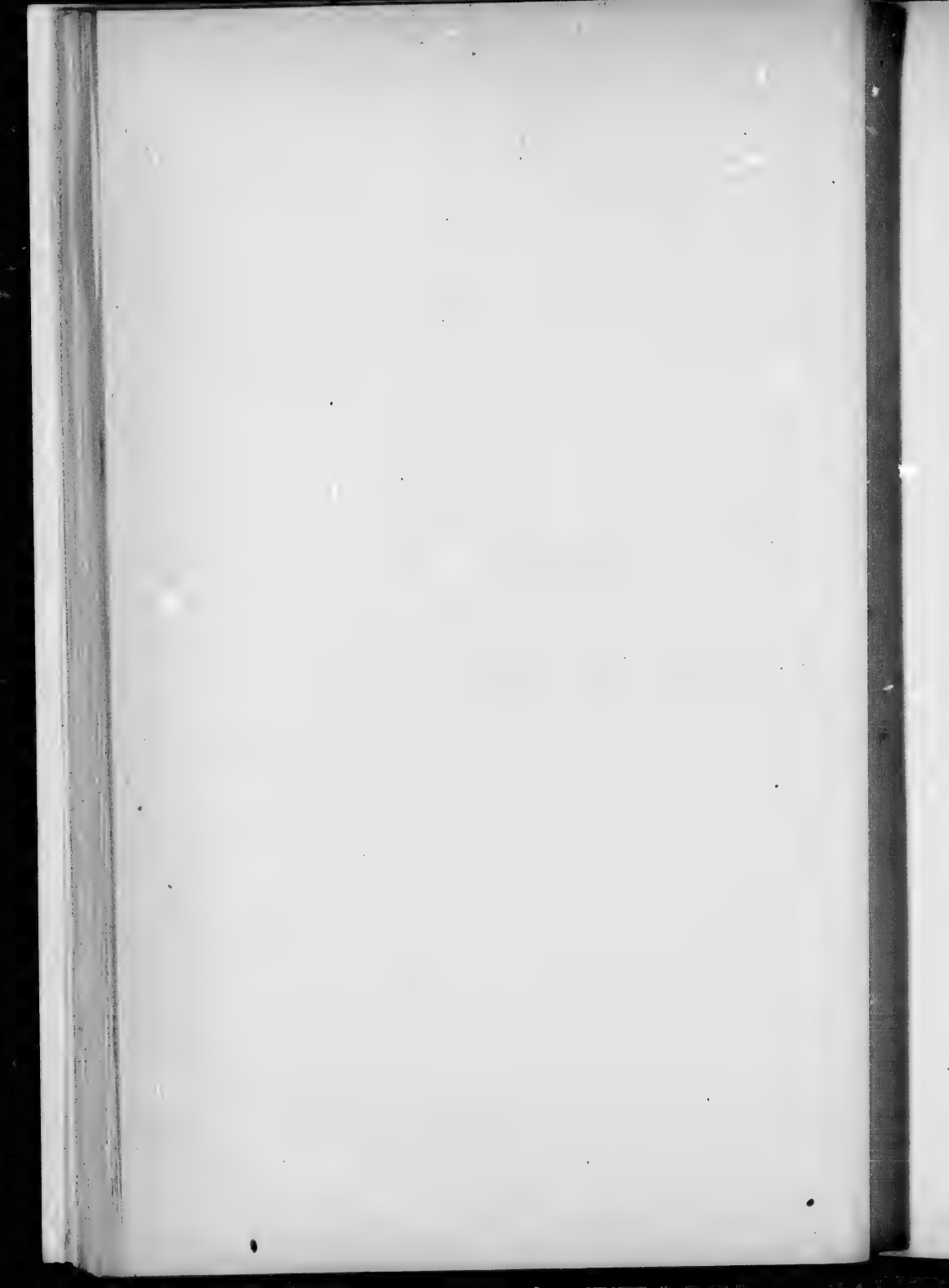
Who Are Tenants. Page 836. A person in possession under an agreement for purchase who makes default may, in New Brunswick, be ejected as a tenant at will: *Ackerman v. Boyd* (1899) 19 C.L.T. 403.

Demand. Page 837. The demand of possession need not be signed; *Re Sutherland and Portigal* (1899) 19 C.L.T. 257.



PART I.

Construction and Operation of Statutes.



REVISED STATUTES OF ONTARIO.

SECTION I.

PRELIMINARY.

CHAPTER 1.

An Act respecting the Form and Interpretation of the Statutes.

SHORT TITLE, s. 1.

MODE OF CITING REVISED STATUTES,
s. 2.

FORM OF STATUTES, ss. 3, 4.

AMENDMENT OF AN ACT BY AN ACT
OF SAME SESSION, s. 5.

TIME OF COMMENCEMENT OF ACTS,
s. 3.

APPLICATION OF THIS ACT, s. 7.

LAW ALWAYS SPEAKING, s. 8 (1).

WORDS AND TERMS—

“shall” and “may,” s. 8 (2).

“herein,” s. 8 (3).

“now” or “next,” s. 8 (4).

“Her Majesty,” “The Crown,”
etc., s. 8 (5).

“Lieut.-Governor,” etc., s. 8 (6).

“Lieut.-Governor in Council,”
s. 8 (7).

“United Kingdom,” “United
States,” s. 8 (8).

“Upper Canada,” s. 8 (9).

“Lower Canada,” s. 8 (9).

“proclamation,” s. 8 (10, 11).

“Great Seal,” s. 8 (10).

“county,” s. 8 (12).

“person,” s. 8 (13).

“writing,” “written,” s. 8 (14).

“month,” “year,” s. 8 (15).

“holiday,” s. 8 (16).

“oath,” “affidavit,” “swear,”

“sworn,” s. 8 (18).

“sureties,” “security,” s. 8 (20).

“Registrar,” s. 8 (21).

“Magistrate,” “Two Justices,”
s. 8 (22).

“Legally qualified medical prac-
titioner,” s. 8 (23).

“Rules of Court,” s. 8 (36).

Expressing number or gender,
s. 8 (24).

Constituting bodies corporate,
s. 8 (25).

Appointing or relating to public
officers, s. 8 (26, 27).

“Felony” or “Misdemeanour”
in Revised Statutes, s. 13.

COMPUTATION OF TIME, s. 8 (17).

WHO MAY ADMINISTER AND CERTIFY
OATHS, s. 8 (18, 19).

OFFICES TO BE HELD DURING PLEA-
SURE, s. 8 (28).

IMPRISONMENT WHERE NO PLACE
SPECIFIED, s. 8 (29).

RECOVERY OF PENALTIES, s. 8 (30, 31).

APPLICATION OF PENALTIES WHEN NOT
OTHERWISE APPROPRIATED, s.
8 (30, 32).

PAYING OVER AND ACCOUNTING FOR PUBLIC MONEYS, s. 8 (33).

ACTS TO BE DONE BY MORE THAN TWO MAY BE DONE BY A MAJORITY, s. 8 (34).

DEVIATIONS FROM PRESCRIBED FORMS, s. 8 (35).

EXTENT OF POWER TO MAKE RULES OF COURT, s. 8 (37).

POWER TO MAKE BY-LAWS, RULES, &C., TO INCLUDE POWER TO ALTER, s. 8 (38).

ALL ACTS TO BE DEEMED PUBLIC ACTS, s. 8 (39).

PREAMBLE TO BE PART OF AN ACT, s. 8 (40).

ACTS TO BE DEEMED REMEDIAL, s. 8 (41).

REFERENCES TO SECTIONS BY NUMBER, s. 8 (42).

CERTAIN PRELIMINARY ACTS MAY BE DONE BEFORE COMMENCEMENT OF ACT, s. 8 (43).

EXPRESSIONS USED IN REGULATIONS AND CERTAIN OTHER INSTRUMENTS TO HAVE SAME MEANING AS IN ACT AUTHORIZING, s. 8 (44).

POWER TO AMEND OR REPEAL ACTS, s. 8 (45).

REPEAL OF ACTS—

Not to revive repealed Acts, s. 8 (46).

Officers appointed, acts done or penalties incurred under repealed Act, s. 8 (49-51).

Rules, &c., made before repeal, s. 8 (52).

Appointments, and securities given before repeal, s. 8 (53).

Not to be deemed a declaration that repealed Act was in force, s. 8 (54).

ACTS NOT TO INVOLVE A DECLARATION AS TO PREVIOUS STATE OF THE LAW, s. 8 (54-56).

RE-ENACTMENT OF AN ACT NOT TO BE AN ADOPTION OF JUDICIAL CONSTRUCTION, s. 8 (57).

ACTS NOT TO AFFECT THE CROWN UNLESS SO DECLARED, s. 8 (58).

OTHER RULES OF CONSTRUCTION APPLICABLE, s. 8 (59).

INTERPRETATION OF ACTS RELATING TO LEGAL MATTERS, s. 9.

INTERPRETATION OF ACTS RELATING TO MUNICIPALITIES, s. 10.

WHERE AN ACT IS AN OFFENCE UNDER TWO ACTS, HOW PUNISHABLE, s. 11.

INTERPRETATION OF THIS ACT, s. 12.
"Felony," "Misdemeanour," in Revised Statutes, s. 13.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Interpretation Act*," R. S. O. 1887, c. 1, s. 1.

What to constitute "The Revised Statutes of Ontario."

How they may be cited.

2. This Act and following series of Acts shall constitute and may be cited for all purposes as "*The Revised Statutes of Ontario, 1897*," and any chapter of the said Revised Statutes may be cited and referred to for all purposes whatever, either by its title as an Act, or by its short title, or by using the expression "*The Act (or The Revised Statute) respecting—*" (adding the remainder of the title given at the beginning of the particular chapter), or by using the expression "*The Revised Statutes, 1897*" or "*The Revised Statutes of Ontario, 1897*," together with a reference to the number of the particular chapter in the copies printed by the Queen's Printer. R. S. O. 1887, c. 1, s. 2.

Form of enacting clause.

3. The following words may be inserted in the preambles of statutes, and shall indicate the authority by virtue of which they are passed: "Her Majesty, by and with the advice and consent

of the Legislative Assembly of the Province of Ontario, enacts as follows." R. S. O. 1887, c. 1, s. 3.

4. After the insertion of the words aforesaid, which shall follow the setting forth of the considerations or reasons upon which the law is grounded, and which shall, with these considerations or reasons, constitute the entire preamble, the various provisions of the statute shall follow in a concise and enunciative form. R. S. O. 1887, c. 1, s. 4.

Provisions to follow in concise form.

5. Any Act of the Legislature of Ontario may be amended, altered or repealed by any Act to be passed in the same Session thereof. R. S. O. 1887, c. 1, s. 5.

Acts may be amended or repealed during Session in which passed. Endorsement on Acts.

6.—(1) The Clerk of the Legislative Assembly shall endorse on every Act of the Legislature of Ontario, immediately after the title of such Act, the day, month and year when the same was by the Lieutenant-Governor assented to, or reserved; in the latter case, the Clerk of the Legislative Assembly shall also endorse thereon the day, month and year when the Lieutenant-Governor has signified either by speech or message to the Legislative Assembly, or by proclamation, that the same was laid before the Governor-General in Council, and that the Governor-General was pleased to assent thereto.

(2) Such endorsement shall be taken to be a part of the Act; and the date of the assent or signification, as the case may be, shall be the date of the commencement of the Act, if no later commencement is therein provided. R. S. O. 1887, c. 1, s. 6.

Time of commencement.

7.—(1) This section and sections 8 to 12 of this Act and each provision thereof, shall extend and apply to these Revised Statutes of Ontario and to every Act of the Legislature of Ontario, passed after the said Revised Statutes take effect, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause, is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto.

This and following sections except 13 to apply to all Acts.

(2) The omission in any Act of a declaration that *The Interpretation Act* shall apply thereto, shall not be construed to prevent its so applying, although such express declaration may be inserted in some other Act or Acts of the same Session. R. S. O. 1887, c. 1, s. 7; 60 V. c. 2, s. 1.

Express declaration that Act shall apply unnecessary.

8. Subject to the limitations in the preceding section of this Act—in every Act to which this section applies,

How enactments shall be construed.

1. The Law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so

Expressions in present tense

{ that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning ;

"Shall" and "may." 2. The word "shall" shall be construed as imperative and the word "may" as permissive ;

"Herein." 3. Wherever the word "herein" is used in any section of an Act, it shall be understood to relate to the whole Act and not to that section only ;

"Now," and "next." 4. The words "now" and "next" shall be construed as having reference to the time when the Act was presented for the Royal Assent ;

"Her Majesty," etc. 5. The words "Her Majesty," "the Queen," or "the Crown," shall mean Her Majesty, Her Heirs and Successors, Sovereigns of the United Kingdom of Great Britain and Ireland ;

"Lieutenant-Governor," or "Governor." 6. The words "Lieutenant-Governor," or "Governor," shall mean the Lieutenant-Governor for the time being of Ontario, or other the Chief Executive Officer or Administrator for the time being carrying on the government of Ontario, by whatever title he is designated ;

"Lieutenant-Governor in Council," etc. 7. The words "Lieutenant-Governor in Council," or "Governor in Council," shall mean the Lieutenant-Governor of Ontario, or person administering the government of Ontario for the time being, acting by and with the advice of the Executive Council for Ontario ;

"United Kingdom," "United States." 8. The words "the United Kingdom" shall mean the United Kingdom of Great Britain and Ireland ; and the words "the United States" shall mean the United States of America :
{ and generally, the name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, shall mean such country, place, body, corporation, society, officer, functionary, person, party or thing, although such name be not the formal and extended designation thereof ;

Names of places, corporations, etc.

"Upper Canada," "Lower Canada." 9. The words "Upper Canada" shall mean all that part of Canada which formerly constituted the Province of Upper Canada ; and the words "Lower Canada" shall mean all that part of Canada which formerly constituted the Province of Lower Canada ;

"Proclamation," "Great Seal." 10. The word "proclamation" shall mean a proclamation under the Great Seal ; and the expression "Great Seal" shall mean the Great Seal of Ontario ;

Lieutenant-Governor acting by proclamation. 11. Where the Lieutenant-Governor is authorized to do any act by proclamation, such proclamation is to be understood to be a proclamation issued under an order of the Lieutenant-Governor in Council ; but it shall not be necessary that it be mentioned in the proclamation that it is issued under such order ;

12. The word "county" shall include two or more counties "County." united for purposes to which the enactment relates;

13. The word "person" shall include any body corporate "Person." or politic, or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to law;

14. The words "writing," "written," or any term of "Writing," like import, shall include words printed, painted, engraved, "Written." lithographed, photographed, phonographed, or otherwise traced or copied;

15. The word "month" shall mean a calendar month; and "Month," the word "year," a calendar year. R. S. O. 1887, c. 1, s. 8 (1-15); "Year."

16. The word "holiday" shall include Sundays, New Year's "Holiday." Day, Good Friday, Easter Monday, and Christmas Day, Dominion Day, the day appointed for the celebration of the birth-day of Her Majesty or of any of Her Royal Successors, Labour Day, and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving. R. S. O. 1887, c. 1, s. 8 (16); 60 V. c. 15, Sched. A (1);

17. If the time limited by an Act for any proceeding, or for the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on, the day next following which is not a holiday. R. S. O. 1887, c. 1, s. 8 (17);

[For legal meaning of expressions relative to time see Cap. 144.]

18. The words "oath" and "affidavit" shall in the case "Oath." of persons for the time being allowed by law to affirm or "Affidavit." declare instead of swearing, include affirmation and declaration; the word "swear" in the like case shall include affirm "Swear." and declare, and "sworn" shall include affirmed and declared. "Sworn."

And in every case where an oath, affirmation or declaration is directed to be made before any person or officer, such person or officer shall have full power and authority to administer the same and to certify to its having been made. 60 V. c. 2, s. 2. Authority to administer.

19. Where by an Act of the Legislature of this Province, Administration of oaths. or by a rule of the Legislative Assembly, or by an order, regulation or commission made or issued by the Lieutenant-Governor in Council, under a law authorizing him to require the taking of evidence under oath, an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered may be given, by any one named in the Act, rule, order, regulation or commission, or by a Judge of any Court, a Notary Public, Justice of the Peace, or Commissioner for taking affidavits, having authority or jurisdiction in the place where the oath is administered; Certificate of administration of oaths.

"Sureties," 20. The word "sureties" shall mean sufficient sureties
 "Security." and the word "security" shall mean sufficient security, and
 where these words are used, one person shall be sufficient
 therefor unless otherwise expressly required ;

"Registrar." 21. The word "Registrar" shall include a Deputy Registrar ;

"Magistrate," 22. The word "Magistrate" shall mean a Justice of the
 "Two Jus- Peace ; the words "two Justices" shall mean two or more
 tices." Justices of the Peace, assembled or acting together ; the words
 "Justice of the Peace," or "Justice of the Peace" or "Magistrate" shall include two
 "Magistrate" or more Justices of the Peace or Magistrates assembled or
 to include two acting together ;
 or more acting together.

If anything is directed to be done by or before a Magistrate or a Justice of the Peace, or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done ;

Implied powers.

Wherever power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer, or functionary to do or enforce the doing of such act or thing ;

"Legally qualified medical practitioner," "duly qualified medical practitioner," "duly qualified medical practitioner," 23. The words "legally qualified medical practitioner" or
 "duly qualified medical practitioner," or any other words im-
 porting legal recognition of any person as a medical prac-
 titioner or member of the medical profession, shall mean a per-
 son registered under *The Ontario Medical Act* ;
 Rev. Stat. c. 176.

Number and gender.

24. Words importing the singular number or the masculine gender only, shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse ;

Effect of words constituting a corporation.

25. Words making any association or number of persons a corporation or body politic and corporate, shall vest in such corporation power to sue and be sued, contract and be contracted with, by their corporate name, to have a common seal, and to alter or change the same at their pleasure, and to have perpetual succession, and power to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure ; and shall also vest in any majority of the members of the corporation, the power to bind the others by their acts ; and shall exempt the individual members of the corporation from personal liability for its debts, obligations or acts, provided they do not contravene the provisions of the Act incorporating them ;

Words authorizing appointment include power to remove.

26. Words authorizing the appointment of any public officer or functionary, or any deputy, shall include the power of removing him, re-appointing him, or appointing another in his stead, from time to time, in the discretion of the authority in whom the power of appointment is vested ;

27. Words directing or empowering a public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, shall include his successors in such office, and his or their lawful deputy ;

Directions to public officer to apply to his successors and his deputy.

28. All officers heretofore or hereafter appointed by the Lieutenant-Governor, whether by commission or otherwise, shall remain in office during pleasure only ;

Appointment by Lieutenant-Governor to be during pleasure.

29. If in any Act any person is directed to be imprisoned or committed to prison, the imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the Common Gaol of the locality in which the order for the imprisonment is made, or if there be no Common Gaol there, then in or to that Common Gaol which is nearest to such locality ; and the keeper of any Common Gaol shall receive the person, and him safely keep and detain in the Common Gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken ;

Imprisonment where no special place is mentioned.

30. Where a pecuniary penalty or a forfeiture is imposed for a contravention of any Act,—then, if no other mode is prescribed for the recovery thereof, the penalty or forfeiture shall be recoverable with costs by civil action or proceeding at the suit of the Crown only, or of a private party suing as well for the Crown as for himself, before a Court having jurisdiction to the amount of the penalty in cases of simple contract, upon the evidence of one credible witness other than the plaintiff or party interested ;

Recovery of penalties when no special mode is prescribed.

If no other provision is made for the appropriation of the penalty or forfeiture, one-half thereof shall belong to the Crown, and the other half shall belong to the private plaintiff, if any there be, and if there be none, the whole shall belong to the Crown ;

Appropriation.

31. Where a pecuniary penalty or forfeiture is imposed by an Act of this Province, and the amount of the penalty or forfeiture is in any respect in the discretion of the Court or Judge, or in case the Court or Judge has the right to impose imprisonment in addition to, or in lieu of, the penalty or forfeiture, and no other mode is by the Act expressly prescribed for the recovery of the penalty or forfeiture, the same may be recovered upon indictment in the High Court of Justice or General Sessions of the Peace ;

Cases where pecuniary penalty imposed by statute may be recovered on indictment

32. Any duty, penalty or sum of money, or the proceeds of any forfeiture, which is by any Act given to the Crown, shall, if no other provision be made respecting it, form part of the Consolidated Revenue Fund of this Province, and be accounted for and otherwise dealt with accordingly ;

Application of penalties, etc., when not otherwise appropriated.

33. If any sum of the public money is by an Act appropriated for any purpose, or directed to be paid by the Lieutenant-Governor,—then, if no other provision is made respecting

Paying over and accounting for public moneys.

it, such sum shall be payable under warrant of the Lieutenant-Governor directed to the Treasurer of the Province, out of the Consolidated Revenue Fund; and all persons entrusted with the expenditure of any such sum, or any part thereof, shall account for the same in such manner and form, with such vouchers, at such periods and to such officer, as the Lieutenant-Governor may direct;

Acts to be done by more than two.

Deviation from forms.

34. Where an act or thing is required to be done by more than two persons, a majority of them may do it;

35. Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them. R. S. O. 1887, c. 1, s. 8 (19-35);

Rules of court.

36. The expression "rules of court" when used in relation to any court shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court. 60 V. c. 2, s. 3 (1);

Authority to make rules of court.

37. The power of the said authority to make rules of court as above defined shall include a power to make rules of court for the purpose of any Act directing or authorizing anything to be done by rules of court. 60 V. c. 2, s. 3 (2);

Power to make by-laws, etc., to confer power to alter.

38. Where power to make by-laws, regulations, rules or orders is conferred, it shall include the power to alter or revoke the same from time to time and make others. R. S. O. 1887, c. 1, s. 8 (36);

Acts to be deemed public Acts.

39. Every Act shall, unless provision it is declared to be a Private Act, shall be a Public Act, and shall be judicially construed as affecting all Judges, Justices of the Peace, and others, without being specially pleaded. R. S. O. 1887, c. 1, s. 8 (37 part).

Preamble to be a part of Act.

40. The Preamble of an Act shall be deemed a part thereof and intended to assist in explaining the purport and object of the Act;

All Acts remedial.

41. Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate object be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems to be contrary to the public good, and

Construction.

shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof. R. S. O. 1887, c. 1, s. 8 (38, 39);

References to numbers of sections to include first and last number.

42. Where reference is made by number to two or more sections, subsections or clauses in any statute, the number first mentioned and the number last mentioned shall both be deemed to be included in the reference. 60 V. c. 2, s. 12;

43. Where an Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws, to give notices, to prescribe forms or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation. 60 V. c. 2, s. 4;

What may be done under an Act before the date fixed for its commencement.

44. Where any Act confers power to make, grant or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations or by-laws, expressions used in the instrument, if it is made after the 31st day of December, 1897, shall, unless the contrary intention appears, have the same respective meaning as in the Act conferring the power. 60 V. c. 2, s. 5;

Expressions used in instruments issued under any Act to have same meaning as in the Act.

45. Every Act shall be construed as reserving to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever the repeal, amendment, revocation, restriction, or modification is deemed by the Legislature to be required for the public good;

Reservation of power to repeal or amend.

46. The repeal of any Act or part of an Act shall not revive any Act or provision of law repealed by such Act or part of an Act, or prevent the effect of any saving clause therein. R. S. O. 1887, c. 1, s. 8 (40, 41);

Repeal of an Act not to revive an Act by it repealed.

47. Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder, to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment; Provided always, that where there is no provision in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed in so far, but in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder. 60 V. c. 2, s. 6;

Repeal of provisions and substitution of other enactments, effect of.

Proviso.

48. Whenever part of an Act is repealed and any provision substituted therefor is incorporated in such Act, unless the

When substituted provisions to take effect.

contrary is expressly declared, such substituted provision shall take effect from the date of the commencement of the repealing Act, and the expression "the commencement of this Act" when used in the provision so substituted shall mean the commencement of the repealing Act. 60 V. c. 2, s. 7;

plus
same

Effect of repeal of Act on persons acting under it.

49. Where any Act is repealed, wholly or in part, and other provisions are substituted, all officers, persons, bodies politic or corporate, acting under the old law, shall continue to act as if appointed under the new law, until others are appointed in their stead: and all proceedings taken under the old law shall be taken up and continued under the new law, when not inconsistent therewith: and all penalties and forfeitures may be recovered, and all proceedings had, in relation to matters which have happened before the repeal, in the same manner as if the law were still in force, pursuing the new provisions as far as they can be adapted to the old law. R. S. O. 1887, c. 1, s. 8 (42);

As to acts, etc., done before repeal.

50. The repeal of an Act at any time shall not affect any act done or any right or right of action existing, accruing, accrued or established, or any proceedings commenced in a civil cause, before the time when such repeal takes effect; but the proceedings in such case shall be conformable when necessary to the repealing Act. R. S. O. 1887, c. 1, s. 8 (43);

Offences committed and penalties incurred not affected by repeal.

51. No offence committed, and no penalty or forfeiture incurred, and no proceeding pending under any Act at any time repealed, shall be affected by the repeal, except that the proceedings shall be conformable, where necessary, to the repealing Act, and that where any penalty, forfeiture or punishment has been mitigated by any of the provisions of the repealing Act, such provisions shall be extended and applied to any judgment to be pronounced after such repeal;

Rules, etc., made before repeal.

52. All rules and regulations made under an Act before the repeal thereof, shall continue valid until altered or annulled;

Appointments and bonds before repeal.

53. All appointments, and all bonds and securities given by the parties appointed under any Act at any time passed and afterwards repealed shall not be affected by the repeal, but shall remain in full force; and all offices, establishments, books, papers and other things made or used under a repealed Act, shall continue as before the repeal. R. S. O. 1887, c. 1, s. 8 (44-46);

Repeal of Act not a declaration that Act was in force.

54. The repeal of any Act or part of an Act shall not be deemed to be or to involve a declaration that such Act, or the part thereof so repealed, was, or was considered by the Legislature to have been, previously in force. 60 V. c. 2, s. 8;

Repeal of amendment not a declaration of previous state of the law.

55. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law. 60 V. c. 2, s. 10;

56. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by the Legislature to have been, different from the law as it has become under such Act as so amended. 60 V. c. 2, s. 9: Amendment of Act not a declaration of difference of state of law.

57. The Legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language. 60 V. c. 2, s. 11; Re enactment, etc., not an adoption of judicial construction. *change.*

58. No provision or enactment in any Act shall affect in any manner or way whatsoever, the rights of Her Majesty, Her Heirs or Successors, unless it is expressly stated therein that Her Majesty shall be bound thereby; nor if the Act be in the nature of a Private Act, shall it affect the rights of any person, or body politic, corporate, or collegiate, such only excepted as are therein mentioned or referred to; Acts not to affect the Crown unless so declared. Private Acts.

59. Nothing in this section shall exclude the application to any Act, of any rule of construction applicable thereto, and not inconsistent with this section. R. S. O. 1887, c. 1, s. 8, (47, 48). Other rules of construction applicable.

9. The interpretation section of *The Judicature Act*, so far as the terms defined can be applied, shall extend to all enactments relating to legal matters. R. S. O. 1887, c. 1, s. 9. Interpretation section of Rev. Stat. c. 51.

10. The interpretation section of *The Municipal Act*, so far as the terms defined can be applied, shall extend to all enactments relating to Municipalities. R. S. O. 1887, c. 1, s. 10. Interpretation section of Municipal Acts, Rev. Stat. c. 223.

11. Where an act or omission constitutes an offence under two or more Acts, or an offence both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence. 60 V. c. 2, s. 13. Offences involving liability under more than one Act, etc.

12. The provisions of this Act shall apply to the construction thereof, and to the words and expressions used therein. R. S. O. 1887, c. 1, s. 11. Provisions herein to apply to this Act.

13. In these Revised Statutes "felony" shall mean any crime which before the passing of *The Criminal Code, 1892*, of Canada would have been a felony under the law of Canada and "misdemeanour" shall mean any crime which before the passing of the said Code would have been a misdemeanour under the said law. 60 V. c. 3, s. 3. Meaning of "felony" and "misdemeanour" when used in Revised Statutes.

NOTES.

Revised Statutes. In construing Revised Statutes, the former enactments may be referred to: *Whelan v. Reg.* (1869) 28 U.C.R. 108.

The Revised Statutes may be considered as one great Act and construed collectively, just as if they had been sections of one Statute: *Boston v. Lelievre* (1868) L.R., 3 P.C. 162.

Prospective or Retrospective. When the Legislature mean to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or, to put the same thing in a somewhat different form. If the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights. A converse rule is that, where the Legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply. It is not unreasonable to suppose that, in regard to mere matters of procedure, the Legislature does not intend to alter the procedure even where past transactions come in question; because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the Legislature has thought imperfect, and therefore has altered; and it may, therefore, well be supposed that the Legislature intends to apply the new and more perfect procedure universally. *Turnbull v. Forman* (1885) 15 Q.B.D. 234; *Scott v. Wye* (1885) 11 P.R. 93; *McKay v. Martin* (1891) 21 O.R. 104.

Follow in concise and enunciative form. The numbers of sections and subsections are constituent parts of an Act: *Washington v. G. T. R.* (1897) 28 S. C.R. 184, see s.c. 24 A.R. 188. A proviso at the end of a sub-section will, if the grammatical or ordinary sense so requires be limited to the subsection, and will not be extended to the whole section, *ib.*

Title. The title may be part of the Act, and may be referred to in order to ascertain the intention of the Legislature: *O'Connor v. Nova Scotia Telephone Co.* (1893) 22 S.C.R. 276; *Greene v. Provincial Insurance Co.* (1880) 4 A. R. 521.

Time of commencement. The Act takes effect from the earliest hour of the day upon which it receives the Royal assent: *Cole v. Porteous* (1892) 19 A. R. 111.

"Shall" and "May." The words "may convey" may be construed as compulsory; *Cameron v. Wait* (1878) 3 A. R. 175.

Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way; *Wilson v. West Hartlepool* (1865) 11 Jur. N. S. 126. So that a statute that a municipality "may" pass a By-law for a certain purpose does not prevent it from exercising its jurisdiction without a by-law; *Bernardin v. North Dufferin* (1891) 10 S. C.R. 581. The provision of the Patent act that the place of trial may be at the place nearest the defendant's residence is compulsory, *Aitcheson v. Mann* (1883) 9 P. R. 473; but a statute providing that the Council of a following year may adopt an assessment is permissive only; *Re Dwyer and Port Arthur* (1891) 21 O. R. 175. Enabling words such as "it shall be lawful" are always compulsory, where they are words to effectuate a legal right; *Julius v. Oxford* (Bishop) (1880) 5 App. Cas. 214.

Herein. The word "herein" may refer either to a section or to the whole act; *McGill v. Peterborough* (1850) 12 U. C. R. 44.

Person. The word "person" does not include a firm or partnership *Bickerton v. Dakin* (1890) 20 O. R. 192, 695.

Section. The word "section" may extent to several clauses grouped together; *Dain v. Gossage* (1873) 6 P. R. 103.

Holiday. The interpretation act by mentioning specific days as holidays sets them apart as such within the meaning of another statute, providing that days set apart by the Ontario Legislature as holidays shall not be computed in reckoning time; *Re West Toronto Election* (1871) 31 U. C. R. 409, 5 P. R. 394.

Time Expiring on a Holiday. In all cases where the time for doing an act is limited by a statute if the last day is a holiday the time is extended, e. g. filing chattel mortgages, see *McLean v. Pinkerton* (1882) 7 A. R. 490.

Corporation. Once a Company is incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are; *Solomon v. Solomon* (1897) A. C. 30.

Penal Statutes. In penal statutes, questions of doubt are to be construed favourably to the accused; *re North Ontario Election H. C. c. 304*, 18 Eliz. c. 5 is in force in Ontario and therefore an infant cannot maintain an action for a penalty under the Election Act; *Garrett v. Robert* (1884) 10 A. R. 630. Two persons may sue for the penalty under the words "a private party"; *Chaput v. Robert*; (1887) 14 A. R. 354.

During Pleasure. Compare R. S. O. c. 223, s. 493 and see *Vernon v. Smith's Falls* (1891) 21 O. R. 331. Unless otherwise provided by law or by special contract, all servants of the crown hold their offices during pleasure and this is a well understood term of the engagement throughout the public service. *Shenton v. Smith* (1895) A. C. 229; *Dunn v. Reg.* (1896) 1 Q. B. 116. An act providing for the dismissal of civil servants for specific offences is inconsistent with the right to dismiss at pleasure; *Gould v. Stuart* (1896) A. C. 375; *Young v. Adams* (1898) A. C. 469.

Forms. Statutory forms may be divided into four classes, (a) forms made to suit rather the generality of cases than all cases; (b) forms inserted merely as examples and only to be followed implicitly so far as the circumstances of each case may admit; (c) forms which must be followed; (d) forms which may or may not be followed, and if followed may be safely followed. See the cases collected in *Truax v. Dixon* (1889), 17 O.R. 375. Variations according to reason and common sense may be made so long as the material matters provided for are correctly given, *Gemmill v. Garland* (1886), 12 O.R. 139.

Rules of Court. A statutory rule if validly made has the same effect as a statute, *Institute of Patent Agents v. Lockwood* (1894), A.C. 347.

Private Acts. Although all Acts are, unless otherwise expressly declared, public Acts, yet if they are in the nature of private Acts, they bind only the persons mentioned therein, see s. 8 (58), *re Goodhue* (1873), 19 Gr. 366, and should be pleaded, *Bailey v. Birkenhead*, 12 Beav. 443; *Kiely v. Kiely* (1878), 25 Gr. 463.

An Act will be deemed a public Act though the operation thereof is locally limited, *Darling v. Hitchcock*, 463.

Acts conferring powers on private bodies or bodies are treated as contracts between the applicants for them, and the legislature on behalf of the public, and are construed strictly, *St. Hyacinthe v. St. Hyacinthe* (1895), 25 S.C.R. 168.

When such Acts impose duties and provide a penalty or other remedy for their violation, an action will not generally lie for damages for breach of such duties, *Atkinson v. Newcastle Waterworks* (1877), 2 Ex.D. 441; *Cowley v. Newcastle Local Board* (1892), A.C. 345; *Johnston v. Consumers Gas Co.* (1898), A.C. 447.

Repeal. Where a municipality had a right of action against another municipality, under a section which was after the accrual of the cause of action repealed, it was held that such right of action was saved by s. 8 (50), *Morris (Township) v. Huron (County)* (1895), 26 O.R. 689.

Headings. Headings of different portions of a statute may be referred to to determine the sense of any doubtful expressions in a section under a particular heading, *Hammersmith and City Railway v. Brand* (1869), L.R. 4 H.L. 171

Donly v. Holmwood (1880), 4 A.R. 555. Thus clauses of the Municipal Act under the rubric "Markets" were held to be for the protection of markets only and to be of limited application, *City of Toronto v. Virgo* (1896), A.C. 88; but clauses though under a particular heading may be extended to cover other cases, as for instance, the clauses under "perjury in insurance cases" in the Criminal Acts were held to relate to all cases of perjury, *R. v. Currie* (1871), 31 U.C.R. 582; and if the meaning is plain, headings will not be allowed to defeat the real purpose of the statute, *Barnes v. Jones* (1876), 51 Cal. 303; *People v. Molyneux* (1869), 40 N.Y. 113.

Preamble. Where the enacting part is clear and unambiguous, it cannot be controlled by the recitals; but where the enacting part is ambiguous it may be explained by reference to the recitals, *Bentley v. Rotheram and Kimworth Local Board of Health* (1876), 4 Ch.D. 592; *R. v. Washington* (1881), 46 U.C.R. 221.

Jurisdiction of Courts. Statutes as to practice and procedure cannot give jurisdiction: *Ahrens v. McGilligat* (1873), 23 C.P. 171.

Adopting judicial construction. Where certain words have received a judicial construction and are repeated without alteration in a subsequent statute the legislature must be taken to have used them according to the meaning so placed upon them: *Ex parte Campbell* (1870), L.R. 5 Ch. 703; *Crain v. Ottawa Collegiate Institute* (1878), 43 U.C.R. 498; *Nicholls v. Cummings* (1877), 1 S.C.R. 395; but this rule will not be applied to an act of the Dominion Parliament in the same terms as provincial acts which have been differently construed in different provinces: *Davidson v. Ross* (1875), 24 Gr. 22; but an expression in a provincial act has been held to afford good evidence as to what a certain term, e.g., "railway track," meant in a Dominion Act: *Toronto Ry. Co. v. Reg.* (1896), A.C. 551.

English decisions. Where the English Court of Appeal have placed a construction upon an English Statute which has been re-enacted in a colony, the colonial courts should govern themselves by it: *Trimble v. Hill* (1880), 5 App. Cas. 342; but a Judge of the High Court should follow our own Court of Appeal in cases of conflict, leaving it to the Court of Appeal to overrule its decision if it sees fit: *MacDonald v. McDonald* (1886), 11 O.R. 187; *MacDonald v. Elliott* (1886), 12 O.R. 98, and upon practice points Canadian decisions are to be preferred: *Coulson v. O'Connell* (1878), 29 C.P. 341.

DOMINION INTERPRETATION ACT.

The following practical differences between the Dominion and Ontario Interpretation Acts may be noted. Under the Dominion Interpretation Act, R.S.C. c. 1, s. 7, every Act of the Dominion Parliament applies to the whole of Canada, except it merely amends an act which applies to the particular province or provinces or its application is expressly restricted. A writing does not expressly include words photographed or phonographed.

No corporation is allowed to carry on the business of banking unless such power is expressly conferred: s. 7 (43).

The provisions of the Ontario Act, taken from 60 Vic. c. 2, except s. 8 (47), are not contained in the Dominion Act.

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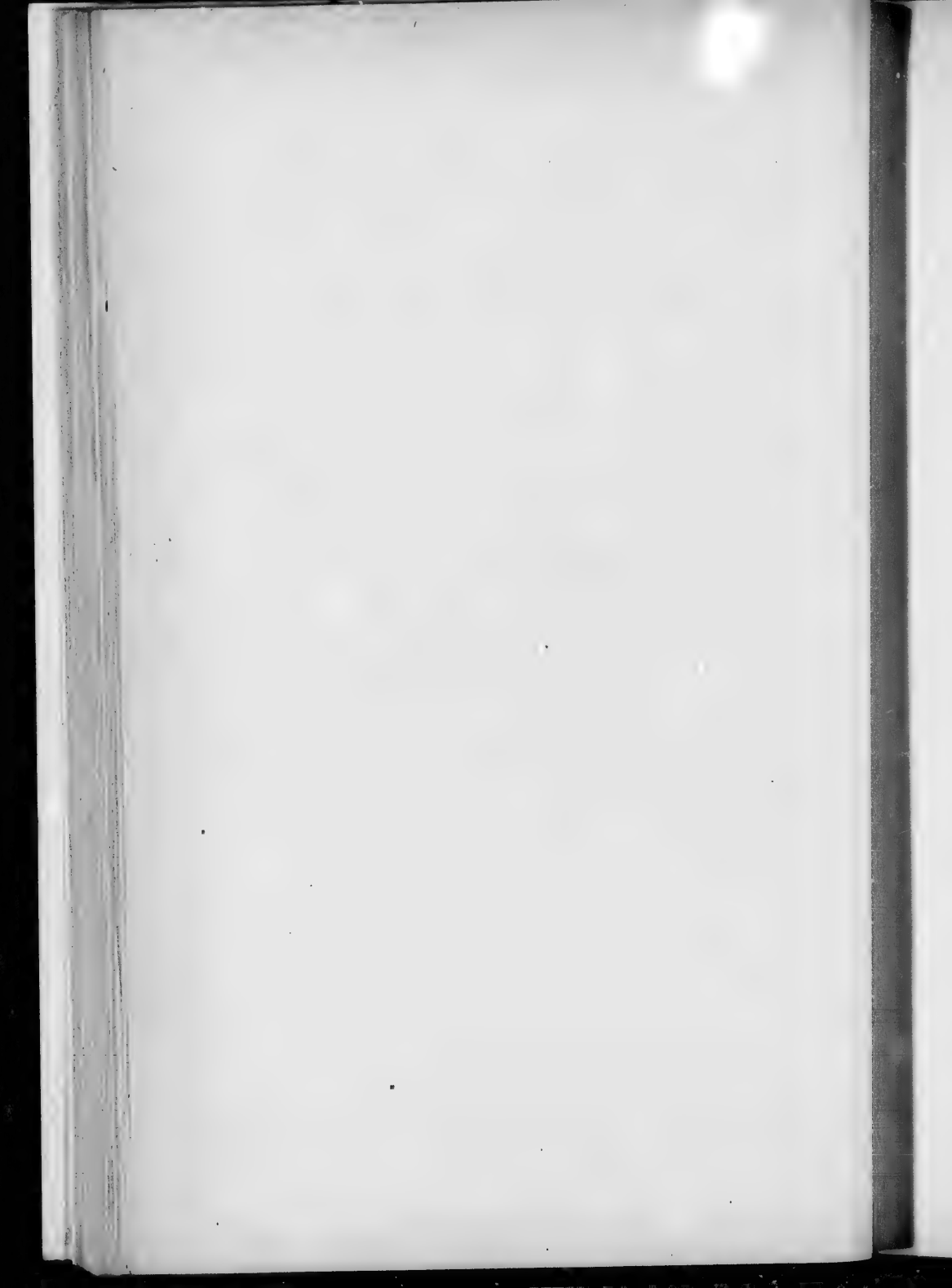
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PART II.

Canadian Constitutional Law.



BRITISH NORTH AMERICA ACT.

IMPERIAL ACT 30-31 VICT. Cap. 3.

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for purposes connected therewith.

[29th March, 1867.]

[*The Statute Law Revision Act, 56-57 V. c. 14, (Imp.) repealed, as spent, sections 2, 25, 42, 43, 81, 89, 127 and 145 and also portions of sections 4, 51 and 88.*]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom:

And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire:

And whereas on the establishment of the Union by authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared:

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

1. This Act may be cited as *The British North America Act, 1867.* Short title.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Application of provisions referring to the Queen.

Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.—UNION.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion under that name accordingly.

Declaration by proclamation of Union of Canada, Nova Scotia and New Brunswick, into one Dominion under name of Canada.

Commencement of subsequent provisions.

Meaning of Canada in such provisions.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

Four Provinces.

5. Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

[Canada now also includes the Provinces of Manitoba, British Columbia and Prince Edward Island and the North West Territories.]

Provinces of Ontario and Quebec.

6. The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

Population of Provinces to be distinguished in decennial census.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act.

8. In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished.

III.—EXECUTIVE POWER.

Executive Power to continue vested in the Queen.

9. The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of provisions referring to Governor-General.

10. The provisions of this Act referring to the Governor General extend and apply to the Governor General for the time being of Canada, or other the Chief Executive Officer or Ad-

ministrator, for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor General.

Constitution of Privy Council for Canada.

12. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

All powers under Acts to be exercised by Governor General with advice of Privy Council or alone.

13. The provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the advice of the Queen's Privy Council for Canada.

Application of provisions referring to Governor General in Council.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from time to time to appoint any person or any persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor General such of the powers, authorities, and functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor General himself of any power, authority or function.

Power to Her Majesty to authorize Governor General to appoint Deputies.

Command of
armed forces
to continue to
be vested in
the Queen.

Seat of Gov-
ernment of
Canada.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

16. Until the Queen otherwise directs the seat of Government of Canada shall be Ottawa.

IV.—LEGISLATIVE POWER.

Constitution
of Parliament
of Canada.

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

[Section 18 was repealed by Imperial Act 38 and 39 Vict. c. 38, and the following section substituted therefor.]

Privileges,
etc., of Houses.

18. The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof respectively shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.]

First Session
of the Parlia-
ment of
Canada.

19. The Parliament of Canada shall be called together not later than six months after the Union.

Yearly Ses-
sion of the
Parliament
of Canada.

20. There shall be a Session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session.

The Senate.

Number of
Senators.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators.

[The Senate now consists of 81 members and includes representatives of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, and Prince Edward Island and of the North West Territories.]

Representa-
tion of Prov-
inces in
Senate.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions—

1. Ontario;
2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick; which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four Senators; Quebec by twenty-four Senators; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to chapter one of the Consolidated Statutes of Canada.

23. The qualification of a Senator shall be as follows :— Qualifications of Senator.

1. He shall be of the full age of thirty years :
2. He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.
3. He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-aleu or in roture, within the Province for which he is appointed, of the value of \$4,000, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same :
4. His real and personal property shall be together worth \$4,000 over and above his debts and liabilities :
5. He shall be resident in the Province for which he is appointed :
6. In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate ; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator. Summoning of Senators.

25. Such persons shall be first summoned to the Senate as the Queen by warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union. Summons of first body of Senators.

26. If at any time on the recommendation of the Governor-General the Queen thinks fit to direct that three or six members be added to the Senate, the Governor General may by summons to three or six qualified persons (as the case may be), representing equally the three divisions of Canada, add to the Senate accordingly. Addition of Senators in certain cases.

Reduction of
Senate to
normal num-
ber.

27. In case of such addition being at any time made the Governor General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more.

Maximum
number of
Senators.

28. The number of Senators shall not at any time exceed seventy-eight.

[See note appended to section 21.]

Tenure of place
in Senate.

29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Resignation of
place in
Senate.

30. A Senator may by writing under his hand addressed to the Governor General resign his place in the Senate, and thereupon the same shall be vacant.

Disqualifica-
tion of
Senators.

31. The place of a Senator shall become vacant in any of the following cases :

1. If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate :
2. If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power :
3. If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter :
4. If he is attainted of treason or convicted of felony or of any infamous crime :
5. If he ceases to be qualified in respect of property or of residence ; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the Government of Canada while holding an office under that Government requiring his presence there.

Summons on
vacancy in
Senate.

32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor General shall by summons to a fit and qualified person fill the vacancy.

Questions as to
qualifications
and vacancies
in Senate.

33. If any question arises respecting the qualification of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment
of Speaker of
Senate.

34. The Governor General may from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers. Quorum Senate.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative. Voting in Senate.

The House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick. Constitution of House of Commons in Canada.

[The number of members is now 213, the Province of Ontario having 92, Quebec 65, Nova Scotia 20, New Brunswick 14, Prince Edward Island 5, British Columbia 6, Manitoba 7, and the North West Territories 4. See Rev. Stats. C., 1886, Chaps. 6 and 7; 55-56 V. Chap. 11.]

38. The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons. Summoning of House of Commons.

39. A Senator shall not be capable of being elected or sitting or voting as a member of the House of Commons. of Senators not to sit in House of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into Electoral Districts as follows:— Electoral districts of the four Provinces

1.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, parts of Cities, and Towns enumerated in the first Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return one member.

2.—QUEBEC.

Quebec shall be divided into sixty-five Electoral Districts, composed of the sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under chapter two of the Consolidated Statutes of Canada, chapter seventy-five

of the Consolidated Statutes of Lower Canada, and the Act of the Province of Canada of the twenty-third year of the Queen, chapter one, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the purposes of this Act an Electoral District entitled to return one member.

3.—NOVA SCOTIA.

Each of the eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return two members, and each of the other Counties one member.

4.—NEW BRUNSWICK.

Each of the fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District; the City of St. John shall also be a separate Electoral District. Each of those fifteen Electoral Districts shall be entitled to return one member.

[The above provisions as to the electoral districts of the Provinces above named have been varied by subsequent Statutes of the Parliament of Canada.]

Continuance
of existing
election laws
until Parlia-
ment of Cana-
da otherwise
provides.

4.1. Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution,—shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any election for a Member of the House of Commons for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

[See Rev. Stat. C., 1886, Chaps. 5, 8 and 9 and subsequent Acts amending these Statutes.]

42. For the first election of members to serve in the House of Commons the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit. Writs for first election.

The person issuing writs under this section shall have the like powers as are possessed at the Union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the election of members to serve in the same respective House of Assembly or Legislative Assembly.

43. In case a vacancy in the representation in the House of Commons of any Electoral District happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this Act shall extend and apply to the issuing and returning of a writ in respect of such vacant District. As to vacancies before meeting of Parliament or before provision is made by Parliament in this behalf.

44. The House of Commons on its first assembling after a general election shall proceed with all practicable speed to elect one of its members to be Speaker. As to election of Speaker of House of Commons.

45. In case of a vacancy happening in the office of Speaker by death, resignation or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be Speaker. As to filling up vacancy in office of Speaker.

46. The Speaker shall preside at all meetings of the House of Commons. Speaker to preside.

[See 48-49 V. c. 1 (Dom.) which creates the office of Deputy Speaker.]

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall during the continuance of such absence of the Speaker have and execute all the powers, privileges, and duties of Speaker. Provision in case of absence of Speaker.

48. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers, and for that purpose the Speaker shall be reckoned as a member. Quorum of House of Commons.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker and when the voices are equal, but not otherwise, the Speaker shall have a vote. Voting in House of Commons.

Duration of
House of Com-
mons.

50. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Decennial Re-
adjustment of
Representation.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be re-adjusted by such authority, in such manner and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

1. Quebec shall have the fixed number of sixty-five members :
2. There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained) :
3. In the computation of the number of members for a Province a fractional part not exceeding one-half of the whole number requisite for entitling the Province to a member shall be disregarded ; but a fractional part exceeding one-half of that number shall be equivalent to the whole number :
4. On any such re-adjustment the number of members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the Province is ascertained at the then latest census to be diminished by one-twentieth part or upwards :
5. Such re-adjustment shall not take effect until the termination of the then existing Parliament.

[See now *Rev. Stat. C., 1886, Cap. 6.*]

Increase of
number of
House of Com-
mons.

52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes ; Royal Assent.

Appropriation
and tax bills

53. Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

Recommendation of money
votes.

54. It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the

appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the Session in which such vote, resolution, address, or bill is proposed.

55. Where a bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's assent, he shall declare according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

Royal assent to bills, etc.

56. Where the Governor General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification.

Disallowance by order in Council of Act assented to by Governor General.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor General for the Queen's assent, the Governor General signifies, by speech or message to each of the Houses of the Parliament or by proclamation, that it has received the assent of the Queen in Council.

Signification of Queen's pleasure on bill reserved.

An entry of every such speech, message, or proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

V.—PROVINCIAL CONSTITUTIONS.

Executive Power.

58. For each Province there shall be an officer, styled the Lieutenant Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada.

Appointment of Lieutenant Governors of Provinces.

59. A Lieutenant Governor shall hold office during the pleasure of the Governor General; but any Lieutenant Governor appointed after the commencement of the first Session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after

Tenure of office of Lieutenant Governor.

the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then within one week after the commencement of the next Session of the Parliament.

Salaries of
Lieutenant
Governors.

60. The salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

Oaths, etc., of
Lieutenant
Governor.

61. Every Lieutenant Governor shall, before assuming the duties of his office, make and subscribe before the Governor General or some person authorized by him, oaths of allegiance and office similar to those taken by the Governor General.

Application of
provisions re-
ferring to
Lieutenant
Governor.

62. The provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the time being of each Province or other the chief executive officer or administrator for the time being carrying on the government of the Province, by whatever title he is designated.

Appointment
of executive
officers for On-
tario and Que-
bec.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant Governor from time to time thinks fit, and in the first instance of the following officers, namely:—The Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec, the Speaker of the Legislative Council and the Solicitor General.

[See now, as to Ontario, *Rev. Stat. Ont., 1897, Cap. 14.*]

Executive
Government
of Nova Scotia
and New
Brunswick.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act.

All powers
under Acts
to be exercised
by Lieutenant
Governor of
Ontario or
Quebec with
advice of
Executive
Council or
alone.

65. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective Executive Councils, or any members thereof,

or by the Lieutenant Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

66. The provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the advice of the Executive Council thereof.

Application of provisions referring to Lieutenant-Governor in Council.

67. The Governor General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant Governor during his absence, illness, or other inability.

Administration in absence etc., of Lieutenant-Governor.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Seats of Provincial Governments.

Legislative Power.

1.—ONTARIO.

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of one House, styled the Legislative Assembly of Ontario.

Legislature for Ontario.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two Electoral Districts set forth in the first Schedule to this Act.

Electoral districts.

[The number of members is now 93, representing 92 Electoral Districts. See Rev. Stat. Ont., 1897, Cap. 6.]

2.—QUEBEC.

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Legislature for Quebec.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant Governor in the Queen's name, by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this Act.

Constitution of Legislative Council.

referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act.

Qualification
of Legislative
Councillors.

73. The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation,
Disqualifica-
tion, etc.

74. The place of a Legislative Councillor of Quebec shall become vacant in the cases *mutatis mutandis*, in which the place of Senator becomes vacant.

Vacancies.

75. When a vacancy happens in the Legislative Council of Quebec, by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

Questions as
to Vacancies,
etc.,

76. If any question arises respecting the qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of
Legislative
Council.

77. The Lieutenant Governor may from time to time, by instrument under the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead.

Quorum of
Legislative
Council.

78. Until the Legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers.

Voting in
Legislative
Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

Constitution
of Legislative
Assembly of
Quebec.

80. The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for assent any bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the second Schedule to this Act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those Electoral Divisions or Districts, and the assent shall not be given to such bills unless an address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3.—ONTARIO AND QUEBEC.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union. First Session of Legislatures.

82. The Lieutenant Governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province. Summoning of Legislative Assemblies.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment permanent or temporary, at the nomination of the Lieutenant Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and, in Quebec, Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office. Restriction on election of holders of offices.

[Acts have since been passed with the view of further securing the independence of the Legislative Assembly of Ontario. See Rev. Stat. Ont., 1897, Chap. 11, ss. 6 to 17.]

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the Union are in force in those Provinces respectively, relative to the following matters, or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec. Continuance of existing election laws.

[See now as to Ontario Rev. Stat. Ont., 1897, Chaps. 9 and 11.]

Provided that until the Legislature of Ontario otherwise provides, at any election for a member of the Legislative

Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

[See now *Rev. Stat. Ont., 1897, Cap. 9, ss. 9-15.*]

Duration of
Legislative
Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

[See now, as to Ontario, *Rev. Stat. Ont., 1897, Cap. 12, s. 3.*]

Yearly Sessions of Legislature.

86. There shall be a session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one session and its first sitting in the next session.

[See now, as to Ontario, *Rev. Stat. Ont., 1897, Cap. 12, s. 4.*]

Speaker,
Quorum, etc.

87. The following provisions of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a Speaker originally and on vacancies, the duties of the Speaker, the absence of the Speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

[See sections 44, 45, 46, 47, 48 and 49 of this Act, and as to Ontario, *Rev. Stat., Ont., 1897, Cap. 12, ss. 38-45, 65 and 66.*]

4.—NOVA SCOTIA AND NEW BRUNSWICK.

Constitutions
of Legislatures
of Nova Scotia
and New
Brunswick.

88. The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

5.—ONTARIO, QUEBEC, AND NOVA SCOTIA.

First elections.

89. Each of the Lieutenant Governors of Ontario, Quebec, and Nova Scotia shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor-

General directs, and so that the first election of member of Assembly for any Electoral District or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that Electoral District.

6.—THE FOUR PROVINCES.

90. The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant Governor of the Province for the Governor-General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada.

Application to
Legislatures of
provisions
respecting
money votes,
etc.

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Legislative
authority of
Parliament
Canada.

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea coast and inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
14. Currency and Coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings' Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

Subjects of
exclusive Pro-
vincial Legis-
lation.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.
5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial, local, or municipal purposes.
10. Local works and undertakings other than such as are of the following classes,—
 - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province :
 - b. Lines of steam ships between the Province and any British or foreign country :
 - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
11. The incorporation of companies with Provincial objects.
12. The solemnization of marriage in the Province.
13. Property and civil rights in the Province.

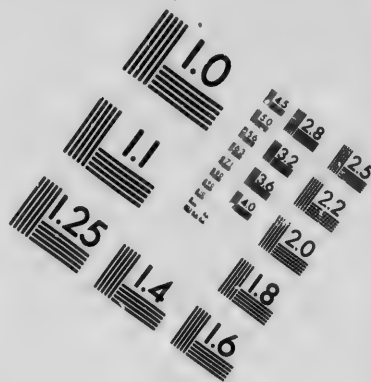
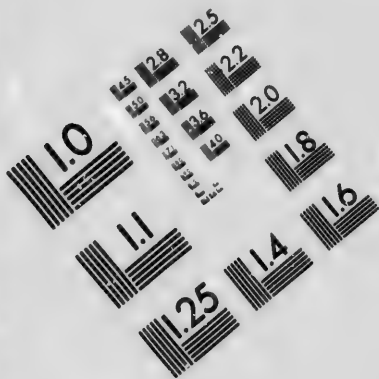
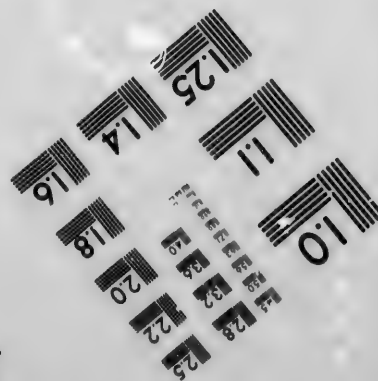
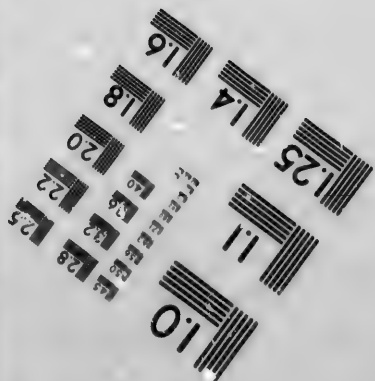
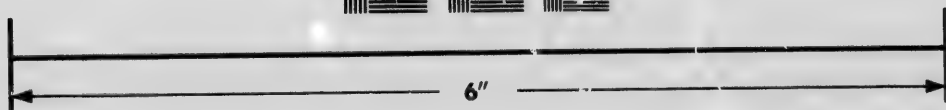
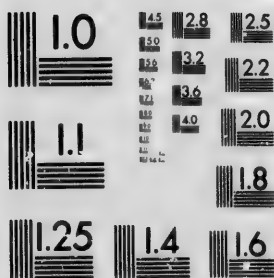


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14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the Province.

Education.

Legislation
respecting
education.

93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.
2. All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.
3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.
4. In case any such Provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Legislation for uniformity of laws in the three Provinces as to property and civil rights and uniformity of procedure in Courts.

Agriculture and Immigration.

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Concurrent powers of Legislation respecting Agriculture and immigration.

VII.—JUDICATURE.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Appointment of Judges.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Ontario, etc.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Selection of Judges in Quebec.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Tenure of office of Judges of Superior Courts.

100. The salaries, allowances and pensions of the Judges of the Superior, District, and County Courts (except the Courts

Salaries, etc., of Judges.

of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

General Court
of Appeal,
etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada.

VIII.—REVENUES; DEBTS; ASSETS; TAXATION.

Creation of
Consolidated
Revenue
Fund.

102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

Expenses of
collection, etc.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of
Provincial
public debts.

104. The annual interest of the public debts of the several Provinces of Canada, Nova Scotia and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada.

Salary of
Governor-
General.

105. Unless altered by the Parliament of Canada, the salary of the Governor General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

Appropriation
of fund subject
to charges.

106. Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

Transfer to
Canada of
stocks, etc.,
belonging to
two Provinces.

107. All stocks, cash, banker's balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

108. The public works and property of each Province, enumerated in the third schedule to this Act, shall be the property of Canada. Transfer of property in schedule.

109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same. Lands, mine, etc., belonging to Provinces to belong to them.

110. All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province. Assets connected with Provincial debts.

111. Canada shall be liable for the debts and liabilities of each Province existing at the Union. Canada to be liable for Provincial debts.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union \$62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon. Liability of Ontario and Quebec to Canada.

113. The assets enumerated in the fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly. Assets of Ontario and Quebec.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union \$8,000,000, and shall be charged with interest at the rate of five per centum per annum thereon. Liability of Nova Scotia to Canada.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union \$7,000,000, and shall be charged with interest at the rate of five per centum per annum thereon. Liability of New Brunswick to Canada.

116. In case the public debt of Nova Scotia and New Brunswick do not at the Union amount to \$8,000,000 and \$7,000,000 respectively, they shall respectively receive by half-yearly payments in advance from the Government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts. Payment of interest to Nova Scotia and New Brunswick if their public debts are less than the stipulated amounts.

117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. Provincial public property.

Grants to
Provinces.

118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures :—

		Dollars.
Ontario	- - -	Eighty thousand.
Quebec	- - -	Seventy thousand.
Nova Scotia	- - -	Sixty thousand.
New Brunswick	- - -	Fifty thousand.

Two hundred and sixty thousand.

and an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population as ascertained by the Census of 1861, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

Further grant
to New
Brunswick
for ten years.

119. New Brunswick shall receive by half-yearly payments in advance from Canada, for the period of ten years from the Union an additional allowance of \$63,000 per annum; but as long as the Public Debt of that Province remains under \$7,000,000, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of \$63,000.

Form of
payments.

120. All payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor General in Council.

Manufac-
tures, etc., of
one Province
to be admitted
free into the
others.

121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance
of Customs
and Excise
Laws.

122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

Exportation
and importa-
tion as
between two
Provinces.

123. Where Customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares and merchandises may, from and after the Union, be imported from one of those Provinces into the other of

thereon on proof of payment of the Customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation.

124. Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen, of title three, of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues.

Lumber dues
in New
Brunswick.

125. No lands or property belonging to Canada or any Province shall be liable to taxation.

Exemption of
public lands,
etc., from
taxation.

126. Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union power of appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

Provincial
Consolidated
Revenue
Fund.

IX.—MISCELLANEOUS PROVISIONS.

General.

127. If any person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand, addressed to the Governor General of the Province of Canada, or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate, shall thereby vacate his seat in such Legislative Council.

As to
Legislative
Councillors
of Provinces,
becoming
Senators.

128. Every member of the Senate or House of Commons of Canada shall before taking his seat therein, take and subscribe before the Governor General or some person authorized by him, and every member of a Legislative Council or Legislative Assembly of any Province shall before taking his seat therein, take and subscribe before the Lieutenant Governor of the Province or some person authorized by him, the oath of allegiance contained in the fifth Schedule to this Act; and every member of the Senate of Canada and every member of the Legislative

Oath of
allegiance,
etc.

Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor General or some person authorized by him, the declaration of qualification contained in the same Schedule.

Continuance
of existing
laws, courts,
officers, etc.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

Transfer of
officers to
Canada.

130. Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties as if the Union had not been made.

Appointment
of new officers.

131. Until the Parliament of Canada otherwise provides, the Governor General in Council may from time to time appoint such officers as the Governor General in Council deems necessary or proper for the effectual execution of this Act.

Power for per-
formance of
treaty obliga-
tions by
Canada as part
of British
Empire.

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

Use of English
and French
languages.

133. Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers, to hold office during pleasure, that is to say:—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor General; and may, by order of the Lieutenant Governor in Council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

Appointment
of executive
officers for
Ontario and
Quebec.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada, as well as those of the Commissioner of Public Works.

Powers,
duties, etc.,
of executive
officers.

136. Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Great Seal.

137. The words "and from thence to the end of the then next ensuing Session of the Legislature," or words to the same effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the powers of the same as defined by this Act.

Construction
of temporary
Acts.

As to errors in names.

138. From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any deed, writ, process, pleading, document, matter or thing, shall not invalidate the same.

As to issue of Proclamations before Union, to commence after union.

139. Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed shall be and continue of like force and effect as if the Union had not been made.

As to issue of Proclamations after Union under authority of Acts before Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its subject matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

Arbitration respecting debts, etc.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

Division of records.

143. The Governor General in Council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof shall be admitted as evidence.

Constitution of townships in Quebec.

144. The Lieutenant Governor of Quebec may from time to time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which town-

ships are not then already constituted, and fix the metes and bounds thereof.

X.—INTERCOLONIAL RAILWAY.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the Union, of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed.

Duty of Government and Parliament of Canada to make railway herein described.

XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Power to admit Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and North-western Territory into the Union by Order in Council.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation in the Senate of Canada of four members, and (notwithstanding anything in this Act) in case of the admission of Newfoundland the normal number of Senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those Provinces shall not be increased at any time beyond ten, except under the provisions of this Act for the appointment of three or six additional Senators under the direction of the Queen.

As to representation of Newfoundland and Prince Edward Island in Senate.

SCHEDULE.

The FIRST SCHEDULE.

Electoral Districts of Ontario.

[This Schedule is omitted as the division of Ontario into Electoral Districts has been altered by subsequent Dominion and Provincial legislation.]

The SECOND SCHEDULE.

Electoral Districts of Quebec specially fixed.

[See Section 80.]

COUNTIES OF—

Pontiac.
Ottawa.
Argenteuil.
Huntingdon.

Missisquoi.
Brome.
Shefford.
Stanstead.
Town of Sherbrooke.

Compton.
Wolfe and Richmond.
Megantic.

The THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general public purposes.

The FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
 Lunatic Asylums.
 Normal School.
 Court Houses,
 in
 Aylmer, }
 Montreal, }
 Kamouraska. }
 Lower Canada.
 Law Society, Upper Canada.
 Montreal Turnpike Trust.
 University Permanent Fund.
 Royal Institution.
 Consolidated Municipal Loan Fund, Upper Canada.
 Consolidated Municipal Loan Fund, Lower Canada.
 Agricultural Society, Upper Canada.
 Lower Canada Legislative Grant.
 Quebec Fire Loan.
 Tamiscouata Advance Account.
 Quebec Turnpike Trust.
 Education—East.
 Building and Jury Fund, Lower Canada.
 Municipalities Fund.
 Lower Canada Superior Education Income Fund.

The FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note.—The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time, with proper terms of reference thereto.

DECLARATION OF QUALIFICATION.

I, A.B. do declare and testify, That I am by law duly qualified to be appointed a Member of the Senate of Canada [*or as the case may be*], and that I am legally or equitably seised as of freehold for my own use and benefit of lands or tenements held in free and common socage [*or seised or possessed for my own use and benefit of lands or tenements held in franc-alieu or in roture (as the case may be),*] in the Province of Nova Scotia [*or as the case may be*] of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a Member of the Senate of Canada [*or as the case may be*], and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

NOTES.

B. N. A. Act. The Act creating the Canadian Federation is an Act passed by the Imperial Parliament. It can be amended only by that Parliament. It may even be repealed by that Parliament. Although by the Act "exclusive" powers of legislation are granted to Canadian legislative bodies, it was not intended to limit the supreme legislative authority of the Imperial Parliament.

Smiles v. Belford (1877), 1 Cart. 576; 1 A. R. 436.

Re College of Physicians and Surgeons (1879), 44 U. C. R. 564.

Ex parte Worms (1876), 22 L. C. Jur. 109; 2 Cart. 315.

What Acts of Imperial Parliament in force. Except that part of the Statute Law of England introduced into Canada in 1792 and those Acts such as the Trustee Relief Act and other Acts conferring jurisdiction on the Court of Chancery (see Con. Stat. U. C. c. 12, s. 26 (10); Judicature Act, s. 28, see *infra* Practice) which have incidentally become part of the Statute Law, no Imperial Act has the force of law in Ontario without re-enactment, unless it is made applicable to Canada by express words or by necessary intendment. See 28 and 29 V. c. 63, s. 1 (Imp. Act).

Merchant's Bank of Halifax v. Gillespie (1885), 10 S. C. R. 312.

Allen v. Hanson (1890), 18 S. C. R. 667.

Merchant's Bank v. Monteith (1884), 10 P. R. 334.

Where Canadian Acts conflict with Imperial Acts. Any colonial law which is in any respect repugnant to an Imperial Act extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be absolutely void and inoperative, 28 & 29 V. c. 63, s. 2 (Imp. Act). The Canadian Copyright Act (R. S. C. c. 62) was technically repugnant to an Order-in-Council made under the English Copyright Act which had been held in *Routledge v. Low* (1868), L. R. 3, H. L. 100, to be in force in Canada, and was therefore confirmed by an Imperial Act 38 & 39 V. c. 53. The Dominion Parliament may confer jurisdiction on the Imperial Vice-Admiralty Courts. The Farewell 7 Q. L. R. 380; 2 Cart. 378; Atty.-Gen. v. Flint (1884), 16 S. C. R. 707; 4 Cart. 288. An Act authorizing proceedings against absentees on contracts made or to be performed in the colony is valid and is not repugnant to any Imperial Act, *Ashbury v. Ellis* (1893), A. C. 339.

Extra-territorial Enactments. "The Legislature has no power over any persons except its own subjects—that is persons natural born subjects or residents or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them, and when legislating for the benefit of persons must *prima facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect." Per Parke B., *Jefferys v. Boosey* (1854), 4. H. L. C. at p. 926, *Shields v. Peck* (1883), 8 S. C. R. 579.

A Colonial Legislature has no jurisdiction to punish a crime committed beyond its jurisdiction; *MacLeod v. Attorney-General New South Wales* (1891), A. C. 445. In *R. v. Plowman* (1894), 25 O. R. 656, it was held that the Dominion Parliament, being a subordinate legislature, had no power to enact that it should be a crime for a British subject to go through a form of marriage abroad, and consequently, sec. 275 of the Criminal Code relating to bigamy was *ultra vires*. This decision conflicted with *R. v. Brerly* (1887), 14 O. R. 525. The Supreme Court has now decided that the sections of the code relating to bigamy are *intra vires*. Re Criminal Code (1897), 27 S. C. R. 461. The grounds for holding the sections to be valid are (1) they are not repugnant to any Imperial Act; (2) the sections relate only to British subjects resident in Canada who leave Canada with intent to commit the offence; (3) that a material part of the offence is committed in Canada; (4) that the Dominion Parliament is omnipotent so long as its legislation is not repugnant to that of the Empire.

Not delegates of Imperial Parliament. The Dominion Parliament and the Provincial Legislatures are not delegates of the Imperial Parliament. Within the limits of their respective jurisdictions they are as absolute as the Imperial Parliament; *Hodge v. Reg.* (1883), 9 App. Cas. 117; 3 Cart. 144; *R. v. Burah* (1878), 3 App. Cas. 889; 3 Cart. 409. *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282; 3 Cart. 432. The Dominion Parliament may interfere with the public rights in navigable waters. *Vancouver v. Canadian Pacific R'y. Co.* (1894), 23 S. C. R. 1. So far as abstract competence is concerned, property may be confiscated without compensation. *Re McDowell & Palmerston* (1892), 22 O. R. 563. The powers of the legislatures may be delegated to subordinate bodies, e.g., license commissioners. *Hodge v. Reg.* (1883), 9 App. Cas. 117.

Legislative power of Dominion Parliament. The enactments of the Parliament of Canada in so far as they are within its competency, override provincial legislation. Parliament has no authority, however, to directly repeal any provincial statute. The virtual repeal of the provincial statute can only be effected by repugnance between its provisions and the enactments of the Dominion. *Atty.-Gen. of Ontario v. Atty.-Gen. of Canada* (1896), A. C. 348, 366.

Exceptions from Provincial exclusive jurisdiction.—Exclusive legislative authority is by section 91 conferred upon Parliament with regard to all enumerated subjects "notwithstanding anything contained in this Act," and it is declared that nothing coming within the class of subjects there enumerated shall be deemed to come within the enumerated classes of subjects assigned exclusively to the Provincial Legislatures. This exception was not meant to derogate from the legislative authority given to provincial legislatures by the 16 sub-sections of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerated heads of s. 91. *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896) A. C. 360. There are, therefore, two areas within which the Dominion Parliament may legislate, (a) a primary area, viz.: all matters not assigned exclusively to the Provincial Legislatures, including those enumerated in s. 91, and this area the Provinces may not invade, (b) a secondary area, viz.: provisions which, though they touch and trench upon Provincial law and Provincial jurisdiction, are ancillary to the legislation within the primary area. These provisions are as effectual as if they belonged to the primary area, and exclude the right of the Provinces to legislate so as to derogate from or destroy the Dominion enactment, per Lord Watson in argument *Atty.-Gen. for Ont. v. Atty.-Gen. for Canada* (1894) A. C. See 30 C. L. J. 191.

The concluding clause of s. 91 had another object. Some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced in s. 91, and the clause was enacted in an endeavor to provide for cases of apparent conflict. *Citizens' Ins. Co. v. Parsons* (1881) 7 App. Cas. 108. Where this apparent conflict exists the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed by those given to the Dominion Parliament. For instance, "solemnization of marriage," though included literally in "marriage and divorce," is within the exclusive legislative authority of the provinces. And "direct taxation for provincial purposes" cannot be overridden by the powers of the Dominion to raise money by any mode of taxation. To prevent conflict, the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. *Ib.* pp. 108, 109.

Peace, order and good government.—The Parliament of Canada has general authority to legislate upon all matters relating to the peace, order and good government of Canada not falling within the classes of subjects allotted to the Provincial Legislatures. To those matters the exception from s. 92, which is enacted by the concluding clause of s. 91, has no application, and in legislating with regard to them the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by s. 92—*Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896) A. C. 348, at p. 360. The Provincial Legislatures, on the other hand, have general power, in addition to their 15 particularly enumerated powers, to legislate with regard to all matters of local or private nature within the Province.

Legislation under this clause will be valid, and in cases of repugnance to Provincial legislation will override the provincial:—

(1) If the Dominion Act falls within the enumerated powers of that Parliament.

(2) If it is not within the enumerated powers, but does not fall within any of the first fifteen enumerated powers of Provincial Legislatures, and (a) it affects the body politic of the Dominion as a whole, or (b) it has ceased to be merely local or provincial and has become unquestionably a matter of national concern and importance; S. C., p. 361.

Invasion of Provincial Jurisdiction. In the following cases enactments of the Dominion Parliament trenching upon Provincial jurisdiction have been held to be valid and *intra vires*.

INTRA VIRES ENACTMENTS OF DOMINION PARLIAMENT.

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|-----------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Elections. | (1879) Valin v. Langlois, 3 S. C. R. 1, 5 App. Cas. 115; 1 Cart. 158,—The Act 37 V. c. 10, imposing upon Provincial Courts the duty of trying Dominion Election Petitions. |
| | (1884) Doyle v. Bell, 32 C. P. 632; 11 A. P. 326; 3 Cart. 297,—37 V. c. 9, s. 109, giving penalties for bribery at Dominion Elections to common informer. |
| | (1891) Re North Perth, 21 O. R. 538,—the Electoral Franchise Act does not trench upon property and civil rights in the Province |
| Insolvency. | (1874) Crombie v. Jackson, 34 U. C. R. 575; 1 Cart. 685,—sec. 50 of Insolvent Act of 1869 providing that claims against Assignees be disposed of without suit. |
| | (1880) Cushing v. Dupuy, 5 App. Cas. 409; 1 Cart. 297,—40 V. c. 41, s. 38, providing that Judgment of Court of Appeal in Insolvency matters final. |
| | (1876) Kinney v. Dudman, ² Russell and Chesley, 19; 2 Cart. 412,—sec. 59 of Insolvent Act of 1869, giving precedence to Assignee over executions. |
| | (1882) Shields v. Peek, 8 S. C. R. 579; 6 A. R. 639; 31 C. P. 112; 3 Cart. 266,—sec. 136 of Insolvent Act of 1875 providing punishment for fraud in action for goods sold. |
| | (1890) Shoobred v. Clarke, 17 S. C. R. 265,—Winding Up Act applicable to Provincial Companies. |
| Banks and banking. | (1880) Smith v. Merchants' Bank, 28 Gr. 629; 8 A. R. 15; 8 S. C. R. 512; 1 Cart. 828,—provisions of the Bank Act allowing transfer of goods to Bank by Warehouse Receipt. |
| | (1891) Quirt v. The Queen, 19 S. C. R. 510; 17 O. R. 615; 17 A. R. 421,—32 V. c. 40, vesting assets of Bank of Upper Canada in the Crown for distribution among creditors. See 30 C. L. J. 194. |
| | (1894) Tennant v. Union Bank of Canada (1894) A. C. 31,—Bank Act gives Dominion Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province and confers upon a bank privileges as a lender which the provincial law does not recognize. |
| Incorporation of companies. | (1884) Colonial Building and Investment Assn. v. Atty.-Gen. of Quebec, 5 Legal News, 116; 9 App. Cas. 157; 3 Cas. 118,—37 V. c. 103, incorporating appellants with power to buy, sell and lease landed property and buildings valid, although powers exercised only in Province of Quebec. |
| Criminal procedure. | (1876) R. v. Bradshaw, 38 U. C. R. 564-32,—33 V. c. 31, s. 66, authorizing provincial Court to try appeal from Magistrate without Jury. |
| | (1882) Ward v. Reed, 22 New Brunswick, 279; 3 Cart. 405,—32, 33 V. c. 31, s. 78, providing that penalties recoverable in a Court of Record, although provincial Act declared County Courts should not have jurisdiction in such cases. |
| General powers. | (1883) Re Wetherell & Jones, 4 O. R. 713; 3 Cart. 315,—31 V. c. 76, providing for taking evidence by Provincial Courts for use in foreign tribunal, see also ex parte Smith, 16 L. C. Jurist, 140 s. p. |
| Peace, order and good government. | (1882) Russell v. The Queen, 7 App. Cas. 829; 2 Cart. 12,—the Canada Temperance Act prohibiting the sale of liquor in municipalities when assented to by Electors thereof. |
| Criminal law. | (1892) R. v. Stone, 23 O. R. 46,—52 V. c. 43, an Act to provide against frauds in supplying milk to cheese factories, etc. |

- (1894) *Flick v. Brisbin*, 26 O. R. 432,—criminal code, sections 865-866, providing that certificate of dismissal of charge or payment of penalty on charge for assault a bar to civil proceedings. See *Heywood v. Hay*, 46 U.C.R. 562; *Nevills v. Ballard* (1897), 28 O. R. 588.
- (1890) *McArthur v. Northern and Pacific Junction Railway Co.*, 17 A. R. 86; *Railways*, 4 Cart. 559,—Railway Act limiting time for bringing actions against Railway Company for injury caused by reason of railway to six months.
- (1898) *Re Canadian Pacific Railway Co. and Township of York*, 18 C.L.T. 48; 25 A. R. 65,—the Railway Act conferring jurisdiction upon the Railway Committee of the Privy Council to impose obligations as to crossings of railways, maintenance of gates, watchmen, etc. See also *Grand Trunk Ry. Co. v. Hamilton Radial Electric Ry. Co.* (1897), 29 O. R. 143.
- (1896) *Re Provincial Fisheries*, 26 S. C. R. 444,—R. S. C. c. 92. Fisheries.
- (1898) *Atty.-Gen. for Canada v. Atty.-Gen. for Ont.* (1898), A.C. 700,—respecting works constructed in or over navigable waters.

Other intra vires legislation. Enactments of the Dominion Parliament have also been attacked as *ultra vires*, upon the ground that they were beyond the power of a subordinate legislature or were in conflict with Imperial Legislation or because they violated some public right. In every instance the legislation has been sustained.

ENACTMENTS ULTRA VIRES OF THE DOMINION.

An enactment of the Dominion Parliament is *ultra vires* if it is within the exclusive jurisdiction of a Provincial Legislature.

It has already been seen that the Dominion Parliament in the exercise of its wide general powers may pass enactments which also would fall within the powers of the Provinces. Its enactments are not *ultra vires* unless they relate to matters purely within Provincial jurisdiction. The cases are, therefore, few.

In the following cases Dominion enactments were held to be *ultra vires*:

- (1885) *Liquor License Act*, 1883, 5 C.L.T. 66; 6 C.L.T. 18; 8 Legal News, 17. *Liquor* 26, 379, 409; *Dominion Sessional Papers* (1885), XVIII., No. 12, 85a; *licenses*. *Wheeler's Confederation Law in Canada*, p. 144. The exclusive power of licensing the liquor traffic is vested in the Provincial Legislatures. See remarks in argument of *Liquor Prohibition Appeal*, 1895, pp. 147, 319, 320.
- (1866) *Atty.-Gen. of Ont. v. Atty.-Gen. of Dominion* (1896), A.C. 349, the *Prohibition*. Dominion Parliament have no power to prohibit the sale of liquor in any one province, consequently they have no power to repeal provincial legislation upon the same point. The provisions of The Canada Temperance Act (Scott Act) purporting to repeal The Temperance Act of 1864 (Dunkin Act) are *ultra vires* of the Dominion Parliament.
- (1880) *McClanaghan v. St. Ann's Mutual Building Society* (1880), 24 L.C. *Provincia* *companies*. *Jurist*, 162; 2 Cart. 237. The Dominion Parliament has no power to provide for the liquidation of building societies in the Province of Quebec, whether solvent or not. See as to Insolvent Companies *Shoolbred v. Clarke* (1890), 17 S.C.R. 265, *supra*.
- (1881) *R. v. Mohr*, 7 Q.L.R. 183. 2. Cart. 257. In the absence of the object of a company incorporated by the Dominion Parliament being to connect two or more Provinces by telephone lines, or of the undertaking of the company being declared to be for the general advantage of Canada, or of two or more Provinces, an Act professing to confer a right to erect poles in the streets of cities and towns was held to be *ultra vires*.
- (1887) *Forsyth v. Bury*, 15 S.C.R. 543, an Act of the Dominion Parliament incorporating a company for the purchase of the Island of Anticosti, situated in the Province of Quebec, was said by Ritchie, C.J., and Strong, J., to be *ultra vires*, but the point was not decided as the Court held that the appellant was estopped from questioning the constitutionality of the Act.
- (1882) *R. v. Robertson*, 6 S.C.R. 52; 2 Cart. 65.
- (1898) *Atty.-Gen. for Canada v. Atty.-Gen. for Ont.* (1898), A.C. 700. Fisheries.

(1896) Re Provincial Fisheries, 26 S.C.R. 444. The provisions of R.S.C. c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. The powers of the Dominion respecting "Sea Coast and Inland Fisheries" do not give authority to deal with property and civil rights, such as the ownership of the beds of rivers, or of the fisheries. The Dominion Parliament has, however, absolute power of legislation short of conferring proprietary rights, such as laws, imposing a tax by way of license, or forbidding fish to be taken at improper season or in improper manner, or with destructive instruments.

HOW FAR INCIDENTAL POWERS OF DOMINION PARLIAMENT EXTEND.

The extent of the incidental power of the Dominion Parliament to trench on the enumerated powers of the provinces does not seem to be capable of a hard and fast dividing line. It has been said by eminent Judges that Parliament may act only so far as such interference may be necessary, and that any clause in an Act which unnecessarily interferes with the rights of the provinces is invalid. See per Ritchie, C.J., *R. v. Robertson* (1882), 6 S.C.R. 110, 111; per Burton and Maclellan, J.J., *McArthur v. Northern and Pacific Junction R. Co.* (1890), 17 A.R. 86; per Henry, J., *Merchants' Bank v. Smith* (1884), 8 S.C.R. at p. 541. In *Atty.-Gen. for Ont. v. Atty.-Gen. for Canada* (1896) A.C. at p. 360, Lord Watson said: "It also appears to their Lordships that the exception (the concluding part of s. 91) was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91."

It will be seen, however, that in every case where clauses in Dominion Acts have been attacked for interference with provincial powers, the Dominion legislation has been sustained, and we therefore have no example of "unnecessary interference." In *Tennant v. Union Bank of Canada* (1894), A.C. 31, Lord Watson said, at p. 46, that the expression "banking" in s. 91 was wide enough to embrace every transaction coming within the legitimate business of a banker, and that the provisions of the Bank Act as to warehouse receipts were valid, although they had the effect of modifying civil rights in the Province. The test of necessity was not in terms applied. In *Doyle v. Bell* (1884), 11 A.R. 335, Rose J., said: "I do not understand by the use of the word 'necessary' . . . that it is meant to lay down the doctrine that to bring within the powers of the Dominion Legislature any provision . . . it must necessarily appear that without such provision it would be impossible to carry into effect the intentions of the Legislature. . . . It cannot be that the Courts are to sit in judgment on the exercise of such discretion and dictate to the Legislature whether they shall adopt this or that mode because in the opinion of the Courts one mode is the more convenient or better or at least as well adapted to effect the purpose of the Legislature."

In *McDougall v. Campbell* (1877), 41 U.C.R. 332, 341, it was held that a barrister could not recover fees for services rendered in an enquiry before the Senate on a divorce bill by a wife and for suitable alimony. It was said "the Senate has no more claim to award alimony and to decide upon the custody of children than it has to devise a scheme for the education of children, etc. Such an enactment would be disregarded by the Courts here."

DOMINION ENUMERATED POWERS.

(2) **The regulation of trade and commerce.** These words include political arrangements in regard to trade, regulation of trade in matters of interprovincial concern and general regulation of trade affecting the whole dominion. *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 113.

The power to regulate does not imply the power to prohibit. It assumes the conservation of the thing to be regulated. *Atty.-Gen. of Ontario v. Atty.-Gen. of Dominion (Prohibition Case)* 1896), A.C. 349, 363.

Provincial legislation of the character mentioned below does not infringe on the exclusive power over trade and commerce given to the Dominion.

(a) **Taxing Statutes.** Bank of Toronto v. Lambe (1887), 12 App. Cas. 586.

(b) **Liquor License Acts.** Hodge v. Reg. (1884), 9 App. Cas. 117.

(c) **Police regulations** as to tires on wagons re Howe (1890), 2 B.C. Hunter 36. Acts regulating form and effect of particular contracts.

(a) Insurance policies, Citizens' Ins. Co. v. Parsons (1881), 7 App. Cas. 96.

(b) Bills of Lading, Beard v. Steele (1873), 34 U.C.R. 43.

(d) **General License Acts.** Angers v. Montreal (1876), 24 L.C. Jur. 259. Mallette v. Montreal, ib. p. 263.

(e) **Game Acts prohibiting export beyond Province.** R. v. Robertson (1886), 3 M.L.R. 620; R. v. Buscowitz (1895), 4 B.C. 132.

(f) **Butcher's Licenses.** Angers v. Montreal (1876), 24 L.C. Jur. 259; Mallette v. Montreal (1879), ib. p. 263.

(3) **Raising money by any mode or system of taxation.** The Dominion may issue licenses and charge a license fee. Atty.-Gen. for Canada v. Atty.-Gen. for Ont. (Fisheries Case) (1898), A.C. 700, 713.

As to instances of direct and indirect taxation, see *infra* s. 92 (2).

(10) **Navigation and Shipping.** R.S.C. c. 92, entitled "An Act respecting certain works constructed in or over Navigable Waters," is clearly legislation relating to "navigation," and is therefore *intra vires* of the Dominion Parliament: Atty.-Gen. for Canada v. Atty.-Gen. for Ontario (Fisheries Case) (1898), A.C. 700, 717.

Harbors. By s. 108 and the 3rd Schedule "Public Harbors are the property of Canada." This includes not only public works but also all that forms part of the harbor. Provincial legislation assuming to give the right to grant water lots in such harbor is invalid. Atty.-Gen. for Canada v. Atty.-Gen. for Ontario (1898), A.C. 700, 711, 714, and the foreshores between high and low water mark may be part of the harbor. Holman v. Green (1881), 6 S.C.R. 707. The Dominion may grant the foreshores to a Railway Company, Vancouver v. C.P.R., 23 S.C.R. 1.

Notwithstanding the exclusive legislative rights over navigation and shipping possessed by the Dominion Parliament the Provinces may:

(1) Incorporate a navigation Company, McDougall v. Union Navigation Co., 21 L.C. Jour. 63; Queddy River Boom Co. v. Davidson (1883), 10 S.C.R. 222.

(2) Extend the limits of a town to the middle of a navigable river, Central Vermont Railway v. St. John (1887), 14 S.C.R. 288.

(3) Tax Ferry-men and Ferries, Longueuil Navigation Co. v. Montreal (1888), 15 S.C.R. 560.

(12) **Sea coast and inland fisheries.** No proprietary rights in relation to fisheries are conferred by this section, and no proprietary rights can therefore be conferred by Dominion Legislature. It follows, therefore, that R.S.C. c. 55, s. 4, assuming to empower the grant of fishery leases conferring an exclusive right to fish in property of the provinces is *ultra vires*, and the subsidiary provisions of the same statute fall with it. Atty.-Gen. for Canada v. Atty.-Gen. for Ont. (Fisheries Case) (1898), A.C. 700, 714; 26 S.C.R. 444.

(13) **Ferries between a Province and any British or Foreign Country or between two Provinces.** A ferry between two points in a province is within the jurisdiction of the Provincial Legislature. Dumer v. Humberstone (1896), 26 S.C.R. 266.

(15) **Banking, Incorporation of Banks, and the issue of paper money.**

Under this provision the Dominion Parliament has power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province, and confers upon a Bank privileges as a lender which the provincial law does not recognize. In particular it may allow the transfer to a Bank of goods by way of security without registration, and without regard to the pro-

visions of a provincial chattel mortgage Act requiring all mortgages of goods to be registered. *Smith v. Merchants Bank* (1880), 28 Gr. 629; 8 A.R. 15; 8 S.C.R. 512; *Tennant v. Union Bank of Canada* (1894), A.C. 31.

The Dominion Parliament may vest the assets of a Bank in the Crown for distribution among creditors. *Quirt v. Reg.* (1891), 19 S.C.R. 510.

(16) **Savings Banks.** The provinces may tax banks. *Bank of Toronto v. Lambe* (1887), 12 App. Cas., and may tax their Dominion notes held as Reserve under the Bank Act. *Windsor v. Commercial Bank* (1882), 3 R. & G. 420.

(19) **Interest.** This extends only to interest on debts arising out of contracts and does not prevent a local Legislature from imposing a percentage of 10 per cent. on unpaid Municipal taxes. *Lynch v. Can. N. W. Land Co.* (1891), 19 S.C.R. 204.

(21) **Bankruptcy and Insolvency.** The main difficulty in dealing with the Dominion powers under this clause has been with regard to provincial acts which were said to invade the federal territory. The cases will be found collected *infra* under provincial powers.

It is a feature common to all known systems of bankruptcy and insolvency that some compulsory means are provided of procuring a ratable distribution of a debtor's assets among his creditors. *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1894), A.C. 189, 200.

The Act of the Dominion Parliament providing for the winding up of insolvent companies is valid, and applies to provincial companies, *Shoolbri v. Clarke* (1890), 17 S.C.R. 265, and it is at least doubtful if a provincial legislature could pass an Act of this kind. *Quirt v. Reg.* (1891), 19 S.C.R. 518, 522.

It is clear that the provincial legislatures cannot enact a Bankruptcy law even until the the Dominion Parliament passes enactments dealing with that subject. *Atty.-Gen. for Canada v. Atty.-Gen. for Ont.* (1899), A.C. 715.

A special Act providing for the realization and distribution of the assets of an insolvent bank is within the legislative competence of the Dominion. *Quirt v. Reg.* (1891), 19 S.C.R. 510. On the other hand a provincial Act for the relief of a society financially embarrassed with a view of preventing insolvency is valid. *L'Union St. Jacques de Montreal v. Belisle* (1874), L.R. 6 P.C. 31.

Ancillary provisions for the working out of an insolvency act may properly be enacted by the Dominion, although they fall within the classes of subjects assigned to the provinces. *Cushing v. Dupuy* (1880), 5 App. Cas. 409; *Shields v. Peek* (1882), 8 S.C.R. 379; *Crombie v. Jackson* (1874), 34 U.C.R. 375; *Kinney v. Dudman* (1876), 2 Russell & Chesley 19.

(23) **Copyrights.** The right to deal with colonial copyright within the Dominion is under the exclusive control of the Parliament of Canada as distinguished from the Provincial Legislatures; but this does not curtail the paramount authority of the Imperial Parliament. *Smiles v. Belford* (1877), 1 A.R. 436.

When a Canadian copyright is obtained prior to publication or copyright in England, the possessor thereof is secured completely against all interference in Canada even against English reproductions or copies made under a subsequent British copyright. *Anglo-Canadian Music Publishers v. Suckling* (1889), 17 O.R. 239.

(24) **Indians and lands reserved for the Indians.** In order to ensure uniformity of administration, all lands reserved for Indian occupation upon any terms or conditions are under the legislative control of the Dominion. But upon the estate of the Crown being disencumbered of the Indian title, the beneficial interest therein accrues to the Provinces in which they are situated. *St. Catherine's Milling Co. v. Reg.* (1888), 14 App. Cas. 46.

Moneys due in respect to Indian Lands may be recovered by the Dominion. *Mowat, A.-G. v. Casgrain* (1897), 6 Q.L.R. (Q.B.) 12.

(26) **Marriage and Divorce.** These words must be limited by the power of the provincial legislatures under s. 92 (12) as to the solemnization of marriage. *Citizens' Ins. Co. v. Parsons* (1882), 7 App. Cas. 108.

(27) **The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including procedure in criminal matters.** The Dominion Parliament may declare anything a crime, but only so as not to interfere with or

exclude the powers of the provinces of dealing with the same thing in its civil aspect and of imposing sanctions for the observance of the law so that though the result might be an inconvenient exposure to a double liability that possibility is no argument against the right to exercise the power, see per E. Blake, Q.C., 17 A.R. 225.

A provincial Statute imposing fine and imprisonment for fraud in adulterating milk was held to be valid, being for the protection of civil rights. *R. v. Wason* (1890), 17 A.R. 221, while a similar Dominion Statute was held to be valid as coming within its powers over criminal law, *R. v. Stone* (1892), 28 O.R. 46.

The competency of a provincial enactment cannot be tested by the severity of the sanction so long as that is limited to fine, penalty or imprisonment, per Osler, J.A., 17 A.R. 240.

It is competent for the Dominion to enact that a criminal prosecution shall bar a civil remedy, *Frick v. Brisbin* (1894), 26 O.R. 423.

Criminal Procedure. The Dominion Parliament has exclusive jurisdiction to provide the procedure to be followed in the prosecution of all offences which are crimes at common law, or made so by Statute within that Parliament's jurisdiction. The provincial Legislatures, on the other hand, have power to provide for the course of trial and adjudication of offenders against their lawful enactments. *R. v. Wason* (1890), 17 A.R. 232.

The utmost discretion is given as to the forms of procedure which may be enacted. *Riel v. Reg.* (1885), 10 App. Cas. 675, see *infra* provincial powers.

Enumerated classes are exclusive. Whenever a matter is one of the classes specified in s. 91, legislation in relation to it by a Provincial Legislature is incompetent. *Atty.-Gen. for Canada v. Atty.-Gen. for Ont.* (1898), A.C. 715.

PROVINCIAL ENACTMENTS.

Provincial enactments. From the circumscribed area allotted to the Provincial Legislatures it was to be expected that their enactments would be more frequently attacked than those in the central Parliament. But few cases have, however, arisen in which Provincial Legislation has in the end been found to be *ultra vires*. There has been perhaps a tendency in local courts to narrow Provincial powers, but the Privy Council has shown a tendency to support all legislation of a local or private nature. Some of the principles to be deduced from the cases are the following:

(a) The subject matter must fall within the classes of subjects enumerated in section 92. *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136.

(b) The onus is on the party alleging the Act to be *ultra vires* to show that the matter being of a local or private nature does also come within one or more of the classes of subjects specially enumerated in the 91st section. *L'Union St. Jacques de Montreal v. Belisle* (1874), L.R. 6 P.C. 36.

(c) Subjects which in one aspect fall within s. 92 may in another aspect and for another purpose fall within s. 91. *R. v. Hodge* (1883), 9 App. Cas. 117.

(d) The language of an enactment will be so construed as to bring it if possible within legislative authority. *Shields v. Peak* (1881), 8 S.C.R. 579; *McLeod v. Atty.-Gen. New South Wales* (1891), A.C. 455; *Monkhouse v. G. T. R. Co.* (1883), 8 A.R. 637; *Atty.-Gen. of Canada v. Atty.-Gen. of Ontario* (1894), 23 S.C.R. 458.

(e) Enactments of a provincial legislature may be valid although liable to be superseded by enactments of the Dominion Parliament. *Atty.-Gen. of Ont. v. Atty.-Gen. of Dominion* (1894), A.C. 189, 200; *Atty.-Gen. of Ont. v. Atty.-Gen. of Dominion* (1896), A.C. 348, 366.

(f) Because the powers of a provincial legislature may be used unwisely or so as to nullify the powers of parliament is no reason for placing a limit on whatever power falls within the legitimate meaning of the enumerated classes of subjects. *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 586.

(g) The general power to legislate concerning every matter in a provincial sense, local or private, given by s. 92 (16), although wide enough to cover, was not intended to include provincial legislation in relation to the classes of subjects already enumerated. *Atty.-Gen. of Ont. v. Atty.-Gen. of Dominion* (1896), A.C. 365.

ULTRA VIRES ENACTMENTS OF PROVINCIAL LEGISLATURES.

Bankruptcy and Insolvency. *Reg. v. Chandler* (1868), 2 Cart. 421, 1 Hannay 556, an Act providing for the discharge of a debtor from gaol on proof of inability to pay debts was held to be ultra vires as falling within the powers of the Dominion Parliament as to bankruptcy and insolvency.

It would appear, however, in the light of subsequent decisions to fall within the powers of the legislature as to provincial courts. *Ex parte Ellis* (1878), 1 P. & B. 593, 2 Cart. 527; *Atty.-Gen. of Ontario v. Atty.-Gen. of Dominion* (1894), A.C. 189; *Clarkson v. Ont. Bank* (1888), 15 A.R. 166.

Murdoch v. Windsor & Annapolis Ry. Co. (1877), 3 Cart. 368; *Russ. Eq.* 137, an Act for facilitating arrangements between Railway Companies and their creditors was held ultra vires for the same reason.

There would appear to be no objection to such an Act with regard to a provincial company so long as there was no conflict with a general Dominion Insolvency law. *L'Union St. Jacques de Montreal v. Belisle* (1874), L.R. 6, P.C. 31.

Criminal law. *Gibson v. McDonald* (1885), 7 O.R. 401; 3 Cart. 319, the provincial legislatures have no power to authorize a County Judge to preside at a Criminal Court of a county other than that for which he is appointed by the Governor-General, but see *Re County Courts of British Columbia* (1892), 21 S.C.R. 446, which holds the contrary.

Criminal law. *R. v. Toland* (1892), 22 O.R. 505, the provincial statute, 53 Victoria, c. 18 (O), conferring upon police magistrates the power to try and convict persons charged with forgery is ultra vires of the provincial legislature, being criminal procedure and therefore within the power of the federal parliament. But the Act so far as it provided that the courts of General Sessions should have such power is valid as being in relation to the constitution of a provincial court of criminal jurisdiction. *R. v. Levinger* (1892), 22 O.R. 690.

Corporations. *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; 1 Cart. 351, the Quebec Legislature had no power to repeal an Act of the Province of Canada creating a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, though it might have imposed conditions upon the transaction of business by the corporation in Quebec.

Railways. *Bourgoin v. La Compagnie du Chemin de Fer de Montreal, Ottawa, et Occidental Ry. Co.* (1880), 5 App. Cas. 381; 1 Cart. 233, a provincial legislature has no power to transfer a federal railway to a new company or to substitute for it a provincial company.

Supreme Court. *Clarkson v. Ryan* (1890), 17 S.C.R. 251; 4 Cart. 439, a provincial legislature has no power to limit the jurisdiction of the Supreme Court.

Taxation. *Atty.-Gen. of Quebec v. Queen's Insurance Co.* (1878), 3 App. Cas. 1090; 1 Cart. 117, an Act imposing a stamp tax upon policies of assurance is direct taxation, and therefore beyond the powers of a local legislature. So also is a stamp tax on exhibits in legal proceedings. *Atty.-Gen. of Quebec v. Reed* (1885), 10 App. Cas. 141.

Leprohon v. Ottawa (1878), 2 A.R. 522; 1 Cart. 592. The Court of Appeal held that every power conferred upon local legislatures was subject to an implied limitation that it must not encroach upon or interfere with the powers conferred elsewhere, and that a tax by or through a provincial legislature upon the means or instruments by which the Dominion Government is carried on is ultra vires and therefore void. See, however, other cases on taxation which do not appear to support this decision. See also *Timmerman v. St. John* (1893), 21 S.C.R. 711.

Intoxicating Liquors. Great conflict has existed as to the powers of provincial legislatures with reference to the sale of intoxicating liquors. It has now been settled that the exclusive jurisdiction over the licensing of the retail trade is vested in the provinces. The provinces, moreover, may punish infractions of its licensing laws by fine or by imprisonment at hard labor.

R. v. Hodge (1884), 9 App. Cas. 117. An Act prohibiting the sale of liquor within the province is within the powers of a local legislature so long as a Dominion prohibitory law is not in force in the locality to which such Act applies. The Parliament of Canada, on the other hand, cannot imperatively enact a prohibitory law adapted and confined to the requirements of localities within a province. A provincial legislature has no jurisdiction either to prohibit the manufacture in or the importation of liquors into the province; *Atty.-Gen. of Ontario v. Atty.-Gen. of Dominion* (1896), A.C. 348. A provincial legislature has the right to require brewers to take out a license. *Brewers and Maltsters' Assn. of Ontario v. Atty.-Gen. for Ont.* (1897), A.C. 231; *R. v. Halliday* (1893), 21 A.R. 42. The decision in *Severn v. Reg.* (1877), 2 S.C.R. 70 is overruled.

In *R. v. Lawrence* (1878), 43 U.C.R. 164, the provision of the Liquor License Act (still retained therein) relating to tampering with witnesses was held to be *ultra vires* as relating to criminal law, and in *R. v. Roddy* (1877), 41 U.C.R. 291, the provisions of the Liquor License Act relating to evidence of the defendant were held to be *ultra vires* as relating to criminal procedure, but since the decisions in *R. v. Hodge* (1883), 9 App. Cas. 117 and *R. v. Wason* (1890), 17 A.R. 221; *R. v. Bittle* (1892), 21 O.R. 605, these decisions cannot be said to be satisfactory except, perhaps, upon the ground that they were comprised in the domain of criminal law before Confederation.

Public Harbors. The provinces have no title to lands forming part of a public harbor. That part of R.S.O. (1897), c. 28, s. 49, assuming to authorize the grant of water lots in public harbors is *ultra vires*. *Atty.-Gen. of Can. v. Atty.-Gen. of Ont.* (1898), A.C. 714.

Fisheries. Regulations controlling the manner of fishing are within the exclusive competence of the Dominion Parliament, and sections 28-39 of R.S.O. c. 288 are *ultra vires*, *Atty.-Gen. of Canada v. Atty.-Gen. of Ont.* (1898), A.C. 714.

PROVINCIAL POWERS.

1. **Amendment of the Constitution.** The provincial legislatures may pass Acts defining their powers and privileges. The independence of the provincial legislatures from outside interference and their protection and the protection of their members from insult while in the discharge of their duties, are matters which may be classed as part of the Constitution. The legislature has none the less a right to protect and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence or brings the offender within reach of the criminal law. The legislature may relieve members of the House from civil liability for acts done and words spoken in the House. *Fielding v. Thomas*. (1896), A.C. 600, 610.

By the combined effect of clauses 1, 4 and 14 it is entirely within the discretion of a Provincial Legislature to determine by what officers of the Crown, or in other words, the Executive Government of the Province shall be represented in its Courts of law or elsewhere and to define by Act of Parliament the duties whether substantial or honorary which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. *Atty.-Gen. for Dominion v. Atty.-Gen. for Ontario*, 14 T.L.R. 106; (1898), A.C. 247.

A statute governing trials of controverted election petitions, and providing there shall be no appeal, is valid, and the Crown has no prerogative right to admit an appeal. *Theberge v. Landry* (1876), 2 App. Cas. 102.

2. **Direct taxation within the Province.** The subject of direct taxation falls wholly within the jurisdiction of provincial legislatures. *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. The provincial legislature may impose direct taxation for a local purpose upon a particular locality within the province. *Dow v. Black* (1875), L.R. 6 P.C. 272.

The definition of John Stuart Mill has been approved by the Privy Council as defining accurately the distinction between direct and indirect taxation. That definition is as follows: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price." Mill's Political Economy, Book V. c. 3.

The best general rule is to look to the time of payment, and if at the time the ultimate incidence is uncertain, then it cannot be called direct taxation. *Atty.-Gen. for Quebec v. Reed* (1884), 10 App. Cas. 144.

The following are instances of direct taxation which have been held to be valid.

A tax imposed upon banks carrying on business within a province varying in amount with the paid up capital and with the number of offices whether or not their principal place of business is within the province. (1887) *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

A tax of a specified sum imposed on each Insurance Company carrying on business in a province; *North British & Mercantile Insurance Co. v. Lambe* (1887), 12 App. Cas. 575.

A tax on Brewers; *Brewers and Maltsters' Assn. v. Atty.-Gen. for Ont.* (1897), A.C. 231.

A tax on companies not incorporated by or under the authority of the provincial legislature; *Halifax v. Western Ass. Co.* (1885), 18 N.S. 387; *Halifax v. Jones* (1896), 28 N.S. 454.

A tax on Dominion notes held by a Bank as portion of its cash reserve, *Windsor v. Commercial Bank of Windsor* (1882), 3 Russell & Geldert, 420; 3 Cart. 377.

A tax on ferrymen on steamboat ferries is intra vires; *Longueuil Navigation Co. v. Montreal* (1888), 15 S.C.R. 566.

A tax on mortgages; *Re Yorkshire Guarantee Co.* (1895), 4 B.C. 258.

A license tax on butchers; *Angers v. Montreal* (1876), 24 L.C.J. 259; 2 Cart. 335.

A penalty of 10 per cent. for non-payment of Municipal taxes; *Lynch v. Can. N. W. Land Co.* (1891), 19 S.C.R. 204.

A tax on manufacturers and traders; *Fortier v. Lambe* (1894), 25 S.C.R. 422.

The following are examples of taxation under the authority of a Provincial Legislature held to be invalid as being indirect.

An Act imposing a stamp duty on policies of insurance and premium receipts; *Atty.-Gen. for Quebec v. Queen Insurance Co.* (1878), 3 App. Cas. 1090.

A stamp duty to become part of the Consolidated Revenue fund of a Province imposed on exhibits filed in Court; *Atty.-Gen. for Quebec v. Reed* (1884), 10 App. Cas. 141; and even where the fund was to be set apart for the administration of justice; *Dulmage v. Douglas* (1871), 4 M.R. 495.

Uniformity of tax. The want of uniformity or equality in the apportionment of the tax does not make it unconstitutional; *Fortier v. Lambe* (1894), 25 S.C.R. 422.

4. Tenure of provincial offices. Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law or by special contract, hold their offices only during the pleasure of the Crown. *Shenton v. Smith* (1895), A.C. 229; *Dunn v. Reg.* (1896), 1 Q.B. 116. This is not by virtue of any special prerogative of the Crown, but because such are the terms of the engagement, as is well understood throughout the public service (1895), A.C. 235.

Where an Act provided for the dismissal of civil servants for specified offences it was held to be inconsistent with importing into the contract of service the term that the Crown might put an end to it at its pleasure; *Gould v. Stuart* (1896), A.C. 575.

The right to appoint Queen's Counsel has been rested upon this clause as well as upon numbers 1, 13 and 14; *Re Queen's Counsel* (1896), 23 A.R. 792 per *Burton J.A.*, at p. 803, and per *MacLennan, J.A.*, at p. 810; s.c. (1898), A.C. 247.

The appointment of Sheriffs and Justices of the Peace may also fall within this provision.

Police Magistrates. The power to appoint Police Magistrates and Justices of the Peace is vested in the Province; *Richardson v. Ranson* (1886), 10 O.R. 387.

Justices of the Peace. The right to appoint Justices of the Peace is vested in the Province; *R. v. Reno* (1868), 4 P.R. 281; *R. v. Bennett* 1882, 1 O.R. 445; *R. v. Bush* (1888), 15 O.R. 398; *Re Queen's Counsel* (1896), 23 A.R. 792; see p. 803, *R. v. Lee* (1887), 15 O.R. 353; *R. v. Horner* (1876), 2 Step. Dig. 450.

Officers may be appointed to enforce Dominion Acts; *License Commissioners of Frontenac v. County of Frontenac* (1887), 14 O.R. 741.

5. Public Lands. Escheated lands belong to the Province; *Atty.-Gen. v. Mercer* (1883), 8 App. Cas. 767.

On the extinguishment of the Indian title to lands in Canada granted by the proclamation of 1763, the beneficial title therein vests in the Province in which the lands are situate; *St. Catharines Milling and Lumber Co. v. Reg.* (1889), 14 App. Cas. 46; 4 Cart. 107.

The bed of all lakes, rivers, and other waters which at the time of confederation had not been granted by the Crown became vested in the Crown in right of the several provinces, subject to the provisions of section 108 as to public harbors; *Holman v. Green* (1881), 6 S.C.R. 707; *R. v. Moss* (1896), 26 S.C.R. 322; *re Provincial Fisheries* (1896), 26 S.C.R. 444; (1898), A.C. 700.

"In construing these enactments it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the Province as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown," per Lord Watson (1889), 14 App. Cas., p. 56.

8. Municipal Institutions. Some controversy has existed as to the meaning of this phrase. In *Harris v. Hamilton* (1879), 44 U.C.R. 641, it was said by Armour, J.: "It must have been in the contemplation of the Legislature that existing laws relating to municipal institutions should not be affected, and that the Local Legislatures should have power to alter and amend those laws."

In *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896), A.C. 348, the contention was made that the Legislatures might endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. The Privy Council said, at p. 364: "Their Lordships can find nothing to support that contention in the language of s. 92. No. 8 which according to its natural meaning simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation the legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess, and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92, other than No. 8."

In incorporating a town a provincial legislature may extend the limits thereof to the centre of a navigable river; *Central Vermont Ry. Co. v. St. Johns* (1887), 14 S.C.R. 288; 14 App. Cas. 590.

In *Poulin v. Quebec* (1884), 9 S.C.R. 185; 3 Cart. 230, and in *Hodge v. Reg.* (1884), 9 App. Cas. 117, at p. 131, the Supreme Court and Privy Council respectively assumed that police regulations respecting the liquor traffic would fall under the powers respecting Municipal Institutions. It would seem, however, that they more properly fall within No. 16, the powers respecting local and private matters; *Atty.-Gen. of Ont. v. Atty.-Gen. for Dominion* (1896), A.C. 348, see *supra*.

The same may be said of the decision in *Ex parte Pillow* (1883), 27 L.C. Jur. 216; 3 Cart. 357, where the right of provincial legislatures to authorize municipal corporations to pass by-laws against nuisances was said to be incidental to municipal institutions.

See also *Lynch v. Can. N. West Land Co.* (1891), 19 S.C.R., p. 204, *supra*.

9. **Licenses.** That the exclusive power of licensing the retail sale of liquors in the provinces is vested in the Provincial Legislatures is now conclusively settled.

Hodge v. Reg. (1884), 9 App. Cas. 117.

Sulte v. Three Rivers (1885), 11 S. C. R. 25.

Re Liquor License Act 1883 (1885), 5 C. L. T. 66, 8 Legal News 26, 379, 409; 4 Cart. 342.

It is now also settled that provincial legislatures have the right to require brewers to take out a license so long as the act is not indirect taxation.

Molson v. Lambe (1887), 15 S. C. R. 253.

R. v. McDougall (1889), 22 N. S. 462.

McManamy v. Sherbrooke (1890), M. L. R. 6 Q. B. 409.

R. v. Halliday (1893), 21 A. R. 42.

Brewers' and Maltsters' Association v. Atty.-Gen. for Ont. (1897), A. C. 231.

The case of *Severn v. Reg.* (1878), 2 S. C. R. 70, must now be treated as overruled.

The Lords of the Privy Council had occasion to consider the words "other licenses" in *Brewers' and Maltsters' Assn. v. Atty.-Gen. for Ont.* (1897), A. C. 231, and they said at p. 237, "They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include 'shop, saloon, tavern' and 'auctioneer' licenses and which would exclude brewers' and distillers' licenses." See on this point *Sun Fire Office v. Hart* (1889), 14 App. Cas. 98, *Pigeon v. Recorder's Court Montreal* (1890), 17 S. C. R. 495.

A provincial legislature has power under this clause to authorize a municipal corporation to impose a license fee on any private stall or shop, *Pigeon v. Recorder's Court Montreal* (1890), 17 S. C. R. 495. A revenue may be raised by fishery licenses. *Atty.-Gen. for Canada v. Atty.-Gen. for Ont. (Fisheries case)* (1898), A. C. 700.

In *R. v. Howard* (1880), 45 U. C. R. 346, doubt was expressed as to the power of the Local Legislatures to limit the number of licenses or to authorize the limiting thereof, but the reasoning was based on the assumption that the Local Legislatures had no power to prohibit the retail sale of liquor, a view now clearly untenable. See *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896), A. C. 348, 24 S. C. R. 170.

The right to license (coupled at any rate with clauses 15 and 16) includes the right of imposing penalties for violating the provincial laws in relation thereto, *Ex. parte Leveille* (1877), 2 Stephens Dig. 445; 2 Cart. 34; *R. v. McMillan* (1873), 2 Pugsley 110, 2 Cart. 489.

The Local Legislatures may also prescribe the qualifications required to be possessed by a licensee and may debar him from certain civil rights; *Danaher v. Peters* (1889), 17 S. C. R. 44; 4 Cart. 425.

Requiring licenses to be taken out is not an interference with trade and commerce. See in addition to foregoing cases, *Angers v. Montreal* (1876), 24 L. C. Jurist 259, *Mallette v. Montreal* (1879), 24 L. C. Jurist 263, 2 Cart. 335, 340, in which cases a license tax on butchers was held good. An Act which purported to be a licensing Act, but which did not compel the licensee to pay anything for the license nor impose any penalty for not taking it up, but which required a stamp to be placed on policies issued by the licensee was held to be ultra vires as indirect taxation; *Atty.-Gen. for Quebec v. Queen Ins. Co.* (1878), 3 App. Cas. 1090, 1098.

[10. Local works and undertakings.

[11. **Incorporation of companies.** A Provincial Legislature has power to authorize the construction of a railway in the Province to connect at the boundary with a railway in a foreign country; *European and North American Ry. Co. v. Thomas* (1871) 1 Pugsley 42; 2 Cart. 439.

A company may be incorporated under a Provincial law to erect a boom in a navigable river, but the Provincial Legislature can confer no power to obstruct navigation. Authority for such purpose may be acquired under R.S.C. c. 92. *Queddy River Driving Boom Co. v. Davidson* (1883) 10, S.C.R. 222.

A Dominion Railway coming within clause 10 (a) as being a work for the general advantage of Canada is not subject to the provisions of the Provincial Railway Act as to packing frogs, such Act professing only to apply to railway companies in respect of which the Provincial Legislature had authority to enact such provisions. *Monkhouse v. Grand Trunk Ry. Co.* (1883) 8 A.R. 637.

On the incorporation of a company the Legislature has power to say what are the powers of the Company under the incorporation. *Re Dom. Provident Assn.* (1894) 25 O. R. 619.

On incorporating a Company a Legislature may authorize the borrowing of money at any rate of interest already legalized as to other persons having a right to borrow. *Royal Can. Ins. Co. v. Montreal Warehousing Co.* (1880) 3 L.N. 155, 2 Cart. 361.

A Provincial Legislature has exclusive jurisdiction to incorporate a Navigation Company, the operations of which are limited to a particular Province. *Macdougall v. Union Navigation Co.* (1877) 21 L. C. Jur. 63, 2 Cart. 228.

A Provincial Act authorizing the winding up of provincial companies is valid; *Re Wallace Huestis Grey Stone Co.* (1881) Russell's Eq. Rep. 461; 3 Cart. 374, but see as to an insolvent company, *Quirt v. Reg.* (1891) 19 S. C. R. 518, 522.

A company incorporated before confederation may be required to take out a provincial license to sell gunpowder, as a matter of police regulation. *Hamilton Powder Co. v. Lambe* (1885), M. L. R., 1 Q. B. 400.

12. Solemnisation of Marriage. In *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, at p. 108 the Privy Council said "Notwithstanding this endeavor to give preeminence to the Dominion Parliament" (referring to the wide terms of Section 91) "in cases of a conflict of powers it is obvious that in some cases where this apparent conflict exists the legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament. Take as one instance, the subject 'Marriage and Divorce' contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet 'Solemnization of marriage in the Province' is enumerated among the classes of subjects in Sec. 92, and no one can doubt, notwithstanding the general language of Sec. 91, that this subject is still within the exclusive authority of the legislature of the Provinces."

13. Property and civil rights within the Province. In the cases where provincial legislation has been held to be valid under this section the main difficulty has been to answer the objection that the exclusive powers of the Dominion Parliament were infringed in respect of the following matters: (1) Trade and Commerce, (2) Bankruptcy and Insolvency, (3) Criminal Law.

Trade and commerce. The first question to be decided is, whether the Act impeached falls within any of the classes of subjects enumerated in Sect. 92 and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not fall within one of the enumerated classes of subjects in Sect. 91, and whether the power of the Provincial Legislature is or is not thereby overborne. *Citizens Ins. Co. v. Parsons* (1881) 7 App. Cas. 96 at p. 109.

Civil rights embrace not only rights as flow from law but also rights arising from contract. The phrase does not, however, include all contracts, because some contracts as for instance bills of exchange and promissory notes fall within section 91 (18) and are therefore within the jurisdiction of the Dominion Parliament. Both sections must therefore be read together. The power of the Dominion Parliament to pass enactments respecting the regulation of trade and commerce would include political arrangements with regard to trade requiring the sanction of Parliament, regulation of trade in matters of provincial concern and it may be the general regulation of trade affecting the whole Dominion. But the authority of the Dominion Parliament does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a particular Province. If, therefore, Insurance Companies, British, Foreign, Dominion or Provincial choose to make contracts of insurance in Ontario relating to property in that Province, the Legislature of that Province may (without touching their status) enact that such contracts shall be subject to certain conditions. *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, 109-114.

Bankruptcy and Insolvency. It was pointed out in *Atty.-Gen. of Ont. v. Atty.-Gen. for Dominion* (1894) A. C. 189 at p. 200 that it is a feature common to all the known systems of bankruptcy and insolvency that some compulsory means are provided of procuring a ratable distribution of a debtor's assets among his creditors, and that although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. It was, therefore, held that legislation relating to assignments purely voluntary for the benefit of creditors did not infringe on the exclusive legislative power conferred upon the Dominion Parliament as to bankruptcy and insolvency.

Criminal Law. The dividing line, if such it may be called, between legislation respecting civil rights and criminal law is well illustrated by *R. v. Wason* (1890) 17 A. R. 221. An Act to provide against frauds in supplying milk to cheese or butter manufactories had been held to be ultra vires by the Queen's Bench Division as constituting a new crime. This decision was reversed by the Court of Appeal. It was pointed out that the competency of the enactment cannot be tested by the severity of the sanction. The legislature when really dealing with property and civil rights must have power to say "thou shalt" or "thou shalt not." The right cannot be denied to a Provincial Legislature to legislate for the better protection of rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade and to punish the infraction of the law so long as Parliament has not occupied the precise field. The thing forbidden is not in such a case converted into a crime merely because it happens to be also morally wrong, more than any other thing which they may lawfully forbid becomes a crime merely because it is forbidden under a penalty.

The following cases will illustrate the application of the foregoing principles ;

Re Goodhue (1872) 19 Grant, 366. The Provincial Legislature has power to pass an Act confirming an arrangement whereby a testator's residuary estate in Ontario was divided before the time provided by the Will for distribution.

Re Windsor and Annapolis Railway, (1883) 4 R. & G. 420, 3 Cart. 387, an Act to facilitate arrangements between Railway Companies and their creditors is within the competence of provincial legislature.

Beard v. Steel (1873), 34 U. C. R. 43, 1 Cart. 683, the provincial Act providing that all rights of suit shall pass to the Consignee of goods under a Bill of Lading, is valid.

Kennedy v. Toronto (1886) 12 O. R. 211, an Act enabling the Corporation of Toronto to lease, sell or otherwise dispose of lands dedicated to them for a public park, was held to be valid.

R. v. Coote (1873) Law R. 4 P. C. 599. A Provincial Act authorizing Fire Commissioners to investigate the origin of fires and commit to prison witnesses refusing to answer, without just cause, is valid.

Jones v. Canada Central Ry. Co. (1881) 46 U. C. R. 250. Where obligations are authorized to be contracted under a local Act, such debts may be dealt with by the same legislature, notwithstanding they are domiciled out of the Province.

Ex parte Dansereau (1875), 19 L. C. Jur. 210, 2 Cart. 165, a provincial Act, providing for the punishment of witnesses failing to obey a summons is valid.

Bennett v. Pharmaceutical Assn. (1881) 1 Dorion 366, 2 Cart. 250. Provincial Legislatures may prescribe the qualification for professions or businesses, and may appropriate fines to Municipal or private corporations.

Keefe v. McLennan (1876) 2 Russell and Chesley, 5, 2 Cart. 400. Provincial Legislatures may regulate the sale of liquors, poisons, or unwholesome provisions.

Cleveland v. Melbourne (1881) 4 L.N. 277, 2 Cart. 241. Provincial Legislatures may authorize the Lieutenant Governor to revoke the right to tolls.

Can. Southern Railway Co. v. Jackson (1890) 17 S.C.R. p. 316, 4 Cart. 451. The Workmen's Compensation Act is applicable to Dominion Railways. See *Washington v. Grand Trunk Ry. Co.* (1897) 24 A.R. 183, reversed by Supreme Court 28 S.C.R. 184.

Citizens Ins. Co. v. Parsons (1882) 7 App. Cas. 96. A Provincial Act providing for uniformity of conditions in Fire Insurance Policies, is valid.

R. v. Wason (1890) 17 A.R. 221. A Provincial Act providing for punishment for fraud in the sale of milk, is valid. See *R. v. Stone* (1893), 23 O.R. 26.

Atty.-Gen. for Ont. v. Atty.-Gen. for Dom. (1894) A.C. 189. A Provincial Act giving an Assignee for the benefit of creditors precedence over execution creditors is valid.

Re McDowall and Palmerston (1892) 22 O.R. 506. A Provincial Legislature may change the ownership of land without compensation, and *a fortiori* may close a burial ground, remove the dead and vest the land in a corporation on payment of compensation.

Re De Veber (1882) 21 N.B. Rep. 401, 2 Cart. 532. A Provincial Act that as against an Assignee in insolvency, a bill of sale should only take effect from filing, is valid.

The opinions expressed in Clarkson v. Ontario Bank (1888) and other cases reported, 15 A.R. 166, against the constitutional validity of the Act respecting assignments and preferences must now be treated as over-ruled.

An Act giving jurisdiction to Justices of the Peace to order payment of wages is *intra vires*. Re Gower v. Joyner (1897) 17 C.L.T. 298.

A servant of the Dominion Government is not relieved from the penalties imposed by a Provincial Act for non-performance of labor in cleaning a highway by shewing that his duties required him at the time to assist in cleaning the track of a Dominion Railway. Fillmore v. Colburn (1897) 28 N.S.R. 292.

14. **Administration of Justice.** (a) Constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction.

Queen's Counsel. The right to appoint Queen's Counsel is vested in the Provincial Executive. In Re Queen's Counsel (1906) 23 A.R. 792. The Act authorizing such appointment is within the legislative authority of the Provincial Legislature. s. c. Atty.-Gen. for Dominion v. Atty.-Gen. for Ontario, 14 T.L.R. 108; (1898) A.C. 247.

Lenoir v. Ritchie (1879) 3 S.C.R. 575, is over-ruled.

Judges. But for the express authority given to the Dominion Government by section 96 to appoint Judges their appointment would also have been a matter within subsections 4 and 14 of section 92. Per Maclellan, J. A., 23 A.R. 811.

Provincial Courts. The Provincial Legislatures may enlarge the jurisdiction of provincial Courts including those of criminal jurisdiction; e.g. to give the General Sessions jurisdiction to try a prisoner on an indictment for forgery. E. v. Levinger (1892) 22 O.R. 690.

Except as to the appointment of Judges of Superior, District and County Courts, the courts of each Province, including the Judges and officials of the Court, together with those persons who practise before them are subject to the jurisdiction and control of the Provincial Legislature; that Legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners whether they be pleaders or solicitors. Re Queen's Counsel; Atty.-Gen. for Dominion v. Atty.-Gen. for Ont. 14 T.L.R. 108 (1898) A.C. 247.

A provision in a Dominion Act allowing parties on the trial of an appeal against a summary conviction to dispense with a jury was held not to be *ultra vires* or an interference with the constitution of the court. R. v. Bradshaw (1876) 38 U.C.R. 504; 2 Cart. 602.

A Provincial statute providing that a Judge of one County or District might preside at a criminal court in another County or District is valid. Re County Courts of British Columbia (1892), 21 S.C.R. 446; see contra Gibson v. McDonald (1885), 7 O.R. 401.

The Provincial Acts relating to the attendances of Grand and Petit Jurors at criminal courts are valid. R. v. Foley (1873), Stevens Dig. 381; 2 Cart. 653; see R. v. O'Rourke (1882), 1 O.R. 404.

Division Courts.—The Provincial Legislatures have complete jurisdiction over Division Courts, including the appointment of Judges and officers thereof; Re Wilson v. McGuire (1883), 2 O.R. 118.

Justices of the Peace.—The right to appoint Justices of the Peace is vested in the provinces; R. v. Reno (1869), 4 P.R. 281; R. v. Bennett (1882), 1 O.R. 445; Richardson v. Ransom (1885), 10 O.R. 387; R. v. Bush, (1888), 16 J.R. 398; Re Queen's Counsel (1896), 23 A.R. 792; see p. 803; R. v. Lee (1887), 15 O.R. 353; R. v. Horner (1876), 2 Step. Dig. 450.

14 (b) Procedure in Civil Matters in those Courts.

Executions from Provincial Courts.—There can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the Provincial Parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that Parliament. The execution is a mere creature of the law, which may determine and regulate the rights to which it gives rise. Accordingly, a Provincial Act postponing executions to a subsequent voluntary assignment by the execution debtor is valid. *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1894), A. C. 189.

Jurisdiction of Police Magistrates.—The Statute of the Province of Ontario which authorizes Police Magistrates to try and convict persons charged with forgery, is *ultra vires*; *R. v. Toland* (1892), 22 O. R. 505.

Criminal Procedure.—Notwithstanding the reservation of criminal procedure to the Dominion Parliament, there is, by necessary implication, power to the Provincial Legislatures so far to regulate criminal procedure (if that be its proper name) as to provide for the course of trial and adjudication of offenders against its lawful enactments; *R. v. Wason* (1890), 17 A. R. 221.

The Quebec License Act taking away certiorari to bring up a conviction under that Act is *ultra vires*; *Pope v. Griffith* (1892), 16 L. C. Jurist, 169; 2 Cart. 291; *Ex parte Duncan* (1872), 16 L. C. Jurist, 188; 2 Cart. 297; *Page v. Griffith* (1873), 17 L. C. Jurist, 302; 2 Cart. 308; *Cote v. Chauveau* (1880), 7 Q. L. R. 258; 2 Cart. 311.

Punishment of witnesses.—A Provincial Act providing for summoning witnesses and punishing them for non-attendance is *ultra vires*; *Ex parte Danseur* (1875), 19 L. C. Jur. 210; 2 Cart. 165.

Judgment Debtor.—A Provincial Legislature may provide for the imprisonment of judgment debtors for obtaining credit by fraud or other criminal act, *Ex parte Ellis* (1878), 1 Pugs. & B. 593; 2 Cart. 527, and may provide for the discharge of any debtor imprisoned under process from any Court, *Johnson v. Poyntz* (1881), 2 Russ. & Geld. 193; 2 Cart. 416.

Imprisonment for debt.—A Provincial Legislature may abolish imprisonment for debt. *Armstrong v. McCutcheon* (1874), 2 Pugs. 381; 2 Cart. 404.

Delegation of judicial powers.—An Act authorizing all the exercise of all powers of a Judge by a Master in the winding up of a company under a Provincial Act may be validly passed by a Provincial Legislature; *Re Dominion Provident Assn.* (1894), 25 O. R. 619.

Gaol limits.—The subject of gaol limits does not so relate to Insolvency as to make a Provincial Act extending them *ultra vires*; *McAlmon v. Pine* (1873), 2 Pugs. 44; 2 Cart. 487.

Appeals to Supreme Court.—It is doubtful if an appeal lies to the Supreme Court where a Provincial Act expressly provides that it shall not lie; *Danjon v. Marquis* (1879) 3 S. C. R. 251.

Habeas Corpus.—It is doubtful if sec. 51 of the Supreme Court Act giving jurisdiction to Judges of the Supreme Court to issue writs of Habeas Corpus is within the powers of the Dominion Parliament. *Re Sproule* (1886), 12 S. C. R. 140.

Proceedings against absentees.—A statute of a local legislature authorizing proceedings against absentees or contracts made or to be performed in the colony is *ultra vires*. Whether the judgment will be enforced by the Courts of another country is a question for those Courts to determine and does not affect the validity of the local law; *Ashbury v. Ellis* (1893), A. C. 339; *Stairs v. Allan* (1896), 28 N. S. R. 410.

Election petitions.—The Dominion Controverted Elections Act in committing jurisdiction to the Provincial Courts for the trial of Election Petitions and providing the procedure therefor does not contravene clause 14; *Valin v. Langlois* (1879), 5 App. Cas. 115.

Where a Provincial Statute provides that a judgment on an election petition shall not be susceptible of appeal, the Crown has no prerogative right to allow an appeal; *Theberge v. Landy* (1876), 2 App. Cas. 102; *Kennedy v. Purcell* (1888), 59 L. T. 279.

15. Imposition of Punishment for Enforcing Laws within Provincial Jurisdiction.

Encroachment upon "criminal law." Parliament is authorized to make the laws of procedure affecting the criminal law which it enacts. Each of the legislatures is authorized to make the laws of procedure affecting the penal laws which they enact respectively. *Pope v. Griffith* (1872), 16 L.C. Jur. 169; 2 Cart. 291.

A sanction appropriate to crimes may be constitutionally attached to a provincial law. *R. v. Wason* (1806), 17 A.R. 221, 240.

The words the "Criminal Law" in s. 91 do not mean that the Local Legislature had not the power to legislate so as to punish by fine or imprisonment with the view of enforcing the laws. *R. v. Boardman* (1871), 30 U.C.R. 553.

Hard Labor. "Imprisonment" means restraint by confinement in a prison with or without its usual accompaniment "hard labor." *R. v. Hodge* (1882), 9 App. Cas. 117, 133; *R. v. Frawley* (1882), 7 A.R. 246.

Fine and Imprisonment. Both modes of punishment may be authorized. *Ex parte Papin* (1871), 15 L.C. Jur. 334; (1872), 16 L.C. Jur. 319; 2 Cart. 320, 322.

Compounding Offences. Punishment may be authorized for compounding offences against provincial laws. *R. v. Boardman* (1871), 30 U.C.R. 553.

No punishment imposed. A law without a sanction is *brutum fulmen*. The Parliament of Canada has provided that it is an offence punishable with one year's imprisonment to disobey a provincial Act by wilfully doing any act which it forbids or omitting to do any act which it requires to be done unless some penalty or other mode of punishment is expressly provided by law. *Criminal Code*, s. 133.

Pardoning power. It would seem that the weight of judicial opinion is that the power to remit penalties and of commuting and remitting sentences imposed for violation of laws within provincial jurisdiction may be validly delegated by a Provincial Legislature to the Lieutenant-Governor or other officer. *Atty.-Gen. for Can. v. Atty.-Gen. for Ont.* (1890), 20 O.R. 222; 19 A.R. 31; 23 S.C.R. 458.

Several of the Judges, however, while holding the Act in question constitutional relied upon the provision contained therein that the same should only relate to matters within the jurisdiction of the Province, and there being no proceeding in dispute which had been attempted to be justified under the Act it was impossible to decide whether the pardoning power could be exercised under any power except that expressly conferred by the Crown.

Application of penalties. The Legislature may provide that the penalties or any portion thereof may be paid to any person or corporation e.g. the College of Pharmacy. *Bennett v. Pharmaceutical Assn. of Quebec* (1881), 1 Dorion 336; 2 Cart. 250.

Legislative Assembly. Insults, assaults or libels upon members of the legislature may be prohibited and punished and an Act authorizing the House to inquire into and punish the offence is *intra vires*. *Fielding v. Thomas* (1896), A.C. 600.

16. All matters of a merely local or private nature in the Province. It will be noticed that the concluding clause of s. 91 provides that matters coming within any of the classes of subjects enumerated in s. 91 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned to the Provincial Legislatures.

In *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96 at p. 108, it was said by the Judicial Committee that that paragraph applied in its grammatical construction only to No. 16 of s. 92. In *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896) A.C. 348 at p. 359 it is said, "The observation was not material to the question arising in that case and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the 16 heads of s. 92 as being from a provincial point of view of a local or private nature."

The provincial legislatures have under this clause jurisdiction over all local or private matters in the province not before enumerated except (1) those enumerated in s. 91 and (2) such matters as are unquestionably of Canadian interest and importance. The Dominion Parliament must be strictly confined to such matters and ought not to trench upon Provincial Legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which in supplement of its enumerated powers is conferred upon the Parliament of Canada by section 91 would not only be contrary to the intent of the Act but would practically destroy the autonomy of the Provinces. If it were once conceded that the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each Province are substantially of local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the Provincial Legislatures (1896) A. C. pp. 360, 361.

A matter cannot logically be held to fall within No. 16 and any of the enumerated classes of subjects; No. 16 has the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada so far as supplementary of enumerated subjects fulfils in s. 91. It assigns to the Provincial Legislature all matters in a provincial sense, local or private which have been omitted from the preceding enumeration, and although its terms are wide enough to cover they were obviously not meant to include Provincial Legislation in relation to the classes of subjects already enumerated, (1896) A. C. 365.

Prohibition. A Provincial Legislature has (in the absence of similar Dominion Legislation) power to prohibit the retail sale of liquor; its manufacture if carried on under such circumstances and conditions as to make its prohibition a merely local matter in the Province but it would not have power to prohibit the importation of such liquors into the Province, *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896) A. C. 348.

Municipalities may still exercise the powers given by the Temperance Act of 1864 to prohibit the sale of intoxicating liquors, *Noel v. Corp'n. of Richmond*, 1 Dorian 333, 2 Cart. 246.

The Ontario Act 39 V. c. 26 (O), R.S.O. (1877) c. 182, ss. 38-42, 41 V. c. 14, providing for officials to enforce the Temperance Act of 1864 is not *ultra vires* License Commissioners of Prince Edward v. County of Prince Edward (1879) 26 Gr. 452.

The Provincial Legislatures may pass enactments for regulating the closing of saloons, *R. v. Hodge* (1883) 9 App. Cas. 117, *Poulin v. Quebec* (1884) 9 S. C. R. 185.

Nuisances. The fact that the Parliament of Canada may enact as part of the criminal law acts for the punishment of persons guilty of committing nuisances does not prevent a local legislature from authorizing municipalities to pass by-laws against nuisances hurtful to public health. *Ex parte Pillow* (1883), 27 L. C. Jur. 216; 3 Cart. 357.

Local Taxation. A Provincial Legislature may authorize a municipality to raise by local taxation a subsidy designed to promote the construction of a railway extending beyond the province but already authorized by Statute. *Dow v. Black* (1875), L. R. 6, P. C. 272.

An Act providing for the relief of a society financially embarrassed incorporated in the Province, is in respect of a matter clearly private and clearly local and is therefore in the absence of Dominion Legislation covering the particular state of facts within the exclusive competency of a Provincial Legislature. *L'Union St. Jacques de Montreal v. Belisle* (1874), L. R. 6, P. C. 31.

Police Magistrates. The Provincial Legislatures have exclusive power to authorize the appointment of Police Magistrates for the Province or any parts thereof. *Richardson v. Ramon* (1886), 10, O. R. 387.

Canada Temperance Act. Provincial Legislatures have authority to pass legislation providing for the expenses of the enforcement of a Dominion Act. License Commissioners of Frontenac v. County of Frontenac (1887), 14 O. R. 741.

Legislative Assembly. A Provincial Legislature may authorize an inquiry into and punishment of an interference with the powers conferred upon it by insult or violence and none the less so because the interference is of a character which involves the commission of a criminal offence or brings the offender within reach of the criminal law, *Fielding v. Thomas* (1896), A. C. 600, but such provisions will not oust the jurisdiction of the Courts or prevent the punishment of the offence under the criminal law. *R. v. Bunting* (1885), 7, O. R. 524.

Queen's Counsel. The appointment of Queen's Counsel for Provincial Courts if not within the preceding clauses might be justified under No. 16. *Per Burton, J. A., Re Queen's Counsel* (1896), 23 A. R. 804.

DOMINION RAILWAYS.

Under s. 92 (10) such works as although wholly situate within any province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces are excepted from provincial legislative jurisdiction.

By the "Railway Act" (51 V. c. 29), ss. 306, 307, the Dominion Parliament declared the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway and the Canadian Pacific Railway to be works for the general advantage of Canada, and each and every branch line or railway then or thereafter connecting with or crossing the said lines of railway or any of them is a work for the general advantage of Canada, and every such railway and branch line is subject to the legislative authority of the Parliament of Canada. SS. 3 and 4 of the same Act enact that the provisions of the Act extend to all persons, companies and railways within the legislative authority of the Parliament of Canada, and as to matters within its legislative authority, and especially as to railway crossings and junctions, offences and penalties and statistics to all persons whether otherwise within their legislative authority or not. The provisions are *intra vires* of the Dominion Parliament; *Grand Trunk Ry. Co. v. Hamilton Radial Electric Ry. Co.* (1897), 29 O. R. 143, and they remove from the effect of provincial legislation, as to the construction or arrangement of the railway track itself, every railway named or which crosses those named. *Washington v. Grand Trunk Ry. Co.* (1897), 24 A. R. 183. The provincial legislation is not *ultra vires* but inapplicable by the effect of the Dominion legislation giving to a former provincial work the *Status* of a Dominion work; *Clegg v. Grand Trunk Ry. Co.* (1886), 10 O. R. 708; *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467. Accordingly provincial Acts with reference to the packing of frogs. *Clegg v. Grand Trunk Ry. Co.* (1886), 10 O. R. 708; or as to the expropriation of lands; *re St. Catherine's and Niagara Central Railway Company and Barbeau* (1886), 15 O. R. 583, or as to the rights of parties under an arbitration on a claim for damages for lowering the grade of a street; *re Kerner and Toronto, Hamilton and Buffalo Ry. Co.* (1896), 28 O. R. 14, or as to *Mechanic's Lien*, *Larsen v. Nelson and Fort Sheppard Ry. Co.* (1895), 4 B. C. 151, or as to the crossing by an electric railway of a Dominion Steam Railway at grade; *Grand Trunk Railway Co. v. Hamilton Radial Electric Railway Co.* (1897), 29 O. R. 143, are inapplicable to such a railway although it may have been originally incorporated by a provincial legislature.

On the other hand such companies are in common with all other persons and corporations subject to provincial legislation concerning other matters than those peculiar to a railway, e.g. *The Workmen's Compensation Act*; *Canada Southern Ry. Co. v. Jackson* (1890), 17 S. C. R. 316, and Acts respecting the procedure for recovery of debts by sale of the debtors property; *Baie des Chaleurs Ry. Co. v. Nantel* (1896) Q. L. R., 5 Q. B. 65, are applicable to Dominion Railways.

EDUCATION—DENOMINATIONAL SCHOOLS, Sec. 93.

In New Brunswick at the Union the law with respect to schools was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to Denominational Schools, and the Act of the provincial legislature, 34 V. c. 21 (N. B.) providing that the schools conducted thereunder should be non-sectarian was therefore held to be valid. *Ex parte Renaud* (1873, 1 Pags. 273; 2 Cart. 445; *Mahe v. Portland, Wheeler's Confederation Law in Canada*, p. 338.

The provisions of the Constitutional Act of Manitoba (33 V. c. 3) as to education are substantially the same as those of s. 93 of the B. N. A. Act, the only difference being that the rights and privileges which classes of persons had by law "or practice" were protected. At the time of the Union with Manitoba denominational schools supported by voluntary contributions existed. In 1871 a system of denominational education was established, the schools being supported by local taxation. In 1890 the denominational system was swept away and the public schools were made entirely non-sectarian. The City of Winnipeg, under the Act of 1890, passed by-laws for levying taxes to support its schools. The Roman Catholics of Manitoba objected to being taxed for schools of which they could not in conscience avail themselves and a motion was made to quash the by-laws. The Courts of Manitoba sustained the by-laws. The Supreme Court of Canada declared them invalid. *Barrett v. Winnipeg* (1891), 19 S. C. R. 374. This decision was reversed by the Judicial Committee of the Privy Council upon the ground that the Act of 1890 did not prejudicially affect any right or privilege of the Roman Catholics which existed at the time of the Union. It was pointed out that every religious body notwithstanding the Act, was free to establish schools throughout the province; to maintain them by school fees or voluntary subscriptions; and to conduct them according to their own religious tenets without molestation or interference. (1892), A.C. 445.

Appeal to Governor-in-Council. The Roman Catholics of Manitoba after the decision in *Barrett v. Winnipeg* appealed to the Governor-in-Council, under s. 93 (3) and the similar provision in the Manitoba Constitutional Act, for a remedial order, and a reference was made by the Governor-in-Council, under 54 & 55 V. c. 25, to the Supreme Court of Canada for advice as to whether an appeal would lie against the Manitoba School Act of 1890 to the Governor-in-Council. The Supreme Court, by a majority, decided that an appeal would not lie; that Manitoba, having established separate schools by its own Act of 1871, had the right to repeal that Act. *Re Manitoba Statutes* (1893) 22, S.C.R. 577. An appeal was then made to the Judicial Committee of the Privy Council where the judgment was reversed. It was held that the appeal would lie to the Governor-in-Council; that the Roman Catholics had acquired by the legislation of Manitoba the right to control denominational schools, and to have them maintained out of the general taxation of the province, and that such rights were affected by the Act of 1890, and that the Governor-in-Council had power to make remedial orders. *Brophy v. Attorney-Gen. of Manitoba* (1895), A.C. 202.

The Governor-in-Council then made an order requiring the Province of Manitoba substantially to re-enact the laws in force prior to 1890. This order was not obeyed. A Bill was introduced into the Dominion Parliament providing a denominational school system for Manitoba, but it did not become law. The Manitoba School Act of 1890 therefore remains the law of that province.

Provincial legislatures have power to legislate respecting denominational schools, and their legislation will be valid so long as it does not prejudicially affect any right or privilege possessed by law at the time of the Union—*e.g.*, changes may be made in the mode of electing Separate School Boards. *Belle-ville School Trustees v. Grainger* (1878), 25 Gr. 570.

Summary.—(1) Legislation prejudicially affecting legal rights of any class to denominational schools existing at the date of the Union is *ultra vires*. No appeal is necessary as to it.

(2) Rights conferred by post-union legislation may be taken away by the province enacting them, subject to an appeal to the Governor-in-Council.

(3) On an appeal a remedial order may be made requiring the provincial authority, *i.e.*, the Legislature to enact legislation restoring either partly or in entirety the rights taken away.

(4) If such legislation is not enacted the Dominion Parliament will then have authority to legislate.

Section 109.

Royalties. Although by s. 102 all duties and revenues over which the provinces before and at the Union had power of appropriation are declared to belong to the Dominion, except those by the Act reserved to the provinces yet by s. 109, all lands, mines, minerals and royalties are reserved to the provinces, "Escheats" are "royalties" within the meaning of s. 109, and, therefore, lands escheated to the Crown are the property of the province where they are situate. *Atty-Gen. for Ont. v. Mercer* (1883), 8 App. Cas. 767; sec. 5, S.C.R. 538.

DECISION OF CONSTITUTIONAL QUESTIONS.

By 53 V. c. 13 (O), R.S.O. (1897), c. 84, provision was made for the reference by the Lieutenant-Governor in Council of any matter which he thought fit to refer to the High Court, or a Divisional Court or the Court of Appeal, and by 54 & 55 V. c. 25 (D) the Governor-in-Council was given substantially similar power to refer matters to the Supreme Court.

Under these sections important constitutional questions have been determined, the decisions in which are noted above.

Notice to Attorney-General. No Act can be declared beyond the constitutional competence either of the Dominion Parliament or the Ontario Legislature until after notice thereof has been served on the Minister of Justice and the Attorney-General for Ontario respectively six days before the argument, and they then have the right to be heard. *Judicature Act, s. 60 (Chapter 51, post).*

A question as to the applicability of the Ontario Insurance Act as to uniform conditions in Fire Insurance Policies to a Company incorporated by a Dominion Act which contained a special provision with reference to the validity of Policies was held not to be of a constitutional character so as to require notice. *Goring v. London Mutual Ins. Co. (1885), 11 O.R. 82.*

Precious metals. The prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown unless by apt and precise words the intention of the Crown be expressed that it shall pass. *Wooley v. Atty.-Gen. of Victoria (1877), 2 App. Cas. 163.*

A conveyance by the Province of British Columbia of public lands does not imply any transfer of the precious metals. *Atty.-Gen. of British Columbia v. Atty.-Gen. of Canada (1889), 14 A.C. 295;* and the words mines, minerals and substances whatsoever thereupon, thereon and thereunder, are insufficient to transfer the precious metals. *Esquimalt Railway Co. v. Bainbridge (1896), A.C. 561.*

English Acts. The English Bankruptcy Act 1869 is effective to vest in the trustee in Bankruptcy the bankrupt's title to land situate in any part of Her Majesty's Dominions. *Callender v. Lagos (Colonial Secretary) (1891), A.C. 460.*

Provincial Courts are bound to take notice that lands in this Province held in trust by a person of unsound mind may under 11 Geo. IV. and 1 Wm. IV., c. 60, be conveyed by a committee appointed by the English Courts. *Thompson v. Bennett (1872), 22 C.P. 393.*

The English Companies' Act of 1862 does not extend to Canada. *Allan v. Hanson (1890), 18 S.C.R. 667.*

Merchants Shipping Act, 1894. The first part of the Merchant Shipping Act 1894, 57, 58 Vic. c. 60 (Imp.); see Dom. Statutes 1895, pp. 1-372, applies to the whole of Her Majesty's Dominions, see s. 91. The provisions of part 2 may be adopted by the Legislature of a British Possession, see section 254. Certain parts of part 3 as regards emigrant ships are also applicable by the Governor, see sections 364-366. Part 8 respecting liability of ship owners extends to the whole of Her Majesty's Dominions; see section 509; see *Georgian Bay Transportation Co. v. Fisher (1880), 5 A.R. 383.* Part 13 extends to the whole of Her Majesty's Dominions; see section 702.

By sections 735 and 736 Colonial Legislatures may repeal wholly or in part any provisions in the Act except those of the third part, relating to emigrant ships, subject to approval of Her Majesty, and may regulate the coasting trade; see *Georgian Bay Transportation Co. v. Fisher, 5 A.R. 383;* see R.S.C. c. 74, s. 131.

Prerogative rights of Dominion. The Dominion Government has the same priority over creditors of equal degree as the Provinces; *Reg. v. Bank of Nova Scotia (1885) 11 S. C. R., 1;* except in Quebec where the prerogative is limited to the case of the common debtor being an officer liable to account to the Crown for public money collected or held by him. *Exchange Bank v. Reg. (1886) 11 App. Cas. 157.*

Dominion elections. The Provincial Courts have no jurisdiction to restrain any revising officer, Judge or returning officer from performing any duty under any statute of the Dominion relating to elections to the Dominion Parliament; *Re Centre Wellington (1879) 44 U.C.R. 132;* *Re North Perth. Heslin v. Lloyd (1891) 21 O. R. 538;* *McLeod v. Noble (1897) 24 A. R. 459, s. c. 28 O. R. 528.*

Sec. 129. Repeal of former laws. The legislative powers conferred by s. 120 to repeal or alter an old law of the Parliament of the Province of Canada are coextensive with the powers of direct legislation with which the Dominion Parliament and Provincial Legislatures respectively are invested by the other sections of the Act; *Dobie v. Temporalities Board* (1882) 7 App. Cas. 136, 147; *Atty.-Gen. for Ontario v. Atty.-Gen. for Dominion* (1896) A. C. 348, 366.

A Quebec Statute repealing an Act of the Province of Canada the provisions of which applied both to Quebec and Ontario is *ultra vires*; *Dobie v. Temporalities Board* (1882) 7 App. Cas. 136. The Temperance Act, 1864, applied only to Upper Canada. The Dominion Parliament therefore had no power to repeal it. *Atty.-Gen. for Ont. v. Atty.-Gen. for Dominion* (1896) A. C. 348.

Crown's relations to Provinces. By s. 9 the Executive Government of the Dominion is declared to continue and be vested in the Queen.

A Lieutenant-Governor when appointed is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government. The object of the Act was neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. *Liquidators of Maritime Bank v. Receiver-General of New Brunswick* (1892) A. C. 437.

The relation between the Crown and the provinces is the same as that which subsists between the Crown and the Dominion in respect of the powers, executive and legislative, public property and revenues, as are vested in them respectively, and therefore a provincial government is entitled to priority over other creditors of equal degree; *Liquidators of Maritime Bank v. Receiver-General of New Brunswick* (1892) A. C. 437.

The prerogative of the Crown to pardon extends to the remission of sentences which are merely of a punitive character inflicted for contempt of Court; *Re Bahama Islands* (Special Reference from) (1893) A. C. 138; see *Re Pardonng power Atty.-Gen. for Can. v. Atty.-Gen. for Ont.* (1899) 20 O. R. 222, 19 A. R. 31, 23 S. C. R. 458.

Debts and Liabilities. By Sec. 111 Canada assumed the debts and liabilities of each Province.

In 1850 the province of Canada became liable to the Ojibway Indians for certain annuities in consideration of the surrender of their title to lands now in Ontario. It was provided in the treaty that if the proceeds of the land warranted the annuities should be increased. Circumstances having arisen to justify the Indians claiming the increased annuities, the question arose by whom the payment thereof should be borne. The Dominion and the Province of Quebec claimed that the lands were subject to a trust within the meaning of s. 109 for their payment and that the lands having become the property of Ontario that Province was bound to assume the liability. This contention was sustained by the Arbitrators but reversed by the Supreme Court. On Appeal to the Judicial Committee of the Privy Council the judgment of the Supreme Court was sustained. It was clear that Canada was liable for the original annuities and it did not appear that the augmentations were to be derived from a different source. Their Lordships had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities whether original or augmented beyond a promise and agreement; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the Province; and that no duty was imposed upon the Province whether in the nature of a trust, obligation or otherwise to apply the revenue derived from the surrendered lands in payment of the annuities. *Ontario v. Dominion* (1895) 25 S. C. R. 434, s.c. (1897) A. C. 199.

Subsequently the question arose whether the liability was one comprised in the debt of the Provinces in so far as it exceeded the amount specified in s. 112 as amended by 36 V. c. 30. On the 7th January 1898, the Arbitrators decided the "liability" was a "debt" to be borne equally by the Provinces of Ontario and Quebec under that section.

Interest upon the excess of the debt of the Provinces should not be deducted until six months from the union, interest never being payable before it accrues. *Canada v. Ontario and Quebec* (1894) 24 S. C. R. 498.

PART III.

Evidence.

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CHAPTER 73.

An Act respecting Witnesses and Evidence.

SHORT TITLE, s. 1.

COMPETENCY OF WITNESSES :

Crime or interest, ss. 2, 3.

Husband and wife, ss. 4, 7, 8, 9.

Evidence of parties, ss. 4, 6, 7.

Criminating questions, s. 5.

In prosecutions under Ontario Acts, etc., s. 9.

CORROBORATIVE EVIDENCE :

In actions for breach of promise, s. 6.

In cases against representatives of deceased persons, s. 10.

In cases against lunatics, s. 11.

AFFIRMATIONS, ss. 12-15.

ATTENDANCE OF WITNESSES :

A party to an action may summon opposite party as a witness, s. 16.

Subpoenas to the province of Quebec, C. S. C. c. 79, ss. 4-13, p. 714.

EXAMINATION OF WITNESSES :

Proof of previous contradictory statements in writing, s. 17.

Proof of previous contradictory oral statements, s. 18.

Proof of previous conviction, s. 19.

Discrediting a party's own witness, s. 20.

STATUTES, PUBLIC DOCUMENTS, ETC., AS EVIDENCE :

Statutes, proclamations, etc., 21-24.

Official documents, ss. 25-29.

Signatures of Judges, etc., s. 30.

Foreign judgments, s. 31.

Notarial documents made in Quebec, ss. 32, 33.

Protests of Bills and Notes, ss. 34, 35.

Sheriff's Conveyance on Division Court judgment, s. 36.

Affidavits made out of Ontario, ss. 37, 38.

Formal defects in Affidavits, s. 39.

Depositions, s. 40.

Wills, ss. 41-44.

Registered instruments, ss. 45-49.

Instruments in Land Titles Offices, s. 50.

Other written instruments, s. 51.

Compelling attendance of witnesses for purpose of foreign commission, s. 52.

EVIDENCE WHEN PERSON RESIDENT IN GREAT BRITAIN IS A PARTY, s. 53.

WHEN PROOF BY ATTESTING WITNESSES UNNECESSARY, s. 54.

COMPARISON OF HANDWRITING, s. 55.

IMFOUNDING INSTRUMENTS OFFERED IN EVIDENCE, s. 56.

POWERS CONFERRED BY ACT ARE IN ADDITION TO ANY OTHER EXISTING POWERS, s. 57.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Evidence Act.*" R. S. O., 1887, Short title. c. 61, s. 1.

COMPETENCY OF WITNESSES.

2. No person offered as a witness shall hereafter be excluded by reason of any alleged incapacity from crime or interest

Witnesses not to be incapacitated by crime or interest.

from giving evidence, according to the practice of the Court, on the trial of any action, issue, matter or proceeding, in any Court of Ontario, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence. R. S. O. 1887, c. 61, s. 2.

Such persons
admitted to
give evidence.

3. Every person so offered shall be admitted to give evidence notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the action or proceeding in which he is offered as a witness, and notwithstanding that such person has been previously convicted of any crime or offence. R. S. O. 1887, c. 61, s. 3.

Evidence of
parties.

4. On the trial of any action, issue, matter or proceeding in any Court in this Province, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, the parties to the proceedings, and the persons in whose behalf the action or other proceeding, is brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the Court, on behalf of themselves or of either or any of the parties to the action or proceeding; and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the Court, on behalf of either or any of the parties to the action or proceeding. R. S. O. 1887, c. 61, s. 4.

Evidence of
husband and
wife.

Questions
tending to
criminate
witnesses.

5. Subject to section 9 of this Act, nothing herein contained shall render any person compellable to answer any question tending to subject him to criminal proceedings or to subject him to prosecution for any penalty. 59 V. c. 18, s. 6.

Evidence in
actions for
breach of pro-
mise.

6. The parties to an action for breach of promise of marriage shall be competent to give evidence in the action: Provided always that no plaintiff in an action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise. R. S. O. 1887, c. 61, s. 6.

Evidence in
proceedings in
consequence of
adultery.

7. The parties to a proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in the proceeding: Provided that in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. R. S. O. 1887, c. 61, s. 7.

8. No husband shall be compellable to disclose any communication made by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage. R. S. O. 1887, c. 61, s. 8.

Communications made during marriage.

9. On the trial of any proceeding, matter or question, under any Act of the Legislature of Ontario, or on the trial of any such proceeding, matter or question, before any Justice of the Peace, Mayor or Police Magistrate, in any matter cognizable by such Justice, Mayor, or Police Magistrate, the party opposing or defending, or the wife or husband of the person opposing or defending shall be competent and compellable to give evidence therein. 55 V. c. 14, s. 1.

Evidence of parties and wives and husbands.

10. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R. S. O. 1887, c. 61, s. 10.

In actions by or against representatives of a deceased person, the evidence of the opposite party must be corroborated.

11. In any action or proceeding by or against a person found by inquisition to be of unsound mind, or being an inmate of a lunatic asylum, an opposite or interested party shall not obtain a verdict, judgment, or decision therein, on his own evidence, unless such evidence is corroborated by some other material evidence. R. S. O. 1887, c. 61, s. 11.

In actions by or against lunatics, etc., evidence of opposite party to be corroborated.

AFFIRMATIONS.

12. In any case in which an oath, declaration or affirmation is required by law, or upon any lawful occasion whatever on which the oath of any person is by law admissible, a Quaker, Mennonist or Tunker, or a member of the church known as the "Unitas Fratrum," or the United Brethren, sometimes called the Moravian Church, having first made the following declaration or affirmation, viz.:

Quakers, Mennonists, Tunkers, etc., permitted to make affirmation.

"I, A. B., do solemnly, sincerely and truly declare and affirm that I am one of the Society called Quakers, Mennonists, Tunkers or Unitas Fratrum, or Moravians" (as the case may be);

may make his affirmation or declaration in the form following, that is to say:

"I, A. B., do solemnly, sincerely and truly affirm and declare," etc.;

and such affirmation or declaration shall have the same force and effect to all intents and purposes, in all Courts and all other places, as an oath taken in the usual form. R. S. O. 1887 c. 61, s. 12.

Certain persons may make affirmation or declaration instead of oath.

13. If a person called as a witness, or required or lesiring to make an affidavit or deposition in a proceeding, or on an occasion whereon or touching a matter respecting which an oath is required, whether on taking office or otherwise, refuses or is unwilling, from alleged conscientious motives, to be sworn, the Court or Judge, or other presiding officer, or person qualified to take affidavits or depositions, may permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz. :

"I, A. B., do solemnly, sincerely and truly affirm and declare that the taking of an oath is, according to my religious belief, unlawful ; and I do also solemnly, sincerely and truly affirm and declare," etc. :

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. R. S. O. 1887, c. 61, s. 13.

Persons who object or are incompetent to take an oath to be allowed to make a declaration.

14.—(1) If in a Court of justice, a person called to give evidence objects to take an oath, or is objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise, affirmation, and declaration :

"I solemnly promise, affirm, and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth."

and upon the person making such solemn affirmation and declaration, his evidence shall be taken in the said proceeding.

Interpretation.

(2) The words " Court of justice " and the words " presiding Judge " in this section shall be deemed to include any person having by law authority to administer an oath for the taking of evidence. R. S. O. 1887, c. 61, s. 14.

Persons authorized to administer oath may administer affirmation.

15. Every person authorized or required to administer an oath for any purpose, may administer any affirmation or declaration aforesaid. R. S. O. 1887, c. 61, s. 15.

SUBPÆNAS.

A party to any action may be summoned as a witness by the opposite party, and consequences of non-attendance.

16. Where a party in an action desires to call the opposite party as a witness at the trial, he shall either subpoena such party or give to him or his solicitor at least eight days' notice of the intention to examine him as a witness in the cause, and if such party does not attend on the notice or subpoena, his non-attendance shall be taken as an admission *pro confesso* against him in the action, unless otherwise ordered by the Judge and a general finding or judgment may be had against the party thereon or the plaintiff may be non-suited, or the proceedings in the action may be postponed by the Judge, on such terms as he sees fit to impose. R. S. O. 1887, c. 61, s. 16.

ISSUE OF SUBPENAS INTO ANY PART OF ONTARIO OR QUEBEC.

[Sections 4-11 and 13 of C. S. C. c. 79 are not consolidated in the Revised Statutes of Canada and are as follows:]

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court, that it is proper to compel the personal attendance at any trial, or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he may be in Canada. Courts may issue subpoenas to any part of Canada.

5. The service of any such writ or process in any part of Canada shall be as valid and effectual, to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court. Service thereof in any part of Canada to be good.

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside. When not to be issued.

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order and no such writ shall issue without such special order. Writs to be specially noted.

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued may, upon proof made of the service thereof, and of such default, to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court. Consequences of disobedience.

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Courts of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process, was served upon him. If expenses paid or tendered.

10. The service of such writs of subpoena or other similar process in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same. How service proved.

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have Costs of attendance provided for.

been allowed on a commission *rogatoire*, or to examine witnesses, unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

Power to issue commission to examine witnesses preserved.

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

EXAMINATION OF WITNESSES.

Proof of contradictory written statements.

17. Upon the trial of any cause a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without the writing being shewn to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Judge at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit. R. S. O. 1837, c. 61, s. 17.

Proof of contradictory oral statements.

18. If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. R. S. O. 1887, c. 61, s. 18.

Proof of previous conviction of a witness may be given if he denies it, etc.

19.—(1) A witness may be questioned as to whether he has been convicted of any crime, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the clerk or officer, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Certificate of conviction.

Fee for.

(2) For such certificate a fee of \$1 and no more may be demanded or taken. R. S. O. 1887, c. 61, s. 19.

How far a party may discredit his own witness.

20. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but

in case the witness, in the opinion of the Judge, proves adverse, such party may contradict him by other evidence, or, by leave of the Judge, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. R. S. O. 1887, c. 61, s. 20.

STATUTES AND PUBLIC DOCUMENTS.

Statutes, Proclamations and Orders in Council, etc.

21. In any proceeding in respect of which the Legislature of Ontario has jurisdiction in this behalf, whenever it becomes necessary or expedient to prove or give in evidence, any statute or ordinance of Canada or of this Province, or of any other Province, or of any Territory in Canada, or of the late Province of Canada, or of any other Province in British North America whether such statute or ordinance was passed before or after the passing of *The British North America Act, 1867*, any copy of any such statute or ordinance purporting to be printed and published by the Queen's Printer for the Dominion or for such Province or Territory, or by the Government Printer for such Province or Territory, shall be receivable and received in evidence to prove the contents thereof in every Court or tribunal having cognizance of such proceeding. 60 V. c. 17, s. 1.

Copies of Canadian and Provincial Statutes as evidence.

22. *Prima facie* evidence of any proclamation, order, regulation or appointment made or issued by the Governor-General or by the Governor in Council or other chief executive officer or Administrator for the time being of the Government of Canada, or by or under the authority of any Minister or head of any department of the Government of Canada may be given in every Court or tribunal, and in all legal proceedings whatsoever, in respect of which the Legislature of this Province has authority to enact this provision, in any of the modes herein-after mentioned, that is to say:

Proclamations, Orders in Council, etc., of Government of Canada, how proved.

- (a) By the production of a copy of the *Canada Gazette*, or of a volume of the Acts of the Parliament of Canada purporting to contain a notice of such proclamation, order, regulation or appointment;
- (b) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer for Canada; or,
- (c) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor-General or by the Governor in Council, or other chief executive officer or Adminis-

trator as aforesaid, of a copy or extract purporting to be certified to be a true copy by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada, and in the case of any order, regulation or appointment made or issued by or under the authority of any such Minister or head of a department, by the production of a copy or extract purporting to be certified as true by the Minister or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides. 60 V. c. 17, s. 2.

Proclamations, Orders in Council, etc., of Provincial Governments, how proved.

23. *Prima facie* evidence of any proclamation, order, regulation or appointment made or issued by a Lieutenant-Governor or Lieutenant-Governor in Council of this or any other Province of Canada, or of any Territory of Canada, or other chief executive officer or Administrator for the time being of the Government of the Province or Territory, or by or under the authority of any member of the Executive Council, being the head of any department of the Government of the Province or Territory may be given in every Court or tribunal and in all legal proceedings in respect of which the Legislature of this Province has authority to enact this provision in any of the modes hereinafter mentioned, that is to say:

- (a) By the production of a copy of the official Gazette for the Province or Territory purporting to contain a notice of such proclamation, order, regulation or appointment;
- (b) By the production of a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or the Government Printer for the Province or Territory;
- (c) By the production of a copy or extract of such proclamation, order, regulation or appointment certified to be a true copy by the clerk or assistant or acting clerk of the Executive Council, or by the head of any department of the Provincial Government or Territorial Government, or by his deputy or acting deputy, as the case may be. 60 V. c. 17, s. 3.

Orders signed by Secretary of State or Provincial Secretary.

24. Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General; and any order in writing signed by the Provincial Secretary, and purporting to be written by command of the Lieutenant-Governor, shall be received in evidence as the order of the Lieutenant-Governor. R. S. O. 1887, c. 20, s. 7, part; 60 V. c. 17, s. 5.

Official Documents.

25. All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* or in the *Ontario Gazette* shall be *prima facie* evidence of the originals, and of the contents thereof. See R.S.C. 1886, c. 139, s. 7; 60 V. c. 17, s. 6.

Notices in
Gazette.

26. In every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any corporation, created by charter or statute in this Province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R. S. O. 1887, c. 61, s. 23.

How public or
official docu-
ments proved.

By-laws, etc.,
of corpora-
tions.

27. Where documents are in the official possession, custody or power of a member of the Executive Council, or the head of a Department of the Public Service of this Province, if the deputy head or other officer of the Department has the documents in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the Department, to object to produce the documents on the ground that they are privileged; and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or head of the Department were personally present and made the objection. R. S. O. 1887 c. 61, s. 24.

Privilege in
case of official
documents.

28. In every Court or tribunal, and in all legal proceedings in respect of which the Legislature of this Province has authority so to enact, a copy of any entry in any book of account kept in any department of the Government of Canada or of this Province, shall be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof. 60 V. c. 17, s. 7. See R.S.C. 1886, c. 139, s. 8.

Entries in
departmental
books to be
prima facie
evidence.

29—(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere pro-

Copies of pub-
lic books or
documents ad-
missible in
evidence.

duction from the proper custody, a copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before a person having by law or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted.

Copies to be delivered if required.

(2) Such officer shall furnish such certified copy or extract to any person applying for the same at a reasonable time, upon his paying therefor a sum not exceeding ten cents for every folio of one hundred words. R. S. O. 1887, c. 61, s. 25.

[As to documents in Crown Lands Department see Chap. 28, sec. 47.]

Signatures of Judges, etc.

Judicial notice to be taken of signatures of Judges, etc.

30. All Courts, Judges, Justices, Masters, Clerks of Courts Commissioners judicially acting, and other judicial officers in this Province, shall take judicial notice of the signature of any of the Judges of the Supreme Court of Canada, the Court of Appeal, the High Court of Justice, the County Courts of Ontario, or the Superior or Circuit Courts in Quebec, where such signature is appended or attached to any decree, order, certificate, affidavit, or judicial or official document, and no proof shall be required of the handwriting or official position of any person certifying in pursuance of this Act to the truth of any copy of or extract from any proclamation, order, regulation or appointment; and any such copy or extract may be in print or in writing, or partly in print and partly in writing. R. S. O. 1887, c. 61, s. 27; 60 V. c. 17, s. 4.

Foreign Judgments.

Foreign judgments, etc., how proved.

31. Any judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature in England or Ireland or in any of the Superior Courts of Law, Equity or Bankruptcy in Scotland, or in any Court of Record in any of the Provinces of Canada, or in any British Colony or Possession, or in any Court of Record of the United States or of any State of the United States of America, may be proved in any action or proceeding in Ontario, in which proof of such judgment, decree or judicial proceeding may be necessary or required, by an exemplification of the same under the seal of the Court without any proof of the authenticity of such seal or other proof whatever, in the same manner as any judgment, decree, or similar judicial proceeding of the High Court in Ontario may be proved by an exemplification thereof in any judicial or other proceeding in the said Court. R. S. O. 1887, c. 61, s. 28.

Notarial Documents.

Copies of notarial acts in Quebec admissible.

32. A copy of a notarial act or instrument in writing made in Quebec, before a Notary, filed, enrolled or enregistered by

such Notary, and certified by a Notary or Prothonotary to be a true copy of the original thereby certified to be in his possession as such Notary or Prothonotary, shall be receivable in evidence in any judicial or other proceeding in Ontario in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved. R. S. O. 1887, c. 61, s. 29.

33. Such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a Notary, or be filed, enrolled or unregistered by a Notary in Quebec. R. S. O. 1887, c. 61, s. 30. How impeached.

Protests of Bills and Notes.

34. All protests of bills of exchange and promissory notes shall be received in all Courts as *prima facie* evidence of the allegations and facts therein contained; and the production of a protest wherever made of a promissory note or bill of exchange, under the hand or seal of one or more Notaries Public, in any Court in Ontario, shall be *prima facie* evidence of the making of such protest. R. S. O. 1887, c. 61, ss. 31, 33; 60 V. c. 15, Sched. A (19). Protests *prima facie* evidence.
Production of protest to be *prima facie* evidence that protest was made.

35. Any note, memorandum or certificate at any time made by one or more Notaries Public in Canada, in his own handwriting or signed by him at the foot of or embodied in any protest, or in a regular register of official acts kept by him shall be *prima facie* evidence in Ontario of the fact of notice of non-acceptance or non-payment of a promissory note or bill of exchange having been sent or delivered, at the time and in the manner stated in such note, certificate or memorandum. R. S. O. 1887, c. 61, s. 32.; 60 V. c. 15. Sched. A (18). Certain certificates of notaries to be *prima facie* evidence.

Sheriff's Conveyance on Division Court Judgment.

36. In proving title under a Sheriff's conveyance based upon an execution issued from a Division Court it shall be sufficient to prove the judgment recovered in the Division Court without proof of any prior proceedings. 57 V. c. 26, s. 4. Proving titles under Division Court executions.

Affidavits, etc., made out of Ontario.

37. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario before some one of the following persons:

A Commissioner authorized to administer oaths in the Supreme Court of Judicature in England or Ireland;

Affidavits to be used in Ontario may be made before certain functionaries in other countries.

A Judge of the Supreme Court of Judicature in England or Ireland;

A Judge of the Court of Session or the Justiciary Court in Scotland;

A Judge of any of the County Courts of Great Britain or Ireland, within his County;

A Notary Public and certified under his hand and official seal;

The Mayor or Chief Magistrate of any City, Borough or Town corporate, in Great Britain or Ireland, or in any Colony of Her Majesty, or in any foreign country, and certified under the common seal of such City, Borough, or Town corporate;

A Judge of any Court of Record or of supreme jurisdiction in any Colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country;

Or, if made in the British Possessions in India, before any Magistrate or Collector certified to have been such under the hand of the Governor of such Possession;

Or, if made in Quebec, before a Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court;

Or before any Consul, Vice-Consul, or Consular Agent of Her Majesty exercising his functions in any foreign place;

Or before a Commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record of the Province;

shall, for the purposes of and in or concerning any cause, matter or thing depending or in any wise concerning any proceedings in any Courts in this Province, be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a Commissioner for taking affidavits therein, or other competent authority of the like nature. R. S. O. 1887, c. 61, s. 34.

Seal and signature need not be proved.

38. Any document purporting to have affixed, impressed or subscribed thereon or thereto the signature of such Commissioner, or the signature and official seal of such Notary Public, or Prothonotary, or the seal of the Corporation, and the signature of such Mayor or Chief Magistrate or Governor as aforesaid, or the seal and signature of such Judge, Consul, Vice-Consul or Consular Agent in testimony of such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, or for any other purpose authorized by this Act, shall be admitted in evidence without proof of such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person. R. S. O. 1887, c. 61, s. 35; 60 V. c. 3, s. 3.

Formal Defects in Affidavits.

39. No informality in the heading, or other formal requisites to any affidavit, declaration or affirmation, made or taken before a Commissioner or other person authorized to take affidavits under *The Act respecting Commissioners for taking Affidavits and Recognizances* or under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered thinks proper to receive it. R. S. O. 1887, c. 61, s. 36.

Informal headings, etc., not to invalidate.

Rev. Stat. c. 74.

Depositions.

40. Where an examination of a party or witness has been taken before a Judge or other officer or person appointed to take the same, copies of the examinations and depositions certified under the hand of the Judge, officer or other person taking the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R. S. O. 1887, c. 61, s. 37.

Copies of depositions certified by person taking the same admissible in evidence.

Proof of Wills.

41. In any action where it is necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish in proof the devise or other testamentary disposition, may give notice to the opposite party ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition, the probate of the will or letters of administration with the will annexed, or a copy thereof, stamped with the seal of the Surrogate Court granting the same, or with the seal of the Court of Chancery, where the probate or letters of administration were granted by the former Court of Probate for Upper Canada; and in every such case the probate or letters of administration or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, under *The Surrogate Courts Act*, unless the party receiving the notice within four days after the receipt, gives notice that he disputes the validity of the devise or other testamentary disposition. R. S. O. 1887, c. 61, s. 38.

In actions concerning real estate, probate, etc., to be *prima facie* evidence of will, etc., after certain notice, unless its validity is put in issue.

Rev. Stat. c. 59.

42. In every case in which in such action the original will is produced and proved, the Court or Judge before whom such evidence is given may direct by which of the parties the costs thereof shall be paid. R. S. O. 1887, c. 61, s. 39.

As to costs of proving a will in an action.

Proof in the case of will of real estate filed in courts in other British possessions.

43. In case of the death of a person in any of Her Majesty's possessions out of Ontario, after having made a will sufficient to pass real estate in Ontario, and whereby such estate has been devised, charged or affected, and in case such will has been duly proved in any Court having the proof and issuing probate of wills in any of such possessions, and remains filed in such Court, then in case notice of the intention to use such probate or certificate in the place of the original will, is given to the opposite party in such proceeding one month before the same is to be so used, the production of the probate of the will, or a certificate of the Judge, Registrar or Clerk of such Court, that the original is filed and remains in the Court, and purports to have been executed before two witnesses, shall in any proceeding in any Court in Ontario, concerning such real estate, be sufficient *prima facie* evidence of the will and the contents thereof, and of the same having been executed so as to pass real estate, without the production of the original will; but the probate or certificate shall not be used if, upon cause shewn before such Court, or a Judge thereof, the Court or Judge finds reason to doubt the sufficiency of the execution of the will to pass such real estate as aforesaid, and makes a rule or order disallowing the production of the probate. R. S. O. 1887, c. 61, s. 40.

Certificate to be *prima facie* evidence.

44. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the Judge, Registrar or Clerk, without proof of his appointment, authority or signature. R. S. O. 1887, c. 61, s. 41.

Copies of Registered Instruments.

Meaning of "instrument," Rev. Stat. c. 136.

45. The word "instrument" in the next succeeding two sections shall have the meaning assigned to the word "instrument" in section 2 of *The Registry Act*. R. S. O. 1887, c. 61, s. 42.

Registered instrument *prima facie* evidence.

46. An exemplification or a certified copy of any registered instrument or memorial under the hand and seal of office of the Registrar in whose office the same is registered shall be received as *prima facie* evidence, in every Court in Ontario, of the original of the instrument or memorial, except in the cases provided for in section 47. R. S. O. 1887, c. 61, s. 43.

[As to effect of production of an original duplicate the registration of which is certified, see Cap. 136, sec. 63.]

Certified copies of registered instruments may be used instead of originals after notice.

47. In any action where it would be necessary to produce and prove an original instrument which has been registered in order to establish such instrument and the contents thereof, the party intending to prove such original instrument may give notice to the opposite party ten days at least before the trial, or other

proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the original instrument, a copy thereof certified by the Registrar, under his hand and seal of office, and in every such case the copy so certified shall be sufficient evidence of the original instrument, and of its validity and contents, unless the party receiving the notice within four days after such receipt, gives notice that he disputes the validity of the original instrument, in which case the costs of producing and proving the original may be ordered by the Court or Judge to be paid by any or either of the parties as may be deemed right. R. S. O. 1887, c. 61, s. 45.

Exception.

Costs in such cases.

48. Where in any legal proceeding, any public officer produces upon a subpoena an original document, such original document is not to be deposited in Court, except in the case provided for by the next section of this Act, but if the instrument or a copy is needed for subsequent reference or use by reason of judgment being postponed or for some other reason, a copy of the document or of so much thereof as the Judge deems necessary, certified under the hand of the officer producing the document or otherwise proved, shall be marked and filed as an exhibit in the place of the original where but for this Act the original should be so marked and filed; and the officer shall be entitled to receive in addition to his ordinary fees, the fees for any certified copy, the same to be paid to him before the said copy is delivered, marked or filed. 53 V. c. 21, s. 1; 55 V. c. 14, s. 2; 60 V. c. 15, Sched. A (39).

Copies of official documents to be filed in lieu of originals.

49. Where there is a question as to the genuineness of the instrument, and the Judge deems it necessary for that or any other reason that the original be retained and makes an order to that effect setting forth the reason, such order shall be delivered to the Registrar or Clerk, and the exhibit shall be retained in Court accordingly, and marked and filed as heretofore. 53 V. c. 21, s. 2.

Original to be retained upon order of Judge.

Instruments deposited in Offices of Land Titles.

50. A certified copy attested by the Master's seal of office of any instrument affecting land which may be deposited, filed, kept, or registered in the office of the Master or Local Master of Titles, shall be *prima facie* evidence of such instrument, and of the contents thereof; and no Master of Titles shall be required to produce any instrument as aforesaid, unless where it is made to appear to the Judge directing the issue of a subpoena that special reasons exist rendering the production of the original necessary, and the said several reasons are to be stated in the order. 53 V. c. 32, s. 10.

Certified copies of instruments to be evidence.

Copies of other written Instruments.

Copies of certain documents may be admitted as evidence on certain conditions.

51.—(1) In any action, or proceeding, in the cases of telegrams, letters, shipping bills, bills of lading, delivery orders, receipts, accounts and other written instruments used in business and other transactions, where it is necessary to prove the original document, the party intending to prove the original may give notice to the opposite party ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence as proof of the contents, an instrument purporting to be a copy of the document.

Inspection.

(2) Such copy may then be inspected by the opposite party at some convenient time and place; and in every such case the copy shall without further proof be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned therein for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the said trial or proceeding, and to require proof of the original; and the Court or Judge, before whom the question is raised may direct by which of the parties the costs which may thereupon attend any production or proof of the original document according to the rules of evidence heretofore existing, shall be paid. R. S. O. 1887, c. 61, s. 46.

Costs.

MISCELLANEOUS PROVISIONS.

Witnesses may be ordered to be examined in relation to any matter pending before a foreign tribunal.

52.—(1) Where upon application for this purpose, it is made to appear to the High Court or a Judge thereof, or to a County Court Judge in this Province, that any Court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the obtaining the testimony in or in relation to any action, suit or proceeding pending in or before such foreign Court or tribunal, of any witnesses out of the jurisdiction thereof and within the jurisdiction of the Court or Judge so applied to, such Court or Judge may order the examination before the person appointed, and in a manner and form directed, by the commission, order or other process, of such witnesses accordingly; and may by the same or a subsequent order, command the attendance of any persons named therein for the purpose of being examined, or the production of any writings or other documents mentioned in the order; and give all such directions as to the time, place and manner of the examination, and all other matters connected therewith as may appear reasonable and just; and the order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made

by the same Court or Judge in a cause depending in such Court or before such Judge.

(2) Every person whose attendance is so ordered shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the High Court.

(3) Every person examined under such commission or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and any other questions which, in a cause pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made, the witness would be entitled to refuse to answer; and no person shall be compelled to produce at the examination, any writing or document which he would not be compellable to produce at the trial of such a cause.

(4) Where the commission directs, or the instructions of the Court accompanying the same direct, that the person to be examined shall be sworn or shall affirm before the Commissioner or other person, the Commissioner or other person shall have authority to administer an oath or affirmation to the person to be examined as aforesaid. R. S. O. 1887, c. 61, s. 47.

53. In an action or other proceeding relating to any debt or account (other than an action by or on behalf of Her Majesty), wherein a person residing in Great Britain is a party, the evidence and examination of witnesses on behalf of either or any of the parties to the action or proceeding, shall be the same, and given in the same manner as in other actions or proceedings according to the practice of the Court. R. S. O. 1887, c. 61, s. 48.

54. It shall not be necessary to prove by the attesting witness, any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. R. S. O. 1887, c. 61, s. 50.

55. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court and jury, as evidence of the genuineness or otherwise of the writing in dispute. R. S. O. 1887, c. 61, s. 51.

56. Where a document is received in evidence by virtue of this Act, the Court, Judge, Commissioner or other person acting or officiating judicially, who admits the same, may,

direct the same to be impounded and kept in the custody of an officer of the Court, or other person, for such period and subject to such conditions as to the Court or person who admits the document seem proper, or until further order touching the same has been made either by such Court or by the Court to which the officer belongs, or by the person or persons who constituted such Court, or by some one of the Judges of the High Court or a County Court (as the case may be), on application made for that purpose. R. S. O. 1887, c. 61, s. 52.

Act to extend
and not to
limit modes of
proof under
existing law.

57. The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at common law. 60 V. c. 17, s. 8.

[See also *The Vendors and Purchasers Act, Cap. 134*]

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NOTES.

Competency. Sections 2 and 3 are similar to the unrepealed portions of the Imperial Statute 6 and 7 V. c. 85 s. 1. Before that Statute all persons having an interest were disqualified as were also persons convicted of felony or any species of *crimen falsi* unless pardoned or restored by having suffered the punishment inflicted for the offence.

Evidence of Parties. The evidence of parties was first allowed in England in County Court actions under 9 and 10 V. c. 95 and ultimately in all civil cases by 14 and 15 V. c. 99 s. 2, the evidence of parties was in England allowed to be received; and by 16 and 17 V. c. 83 and 32 and 33 V. c. 68, the incompetency of husband and wives of parties was removed subject to the restrictions now contained in ss. 5, 6, 7 and 8. While 16 V. c. 19 s. 1 removed in Canada, the incompetency of witnesses from crime or interest, the evidence of parties and their spouses was not made competent until 1870, 33 V. c. 13 s. 1. A wife may prove her own adultery in an action against her husband for goods supplied to her; *Cooper v. Lloyd* (1859) 6 C. B. N. S. 519.

Competent and Compellable. The word "compellable" means "compellable by process of law" *Kops v. Reg.* (1894) A. C. 650.

Questions Tending to Criminate. The provisions of s. 5 embody the law as to the protection of a witness, though including the case of a party examined as a witness; *D'Ivry v. World Newspaper Co.* (1897) 17 P. R. 387. A party is protected from answering any question not only that has a direct tendency to criminate him but that forms one step toward doing so subject to the qualification that he must pledge his oath to his belief that such would or might be the effect and that it appears to the presiding Judge that under all the circumstances such belief is likely to be well founded; *Power v. Ellis*, (1881) 6 S.C.R. 1; *Lamb v. Munster* (1883) 10 Q. B. D. 110; *Weiser v. Heintzman* (1893) 15 P. R. 258; *D'Ivry v. World Newspaper Co.* (1897) 17 P. R. 387. This protection extends also to examinations for discovery; *Jones v. Gallon* (1882) 9 P. R. 296; *Hall v. Gowanlock* (1888) 12 P. R. 604; *Weiser v. Heintzman* (1893) 15 P. R. 258 and to the production of documents; *D'Ivry v. World Newspaper Co.* (1897) 17 P. R. 387, and the Statute 56 V. c. 31 (D) providing that no person shall be ex-usable from answering any question upon the ground that the answer may tend to criminate him has not altered the law applicable to civil actions; *Weiser v. Heintzman* (1893) 15 P. R. 407.

The witness is compellable to answer when he has received before or at the trial a pardon under the great seal for the offence which he fears; *R. v. Boyes* (1861) 1 B. & S. 311.

Although the witness is not bound to answer, the question may be put; *The Queen's Case* (1820) 2 Brod. & B. 311 and the Court must see from the circumstances of the case and the nature of the questions that the witness has reasonable grounds to apprehend danger. *Ex parte Reynolds* (1882) 20 Ch. D. 294, but if danger is once made to appear, great latitude will be allowed; *Osborn v. London Dock Co.* (1856) 10 Ex. 698. Counsel will not be allowed to argue in support of the objection; *R. v. Adey* (1831) 1 M. & Rob. 94. The objection is too late if raised for the first time on an appeal; *Miller v. McTaggart* (1891) 20 O. R. 617.

Penalties. The penal provisions of 13 Eliz. c. 5 afford no ground for a refusal to answer questions in an action to set aside a fraudulent conveyance, *Dunford v. Carlisle* (1884) 10 P. R. 449. The provisions of s. 9 refer only to the trial of summary criminal or quasi-criminal proceedings in which the penalty is sought to be recovered, so that in other proceedings a witness will still be entitled to the protection of s. 5. In actions for penalties discovery either by examination or production of documents cannot be obtained from the defendant; *Hunnings v. Williamson* (1883) 10 Q. B. D. 459; *Martin v. Treacher* (1885) 16 Q. B. D. 507; *Jones v. Jones* (1889) 22 Q. B. D. 425; *Hobbs v. Hudson* (1890) 25 Q. B. D. 232; *Saunders v. Wiel* (1892) 2 Q. B. D. 321; *Pickercil River Improvement Co. v. Moore* (1896) 17 P. R. 287; *Moxborough v. Whitwood Urban District Council* (1897) 2 Q. B. 111; unless the

penalty is imposed by way of damages and not of punishment; *Adams v. Batley* (1886) 18 Q. B. D. 625; See *Huntingdon v. Attrill* (1893) A. C. 150. This practice is based not on the section but on the principles relating to discovery which were in force in the old Court of Chancery.

Breach of Promise of Marriage. Until 1882 the evidence of parties was not received in actions of breach of promise: *Jones v. Gallon* (1882), 9 P.R. 296; but since the passing of 45 V. c. 10, s. 3 (Ont.) the parties to an action for breach of promise of marriage are both competent and compellable witnesses, *McLaughlin v. Moore* (1884), 10 P.R. 326; *Jones v. Gallon* (1882), 9 P.R. 296. The present section 6 is similar to Imperial Statute 32 & 33 V. c. 68, s. 2. Evidence that the plaintiff was overheard to charge the defendant with having made the promise and that the defendant made no answer is corroborative evidence, *Bessela v. Stern* (1877), 2 C.P.D. 265; but the mere fact of his not answering letters charging the promise is not, *Wiedeman v. Walpole* (1891), 2 Q.B. 534. Evidence sufficient to make out a promise is not required, but evidence which supports or strengthens the plaintiff's evidence that a promise was made, *Costello v. Hunter* (1886), 12 O.R. 333. Conduct of the parties from which before the passing of the section a promise to marry might have been inferred is sufficient corroboration, *Yarwood v. Hart* (1888), 6 O.R. 23. Where the date of the promise is material it is not necessary that the corroboration should extend thereto, so long as it is not inconsistent with the promise at the date alleged by the plaintiff; *Smith v. Jamieson* (1889), 17 O.R. 626.

Proceedings in consequence of Adultery. The Imperial equivalent for s. 7 is 32 & 33 V. c. 68, s. 3. The proviso in that section differs from that in s. 7 by providing "that no witness in any proceeding whether a party to the suit or not shall be liable," etc., instead of "that in such a case the husband or wife if competent only under and by virtue of this Act, shall not be liable," etc. It will be observed that the section does not make any person compellable to give evidence. There are no reported cases as to the effect of the difference between this section and that in the Imperial Act. It may be that a party to the suit who tenders himself as a witness may be asked any question while the husband or wife of such party would not be so liable.

Although the section says the witness shall not be liable to be asked any question tending to show that he or she has been guilty of adultery, it means that on it being proposed to put questions of that kind he or she may claim the protection of the Statute and say that he or she is not desirous of being interrogated on the subject, when it is the duty of the Judge to refuse to allow any of such questions to be put. The privilege must, however, be claimed by the witness, not by counsel, *Hebblethwaite v. Hebblethwaite* (1869), L.R. 2 P. & D. 29. When the Statute applies no question tending to show that the witness has been guilty of adultery will be allowed if protection is claimed, *Babbage v. Babbage* (1870), L.R. 2 P. & D. 222. A witness, however, who denies the truth of some of the charges on cross-examination is bound to answer questions respecting all the charges contained in the pleadings, *Brown v. Brown* (1874), L.R. 3 P. & D. 198. Where the legitimacy of children born in wedlock is in question, the section does not permit the evidence of the husband to prove non-access to the wife to be received, *Guardians of Nottingham v. Tomkinson* (1879), 4 C.P.D. 343; *Burnaby v. Baillie* (1889), 42 Ch.D. 282.

In an action of criminal conversation the husband has no right to examine the wife for discovery, *Murray v. Brown* (1894), 16 P.R. 125.

The evidence of one witness by confession of loose character, is not sufficient to prove adultery unless corroborated, *Aldrich v. Aldrich* (1891), 21 O.R. 447.

Communications during Marriage. The Act protects all communications, not merely those which are confidential; but it does not protect communications before marriage: *O'Connor v. Majorilanks* (1842), 4 M. & Gr. 435, and the privilege lasts after dissolution of the marriage or the death of one of the parties; *Monroe v. Twistleton* (1802), 2 Peake Add. Ca. 219; *Aveson v. Kinraid* (1805), 6 East 188, 8 R.R. 445. A witness who is making the protected disclosures, may refuse to disclose anything further at any time during his examination; *Connolly v. Murrell* (1891), 14 P.R. 187, 270.

Evidence on Prosecutions. Prior to 1892 the words "not being a crime" were contained in the section similar to s. 9, and where the evidence of a defendant was received in a prosecution under a Municipal By-law the conviction was quashed, *R. v. Hart* (1891), 20 O.R. 611; *R. v. Becker* (1891), 20 O.R. 676. The elision of those words now makes a defendant competent and compellable in all prosecutions for violation of provincial acts.

Actions by or against Representatives. Material evidence is anything material to the issue; *McDonald v. McKinnon* (1878), 26 Gr. 12: it may be either direct or circumstantial; *Green v. McLeod* (1896), 23 A.R. 676. Anything which helps the judicial mind to believe one or more of the material statements is sufficient corroboration and it is not necessary that the case should be wholly proved by independent testimony; *Parker v. Parker* (1881), 32 C.P. 113; *Radford v. Macdonald* (1887), 18 A. R. 167; *Watson v. Bradshaw* (1881), 6 A. R. 666. The evidence of executors that at the time notes came into their possession they bore endorsements of payments made to the testator, does not require corroboration not being in respect of a matter occurring before the death of the deceased; *Staebler v. Zimmerman* (1894), 21 A.R. 266. Each joint debtor of a deceased is an opposite or interested party in the same kind, and they constitute together an opposite or interested party within section 10, and the evidence of one is not sufficiently corroborated by the other, *Taylor v. Regis* (1895), 26 O.R. 483. Where each item of a claim against the estate of a deceased person is an independent transaction some corroboration must be adduced as to each; *Cook v. Grant* (1882), 32 C.P. 511; *Re Ross* (1881), 29 Gr. 385. Executors who in good faith compromise a claim against the estate need not adduce corroborative evidence in support of the claim on passing their accounts; *re Robbins* (1876), 23 Gr. 162. See also *Halleran v. Moon* (1881), 28 Gr. 319; *Cole v. Manning* (1877), 2 Q.B.D. 611.

What is not Corroboration. Evidence which is consistent with two opposite views is not corroborative of either; *Re Finch, Finch v. Finch* (1883), 23 Ch. D. 267; *Tucker v. McMahon* (1886), 11 O.R. 718. Where a husband received money from his wife, and there was no evidence but her own that it was received by way of loan, her claim against his estate was disallowed; *Re Laws, Laws v. Laws* (1881), 28 Gr. 382. See also *Burn v. Burn* (1885), 8 O.R. 237, 253.

Corroboration not Required. Where a creditor assigned his debt, to the plaintiff who sued the debtor's executors, the original creditor's evidence does not require corroboration; *Watson v. Severn* (1881), 6 A.R. 559.

Calling opposite party as a witness. Section 16 extends only to cases in which by the same Act the opposite party may be called as a witness, *Jones v. Gallon* (1882), 9 P.R. 290. A proper sum for expenses should be tendered with the notice under s. 16, *Street v. Faulkner* (1856), 15 U.C.R. 116. Parties resident out of the jurisdiction cannot be compelled to attend on notice, *Patchim v. Davis* (1853), 10 U.C.R. 639; *Tyre v. Wilkes* (1859), 18 U.C.R. 46. The section does not extend to corporations, *Dunwick School Trustees v. McBeath* (1851), 4 C.P. 228. On defendant's non appearance a verdict may be entered for the plaintiff, *McWhinney v. McQuaid* (1855), 5 C.P. 161; and no attention will be paid to his affidavit impeaching the correctness of the verdict, *Manning v. Mills* (1854), 12 U.C.R. 515; but it would seem to be necessary to call for a party served with notice at the trial, *Pegg v. Plank* (1853), 3 C.P. 396, and perhaps evidence may be received in support of the defence although the defendant may not be present, *McGann v. Keyes* (1854), 12 U.C.R. 429. A defendant away from home cannot be compelled to wait over for several days on payment of one day's conduct money. *Bolkow v. Foster* (1878), 7 P.R. 388.

The section authorizes the calling of the opposite party only at the trial, *Vardon v. Vardon* (1878), 7 P.R. 436. Where the opposite party is called the party calling him is not necessarily concluded by his answers, *Mair v. Cully* (1863), 10 U.C.R. 321; *Scott v. Crerar* (1887), 14 A.R., at p. 159. By non-attendance the defendant does not admit the amount of damages, *Robertson v. Ross* (1853), 2 C.P. 193.

Subpoenas to Quebec. The opposite party may be a witness within C.S.C. c. 79, s. 4, *Moffatt v. Prentice* (1873), 6 P.R. 33. When the plaintiff applies for an order for a subpoena it is necessary for him to show that no suit is pending for the same cause of action in Quebec, *McPherson v. McPherson* (1870), 3 Chy. Chamb. 58, but a defendant applying need not; *Daly v. Robinson* (1868), 1 Chy. Chamb. 271. The application for the order may be made to the Master in Chambers or a Local Judge, *Moffatt v. Prentice* (1873), 6 P.R. 33, and the order will be made *ex parte* and absolute in the first instance; *Redman v. Broers* (1855), 4 W.R. 24; but the affidavit should shew what the witness is to prove or some reasonable grounds for bringing him, *Allen v. Hamilton* (1867), L.R. 2 C.P. 30. The subpoena must shew it was issued pursuant to an order or the party served cannot be punished for disobedience. *Re Darling* (1877), 39 U.C.R. 339.

It is doubtful whether the power to issue subpoenas to Quebec applies to arbitrations. In *Elliott v. Queen City Assee. Co.* (1873), 6 P.R. 30, it was held that the power existed when the submission had been made, a rule of Court, but in *Hall v. Brand* (1883), 12 Q.B.D. 39, where an order had been made in an action referring the cause "and all matters in difference" to an arbitrator, the arbitration was not a trial within 17 & 18 V. c. 34, s. 1 (Imperial), which is substantially the same as C.S.C. c. 79, s. 4.

Contradictory written statements. When a document is put into the hands of a witness under cross-examination merely to prove the signature or identity or general nature of it, the opposite party is not entitled to immediate inspection of it, except sufficiently to enable him to re-examine about the writing and also to identify the writing in case it should afterwards be put in evidence; he may not read the document through or comment upon its contents until it is put in by the other side, nor does it till then become evidence in the cause, but if any question be put as to its contents or any further question be founded on it there will be a right to inspect it, *Roscoe's N.P.* 16th Ed. 179. Where it is intended to contradict an affidavit by a written document it is necessary that the party making the affidavit be cross-examined upon it to give him an opportunity of explaining it, otherwise the document cannot be received, *Hemming v. Maddick* (1872), L.R. 7 Ch. 395. The contradictory statements may be contained in a series of documents of which no one by itself is sufficient, *Jackson v. Thomason* (1861), 1 B. & S. 745. A statement taken down by a solicitor in the presence of a witness is not a written statement within s. 17, *Amstell v. Alexander* (1867), 16 L.T. 830. A party cannot contradict his own witness by previous written statements, *Ryberg v. Ryberg* (1863), 32 L.J. Mag. Cas. 112.

Contradictory Oral Statements. It is not enough to ask a witness whom it is proposed to contradict whether he ever made a statement—the time, place and person involved in the supposed contradiction should be indicated; *Angus v. Smith* (1829) M. & M. 474. A witness cannot be cross-examined for the purpose of contradicting him on matters irrelevant to the issue; *Ex Parte Palmer* (1832) 1 Deac. & C. 372; *Ex Parte Arnaby* (1833) 2 Deac. & C. 213; *Goddard v. Farr* (1854) 3 W. R. 633, and if an irrelevant question is put the answer is conclusive; *Atty.-Gen. v. Hitchcock* (1847) 1 Ex. 91; *Bank of Hamilton v. Isaacs* (1888) 16 O. R. 450.

Previous Conviction. A previous conviction if denied may be proved although altogether irrelevant; *Ward v. Sinfield* (1880) 43 L. T. 253. A certificate signed by a de facto officer who by virtue of that office has the custody of the records is sufficient, e.g. a deputy clerk of the peace; *R. v. Parsons* (1866) L. R. 1 C. C. 24.

Contradicting Party's own Witnesses. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court; *Coles v. Coles* (1866) L. R. 1 P. & D. 70. A person whose evidence turns out to be unfavorable to the party calling him, is not therefore an "adverse witness" he must in the opinion of the Judge be adverse in the sense of shewing a hostile mind; *Greenough v. Eccles* (1859) 5 C. B. N. S. 786. The discretion of the Judge at the trial is absolute and cannot be reviewed; *Rice v. Howard* (1886) 16 Q. B. D. 681. Where a surgeon had given a certificate of serious injury to a plaintiff, and on being called by him contradicted it and alleged it to be collusively given, he was allowed to be treated as adverse. *Martin v. Traveller's Insurance Co.* (1859) 1 F. & F. 505; and where a witness had given a different statement to the party's solicitor he was allowed to be treated as adverse, but only with a view to discredit him generally; *Faulkner v. Brine* (1858) 1 F. & F. 254; *Amstell v. Alexander* (1867) 16 L. T. 830; but the section is not meant to apply to the loose statements made with a view to prepare the evidence; *Reed v. King* (1858) 30 L. T. 290. In actions to establish a will it is necessary to prove due execution, by one of the subscribing witnesses. A party calling such a witness calls him by compulsion of law and the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue; *Coles v. Coles* (1866) L. R. 1 P. & D. 70. Although a witness may disprove the case of the party calling him it may nevertheless be proved by other witnesses, such witnesses not being called to discredit him but to contradict him on the material facts *Ewer v. Ambrose* (1825) 5 D. & R. 629; *Friedlander v. London Assurance* (1852) 4 B. & Ad. 193. A party calling an adverse litigant cannot cross-examine him without the leave of the Judge; *Price v. Manning* (1889) 42 Ch. D. 372. If

an examiner allows a witness to be treated as hostile and the witness deems himself unfairly treated the proper course is to refuse to answer and to bring the matter before the Court; *Ohlsen v. Terrero* (1875) L. R. 10 Ch. 127.

Proclamations. A cutting from the Official Gazette is not sufficient evidence *R. v. Lowe* (1883) 48 L. T. 768.

Public Documents. A public document is a document that is made for the purpose of the public making use of it, especially where there is a judicial or quasi judicial duty to inquire; *Sturla v. Freccia* (1880) 5 App. Cas. 624. An award of fence viewers is within s. 26; *Warren v. Dealippee* (1874) 33 U. C. R. 59. Where a document—a petition to the Crown—is of such an age that upon production it would prove itself a certified copy by the Clerk of the Executive Council, is sufficient without proof of the signatures to the document; *Montgomery v. Graham* (1871) 31 U. C. R. 37.

State Papers. The general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice; *Beatson v. Skene* (1860) 5 H. & N. 838. Formerly the question as to whether the document should be produced or not was determinable only by the officer at the head of the department and his judgment was conclusive and could not be reviewed by the Court; *Bradley v. McIntosh* (1884) 5 O. R. 227. Now the deputy head or other officer who has possession of the documents may determine it. The officer may decline to produce any document—a letter, or complaint to or other communication with the Government; *Attg.-Gen. v. Bryant* (1846) 15 M. & W. 169; *Harrison v. Bush* (1855) 5 E. & B. 344.

Proof by Examined Copy. S. 29 is similar to 14 and 15 V. c. 99 s. 14 (Imperial). The first part states the common law rule. When a copy is certified under the section it is admissible on mere production; *R. v. Weaver* (1873) L. R. 2 C. C. 85. If the certificate is informal it may be proved to be an examined copy; *R. v. Mainwaring* (1856) 26 L. J., Mag. Cas. 10. Voters lists are within the section; *Reed v. Lamb* (1860) 6 H. & N. 75.

Foreign Judgments. A copy of a judgment certified to be a true copy under the hand of the Prothonotaries of the Superior Court of Lower Canada, and the seal of the Court was held to be a sufficient exemplification within s. 31; *Tilton v. McKay* (1874) 24 C. P. 94; but a copy of an English Judgment certified by one of the masters of the Court and without the seal of the Court is insufficient; *Hesketh v. Ward* (1866) 17 C. P. 190, and where the seal was of the "fourteenth" judicial district certifying a judgment recovered in the "tenth" district the proof was insufficient; *Junkin v. Davis* (1863) 22 U. C. R., 369, 6 C. P. 408. An *ex parte* order of a foreign Court is an order or other judicial proceeding; *Leishman v. Cochrane* (1863) 1 Moo. P. C. N. S. 315.

Notarial Protest. A protest from Lower Canada, certified as a true copy from the notary's book is good without any notarial seal, *Ross v. McKindsey* (1841), 1 U.C.R. 507. Any seal declared in the protest to be the notary's official seal is sufficient; *Commercial Bank v. Brega* (1867), 17 C. P. 473. See as to affidavits R.S.O. c. 175, s. 8.

Division Court Judgment. A judgment in a Division Court is properly proved by a certified copy of the entries in the procedure book, under s. 45 of the Division Courts Act; *R. v. Rowland* (1858), 1 F. & F. 72.

Affidavits made out of Ontario. An affidavit not signed by the deponent may be received if the jurat shows that it was sworn before an authorized person; *Re Howard* (1874), L.R. 9 C.P. 347.

Proof of Wills. A probate is evidence of the testator's death, as well as of the will; *Davis v. Van Norman* (1870), 30 U.C.R. 437. The absence of the notice required by s. 41 creates only a technical difficulty, and if not given the Court may properly, and would adjourn the trial to give an opportunity to remove the difficulty; *Hilliard v. Effe* (1874), L.R. 7 H.L. 36. The notice once given is available at any trial of the action; *Wilson v. Baird* (1868) 19 C.P. 98. If no notice of disputing the validity of the will is given, but on the probate being produced the will does not appear to be duly executed, the Court will give liberty to adduce further evidence to show its due execution; *Stewart v. Lees* (1876), 24 Gr. 433. The words "sufficient evidence" have not the same meaning as "conclusive evidence." They mean that the probate

without more will be admissible evidence of the will and its contents as to reality and will be *prima facie* evidence of the validity of the will and the competence of the testator; in other words the probate alone will be sufficient evidence to go to the jury of a devise of realty, but there is nothing to prevent the other side from showing by evidence that the will is not valid or that the testator was not competent; *Barraclough v. Greenough* (1867), L. R. 2 Q. B. 612.

The words "Her Majesty's possessions out of Ontario" in s. 43 include England; *Coltman v. Brown* (1859), 16 U.C.R. 133.

Registered Instruments. An original duplicate endorsed with a certificate of registration is evidence both of registration and execution; *Canada Permanent v. Page* (1879), 30 C.P. 1. A certified copy is sufficient evidence when notice is given. If no notice is given it would seem to be necessary to prove the execution of the original. See R.S.O. c. 136, s. 56.

Suits before Foreign Tribunals. Concurrent Dominion Legislation with reference to the examination of witnesses in suits before foreign tribunals will be found in R.S.C. c. 140; but the right of the province to legislate upon the subject was declared in *re Wetherell v. Jones* (1887), 4 O.R. 713.

Actions with British Residents. Section 53 was enacted to virtually repeal the Statute of 5 Geo. II c. 7 and 5 & 6 Will. IV c. 62, authorizing evidence in suits with residents of Great Britain to be given by affidavit; see *Smith v. McGowan* (1854), 11 U.C.R. 399; 12 U.C.R. 270; *Gabriel v. Derbyshire* (1851), 1 C.P. 422.

Attesting witnesses—when necessary. The following are documents to the validity of which attestation is necessary: (1) Deeds under powers, see R.S.O. c. 119, s. 18. (2) Wills, see R.S.O. c. 128, s. 13. (3) Warrants of attorney and cognovits, see C.R. 601. In these cases the attesting witness must prove the document, or if he is dead or cannot be found, his handwriting must be proved; see *Roscoe's N.P.* 16th Ed. 130, *et seq.*; but all the witnesses must be accounted for; *Doe d. McDonald v. Twigg* (1849), 5 U.C.R. 167.

Comparison of Disputed Writings. An irrelevant document may be introduced in evidence under s. 55; *Birch v. Ridgway* (1858), 1 F. & F. 270; *Creswell v. Jackson* (1860), 2 F. & F. 24; but if any question arises as to its genuineness it must be decided by the Judge; *Bartlett v. Smith* (1843), 11 M. & W. 483. Where the question is as to the handwriting of a witness and the witness in cross-examination is induced to write, his writing may be used for comparison; *Cobbett v. Kilminster* (1865), 4 F. & F. 490. Evidence admitted on the comparison of handwriting should be treated as applicable to the case generally when it properly applies to it; *Royal Canadian Bank v. Brown* (1868), 27 U.C.R. 41.

Impounding Documents. Before a document can be impounded it must be put in evidence; *R. v. Clifford* (1824), 1 C. & P. 521, but application must be made during the trial; *Borton v. Ockford* (1836), 7 C. & P. 547. Copies of impounded documents cannot be taken; *Re Solicitor* (1891), 65 L.T. 584.

THE CANADA EVIDENCE ACT.

56 Victoria, chapter 31, as amended by 61 Victoria, chapter 53 (Dominion).

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as The Canada Evidence Act, Short title. 1893.

2. This Act shall apply to all criminal proceedings, and to Application. all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

WITNESSES.

3. A person shall not be incompetent to give evidence by No incompet- reason of interest or crime. eney from crime or interest.

4. Every person charged with an offence, and the wife or Competency of accused and husband, as the case may be, of the person so charged, shall of wife and husband. be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage. Proviso: as to communications during marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury.

5. No witness shall be excused from answering any ques- Incriminating answers. tion upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and, if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other

criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence. 61 Vict. chap. 53, s. 1.

Evidence of mute.

6. A witness who is unable to speak, may give his evidence in any other other manner in which he can make it intelligible.

Judicial notice to be taken of Imperial Statutes, &c.

7. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant-Governor in Council of any province or colony, which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any province or colony, whether re-enacted before or after the passing of The British North America Act, 1867.

Proof of proclamations, &c., of Governor-General, &c.

8. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor-General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada, may be given in all or any of the modes hereinafter mentioned, that is to say :—

Canada Gazette, &c.

(a) By the production of a copy of the Canada Gazette or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof ;

Copy printed by Queen's printer.

(b) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Queen's printer for Canada ; and

Copy or extract duly certified.

(c) By the production in the case of any proclamation order, regulation or appointment made or issued by the Governor-General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the Queen's Privy Council for Canada,—and in the case of any order, regulation or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

Proof of proclamations, &c., of Lieutenant-Governor, &c.

9. Evidence of any proclamation, order, regulation or appointment made or issued by the Lieutenant-Governor or Lieutenant-Governor in Council of any province, or by or under the authority of any member of the Executive Council, being the head of any department of the Government of the province, may be given in all or any of the modes hereinafter mentioned, that is to say :—

Official Gazette, &c.

(a) By the production of a copy of the Official Gazette for the province purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof ;

(b) By the production of a copy of such proclamation, order, regulation or appointment purporting to be printed by the Government or Queen's printer for the province; Copy printed by Government printer.

(c) By the production of a copy or extract of such proclamation, order, regulation or appointment purporting to be certified to be true by the clerk or assistant, or acting clerk of the Executive Council, or by the head of any department of the Government of the province, or by his deputy or acting deputy, as the case may be. Copy of extract duly certified.

10. Evidence of any proceeding or record whatsoever of, in, or before any court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court, or before any justice of the peace or any coroner in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever; and if any such court, justice or coroner has no seal, or so certifies, then by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court, or of such justice or coroner, without any proof of the authenticity of such signature or other proof whatsoever. Proof of judicial proceedings, &c.

11. Imperial proclamations, Orders in Council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, acts or documents may be proved Proof of Imperial Acts, etc. (a) in the same manner as the same may from time to time be provable in any court in England, or (b) by the production of a copy of the Canada Gazette, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof, or (c) by the production of a copy thereof, purporting to be printed by the Queen's Printer for Canada.

12. In every case in which the original record could be received in evidence, a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof, shall be receivable in evidence without proof of the Proof of official or public documents.

seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

Copies of
public books
or documents
admissible in
evidence.

13. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

Proof of
handwriting,
etc., not re-
quisite.

14. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document; and any such copy or extract may be in print or in writing, or partly in print, and partly in writing.

Order signed
by Secretary
of State.

15. Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General.

Copies of
notices, etc.,
in Canada
Gazette.

16. All copies of official and other notices, advertisements and documents printed in the Canada Gazette shall be *prima facie* evidence of the originals, and the contents thereof.

Copies of
entries in
books of Gov-
ernment de-
partments.

17. A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

Proof of
notarial acts
in Quebec.

18. Any document purporting to be a copy of a notarial act or instrument made, filed or enregistered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved; Provided, that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some

material particular, or that the original is not an instrument of such nature as may by the law of the Province of Quebec be taken before a notary or be filed, enrolled or enregistered by a notary in the said province.

19. No copy of any book or other document as provided in sections ten, twelve, thirteen, fourteen, seventeen and eighteen of this Act, shall be received in evidence upon any trial unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention. The reasonableness of the notice shall be determined by the court or judge, but the notice shall not in any case be less than ten days. Notices to be given to adverse party.

20. The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law. Construction of this Act.

21. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings. Application of provincial laws of evidence.

Oaths and Affirmations.

22. Every Court and Judge, and every person having, by law or consent of parties, authority to hear and receive evidence shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. Who may administer oaths.

23. If a person called or desiring to give evidence, objects on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation:— Affirmation of witnesses instead of oath.

“I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.”

And upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

24. If a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on taking office or otherwise, refuses or is unwilling to be sworn on grounds of conscientious scruples, the Court or Judge, or other officer or person qualified to take affidavits or Affirmation instead of oath.

depositions, shall permit such person instead of being sworn to make his solemn affirmation in the words following, viz., "I, A. B., do solemnly affirm," etc., which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

Perjury.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the next preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

Evidence of child.

25. In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the Judge, Justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received though not given upon oath, if, in the opinion of the Judge, Justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Corroboration required.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

STATUTORY DECLARATIONS.

Solemn declaration.

26. Any Judge, notary public, Justice of the Peace, Police or Stipendiary Magistrate, recorder, or any other person authorized to take affidavits to be sworn to before the Provincial or Dominion Courts, or any other judicial officer authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form of Schedule A to this Act, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact or of any account rendered in writing.

Affidavits required by insurance companies.

27. Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any Justice of the Peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration.

Repeal.

28. The Acts mentioned in Schedule B to this Act are hereby repealed.

Commencement of Act.

29. This Act shall come into force on the first day of July, one thousand eight hundred and ninety-three.

NOTES.

Application of Act. Criminal procedure is within the exclusive cognizance of the Dominion Parliament, B.N.A. Act, s. 91 (27). The procedure in civil matters in provincial courts is within the competence of the provincial legislatures, B.N.A. Act, s. 92 (14). So far as applicable, the Canada Evidence Act probably governs proceedings in the Exchequer Court.

Incriminating Answers. The amendment to the Act made by 61 V. c. 53, makes it necessary for a witness who desires protection from incriminating answers to object to answer the questions, the answers to which might tend to criminate him. The cases cited in the notes to R.S.O. c. 73, p. 93, show when the witness would before the act have been excused from answering. In *R. v. Hendershot* (1895), 26 O.R. 678, and *R. v. Williams* (1897), 28 O.R. 583, it was held that under s. 5 of the act as it then stood, evidence given by a person without objection could afterwards be used in criminal proceedings against him, but this case was not followed in *R. v. Hammond* (1898), 29 O.R. 211. Parliament has now settled that the rule laid down in the two earlier cases is to be followed.

Judicial Notice. In civil proceedings in provincial courts it would be necessary to prove a statute or ordinance of another province in the manner provided by R.S.O. c. 73, s. 21; but in criminal and other proceedings within the authority of the Dominion Parliament judicial notice would be taken thereof without production or proof.

Proclamations, etc. Sections 8 and 9 are substantially the same as sections 22 and 23 of R.S.O. c. 73.

Judgments. Section 10 is somewhat wider than section 31 of R.S.O. c. 73 dealing with the proof of judgments and other judicial proceedings.

Official Documents. See similar provisions R.S.O. c. 73, ss. 26, 27, 28 and 29.

Notarial Documents. See R.S.O. c. 73, ss. 32 and 33.

Notice of Intention to use Copy. In civil proceedings in provincial courts, no notice of the intention to use copies of public or official documents is necessary, but the copies are *prima facie* evidence upon production. In matters to which the Canada Evidence Act applies, at least ten days notice must be given.

Objection to Take Oath. See R.S.O., c. 73, s. 14.

Evidence of Children. There is no provision, similar to that made by section 25, for receiving the evidence of a child who does not understand the nature of an oath, in civil proceedings in provincial courts, and such evidence cannot therefore be received. *Roscoe's N. P.* 16th Ed. 161.

Extra-judicial Oaths. Formerly a penalty was imposed on any official administering an oath except in judicial proceedings, or where an oath was required by law, R.S.C., c. 141. The object was to suppress extra-judicial oaths.

A person who wilfully and corruptly makes a false declaration is guilty of perjury. Criminal Code s. 148.

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PART IV.

Torts.

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CHAPTER 68.

An Act respecting Actions of Libel and Slander.

INTERPRETATION, s. 1, 8 (2).

WHETHER A PUBLICATION AMOUNTS
TO A LIBEL, A QUESTION FOR THE
JURY, s. 2.AVERMENTS IN ACTIONS FOR LIBEL OR
SLANDER, s. 3.APOLOGY MAY BE SHEWN IN MITIGA-
TION OF DAMAGES, s. 4.SPECIAL DAMAGES NEED NOT BE
PROVED IN CERTAIN SLANDERS OF
WOMEN, s. 5.PLEA OF PUBLICATION WITHOUT
MALICE OR GROSS NEGLIGENCE
WITH AN APOLOGY, s. 6.PAYMENT INTO COURT BY WAY OF
AMENDS, s. 7.

PRIVILEGED REPORTS, ss. 8, 9.

SECURITY FOR COSTS, s. 10.

PLACE OF TRIAL, s. 11.

SUBSEQUENT SECTIONS TO APPLY
ONLY TO NEWSPAPERS PUBLISH-
ED IN ONTARIO, s. 12.

LIMITATIONS OF ACTIONS, s. 13.

CONSOLIDATION OF ACTIONS, s. 14.

ORDER OF JUDGE RESPECTING SE-
CURITY FINAL, s. 15.DAMAGES RECOVERED IN OTHER AC-
TIONS, ETC., MAY BE PROVED IN
MITIGATION, s. 16.AUTHOR OF LIBEL MAY BE JOINED AS
A DEFENDANT, s. 17.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts
as follows:—

1. In this Act "newspaper" shall mean any paper Interpretation.
containing public news, intelligence, or occurrences, or any re-
marks or observations thereon, printed for sale and published
periodically, or in parts or numbers, at intervals not exceeding
twenty-six days between the publication of any two such
papers, parts or numbers, and any paper printed in order
to be dispersed and made public weekly or oftener, or at inter-
vals not exceeding twenty-six days, and containing only, or
principally, advertisements. R. S. O. 1887, c. 57, s. 1; 57 V.
c. 27, s. 2 part; 60 V. c. 15, s. 8. "Newspaper."

2. On the trial of an action for the making or publishing
a libel, on the defence of not guilty the jury sworn to try
the issue may give a general verdict of guilty, or not guilty,
upon the whole matter put in issue in the action, and shall
not be required or directed by the Court or Judge, before whom
the action is tried, to find the defendant guilty, merely on the
proof of publication by the defendant of the paper charged to
be a libel, and of the sense ascribed to the action;
but the Court or Judge before whom the action had shall,
according to the discretion of the Court or Judge, give the
opinion and directions of the Court or Judge to the jury on

Jury not to
be directed to
return a ver-
dict of guilty
on the mere
proof of the
publication
and of the
sense ascribed.

the matter in issue, as in other cases; and the jury may on such issue find a special verdict, if they think fit so to do, and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have moved before the passing of this Act. R. S. O. 1887, c. 57, s. 2.

Averments in actions for libel or slander.

3. In actions of libel and slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory averment to shew how the words or matter were used in that sense, and the averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the statement of claim shall be sufficient. R. S. O. 1887, c. 57, s. 3.

Defendant may prove in mitigation that he offered a written or printed apology.

4. In an action for defamation where the defendant has pleaded not guilty only, or has suffered judgment by default, or judgment has been given against him on demurrer, he may give in evidence, in mitigation of damages, that he made or offered a written or printed apology to the plaintiff for such defamation before the commencement of the action; or in case the action was commenced before there was an opportunity of making or offering such apology, that he did so as soon afterwards as he had an opportunity. R. S. O. 1887, c. 57, s. 4.

Proof of special damage not required in certain cases.

5.—(1) In an action of slander for defamatory words spoken of any woman and imputing or meaning that such woman has committed or been guilty of adultery, fornication or concubinage, it shall not be necessary to allege in the plaintiff's statement of claim, or to prove at the trial, that any special damage resulted to the plaintiff from the utterance of such words, but the plaintiff may recover nominal damages without averment or proof of special damage.

Statement of claim to refer to this section

(2) A plaintiff shall not under this section, or because or by reason of the provisions in this section contained, be entitled to recover a verdict in any such action, unless the statement of claim contains an allegation that the action is brought by the plaintiff under the provisions of this section.

Security for costs.

(3) In any such action, the defendant may, at any time after the filing of the statement of claim, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant shewing the nature of the action and that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favor of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for the costs to be incurred in such action, and the security so ordered shall be given in accordance with the practice in cases where

a plaintiff resides out of the Province, and the order shall be a stay of proceedings until the proper security is given.

(4) For the purposes of sub-section 3 of this section the plaintiff or the defendant may be examined upon oath at any time after the statement of claim has been filed. 52 V. c. 14, s. 1.

Examination of parties.

newspaper 6.—(1) In an action for libel contained in a newspaper, the defendant may plead that the libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the newspaper a full apology for the libel; or if the newspaper in which the libel appeared is one ordinarily published at intervals exceeding one week, that he offered to publish the apology in any newspaper to be selected by the plaintiff in the action.

Defendant may plead that the libel was inserted without malice or gross negligence, and that he published or offered to publish an apology.

(2) No such action shall lie unless and until the plaintiff has given to the defendant notice in writing, specifying the statements complained of, such notice to be served in the same manner as a plaintiff's statement of claim is served or by delivering the notice to some grown up person at the place of business of the defendant. The plaintiff shall recover actual damages only, if it appears on the trial of the action, that the article was published in good faith, and that there was reasonable ground to believe that the same was for the public benefit, and if it did not involve a criminal charge, and if it appears that the publication took place in mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published either in the next regular issue of the newspaper, or in any regular issue thereof published within three days after the receipt of such notice, and was so published in as conspicuous a place and type as was the article complained of,

Action not to lie till notice given.

(3) The provisions of this section shall not apply to the case of any libel against any candidate for a public office in this Province, unless the retraction of the charge is made editorially in a conspicuous manner, at least five days before the election. R. S. O. 1887, c. 57, s. 5.

Section not to apply to certain cases.

newspaper 7. A defendant, upon filing the defence in the preceding section mentioned, may pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel, and such payment shall be of the same effect, and available to the same extent and in the same manner, and be subject to the same rules and regulations as to costs, and the form of pleading (except so far as regards the additional facts hereinbefore required to be pleaded by the defendant), as payment of money into Court in other cases; and to such defence the plaintiff may reply generally, denying the whole thereof. R. S. O. 1887, c. 57, s. 6.

And may pay money into Court as amends.

*newspaper
Reports of
Public meetings*

fair reports
of public
meetings to be
privileged.

Proviso.

8.—(1) A report published in a newspaper of the proceedings of a public meeting shall be privileged, if the meeting was lawfully convened for a lawful purpose and open to the public, and if the report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; Provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff can shew that the defendant has refused to insert in a newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff

Meaning of
"public meeting".

(2) The words "a public meeting" in this section shall extend to any lawful meeting to which the public are invited, and of which announcement has been made by printed or written notice thereof being posted up in at least six conspicuous places in the municipality where the meeting is held, or by advertisement in a newspaper published in such municipality, or if there be none published therein then in the one published nearest to the place of meeting. R. S. O. 1887, c. 57, s. 7.

*Reports of
Court.*

Report of
proceedings
in Courts
privileged.

9. All reports of proceedings in any Court of Justice, published in a newspaper shall be privileged, provided that they are fair and authentic and without comments, unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared a reasonable letter or statement of explanation or contradiction, by or on behalf of the plaintiff. R. S. O. 1887, c. 57, s. 8.

*newspaper.
Security for
costs.*

Security for
costs.

10.—(1) In an action brought for libel contained in a newspaper, the defendant may, at any time after the filing of the statement of claim, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant or his agent, shewing the nature of the action and of the defence, and shewing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for the costs to be incurred in such action, and the security so ordered shall be given in accordance with the practice in cases where a plaintiff resides out of the Province, and the order shall be a stay of proceedings until the proper security is given as aforesaid.

(a) But where the alleged libel involves a criminal charge the defendant shall not be entitled to security for costs under this Act, unless he satisfies the Court or Judge that the action is trivial or frivolous.

or that the several circumstances which under subsection 2 of section 6 of this Act entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstance that the article complained of involves a criminal charge.

(2) For the purposes of this section the plaintiff or the defendant or their agents may be examined upon oath at any time after the statement of claim has been filed. R. S. O. 1887, c. 57, s. 9.

11. Every action for libel contained in a newspaper shall be tried in the county where the chief office of such newspaper is, or in the county wherein the plaintiff resides at the time the action is brought; but upon the application of either party the Court or a Judge may direct the issues to be tried or the damages to be assessed in any other county if it be made to appear to be in the interests of justice, or that it will promote a fair trial, and may impose such terms as to the payment of witness fees, and otherwise as may seem proper. R. S. O. 1887, c. 57, s. 10.

12. The following sections of this Act shall only apply to newspapers printed for sale and published in this Province, but nothing therein contained shall be construed as taking away any right which a newspaper not published in the Province may have under the preceding sections of this Act. 57 V. c. 27, s. 2 part; s. 10.

13. Every action for libel contained in a newspaper shall be commenced within three months after the publication complained of has come to the notice or knowledge of the person defamed; but where an action is brought and is maintainable for any libel published within said period of three months such action may include a claim or claims for any other libel published against the plaintiff by the defendant in the same newspaper within a period of one year prior to the commencement of the action. 57 V. c. 27, s. 4.

14.—(1) It shall be competent for a Judge of the High Court of Justice upon an application by or on behalf of two or more defendants, in any two or more actions for the same or substantially the same libel, brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and after such order has been made, and before the trial of the said actions, the defendants, in any new actions, instituted in respect to the same or substantially the same libel, shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.

Place of trial.

Application of following sections of Act.

Time within which action must be brought.

Consolidation of different actions for same libel.

YORK UNIVERSITY LAW LIBRARY

How damages assessed and costs apportioned in such cases.

(2) In a consolidated action under this section the jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants, in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last mentioned defendants; and the Judge at the trial, in the event of the plaintiff being awarded the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants. 57 V. c. 27, s. 5.

newspaper

Order of Judge respecting security final.

15. An order made under section 10 by a Judge of the High Court granting or refusing security for costs in an action for libel contained in a newspaper shall be final and shall not be subject to appeal, and where the order is made by a Local Judge the same may be appealed from to a Judge of the High Court sitting in Chambers, whose order shall be final and shall not be subject to appeal. 57 V. c. 27, s. 7.

newspaper

Evidence in mitigation of damages.

16. Upon the trial of any action for libel contained in a newspaper, the defendant shall be at liberty to give in evidence, in mitigation of damages, that the plaintiff has already brought actions for, or has recovered damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought. 57 V. c. 27, s. 3.

Joinder of certain persons as party defendants.

17.—(1) In any action instituted for the publication in a newspaper of any defamatory matter which has been communicated in writing by any person to such newspaper with a view to its publication therein, the defendant may at any stage of the proceedings, upon notice to such person and an affidavit verifying the facts, apply to a Judge in chambers for an order joining such person as a party defendant in the action, and such person may be so joined on such terms as may appear to be just; and thereafter the defendant in the action, who is charged with, the publication in the newspaper of the defamatory matter complained of, may claim in the action against the party so joined as aforesaid any remedy over or relief to which, under the circumstances he may by law be entitled against such party.

(2) This section shall not apply where the defamatory matter was known by the defendant to be untrue, or was contained in an anonymous communication. 57 V. c. 27, s. 6.

NOTES.

Newspaper. A Mercantile Agency sheet is a "newspaper printed for sale;" *Slattery v. Dunn* (1898), 34 C.L.J. 564; 18 P.R. 108.

Jury to be Judges of Law and Fact. Section 2 is the same in substance as Fox's Libel Act, 32 Geo. III, c. 60, except that that act in terms applies only to criminal proceedings. In civil proceedings the practice always was the same; *Baylis v. Lawrence* (1841), 11 A. & E. 920. The judge defines a libel in point of law and leaves it to the jury to say whether the publication falls within the definition; *Parmiter v. Coupland* (1840), 6 M. & W. 105. When the words are not fairly susceptible of a defamatory meaning the judge will nonsuit; *Hunt v. Goodlake* (1873), 29 L.T. 472. The test is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense; *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, 745. The plaintiff must satisfy both the Court and jury that the words convey the libellous imputation charged; per Lord Blackburn, *ib.* at p. 776. If the words are capable of the libellous meaning alleged, the case must be submitted to the jury; *Huber v. Crookall* (1886), 10 O.R. 475. The intention of the defendant is not material. The test is, what the understanding of the parties to whom the publication is made would naturally be under the circumstances of the publication. *Johnson v. Ewart* (1893), 24 O.R. 116.

Prefatory Averment. Before the Common Law Procedure Act (19 V. c. 43, s. 110), if there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record in order to enable the Court to judge whether the words understood with reference to those circumstances bore that more extended sense, or else those circumstances could not be looked at in favor of the plaintiff, and great nicety was required in setting out those circumstances. By s. 3 it was not intended to alter the law except as to pleading, and the Court has exactly the same power that it had before, and if they are of opinion that if all which could be found upon the evidence had been put on the record under the old system, the judgment would have been arrested, they should give judgment for the defendant. Per Lord Blackburn; *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 772, 782.

Apology. Section 4 is substantially the same as s. 1 of Lord Campbell's Libel Act (6 & 7 V. c. 96), and s. 6 (1) is substantially the same as the first part of s. 2 of that act. Both sections mean the same thing as to the time of publishing the apology; *Ravenhill v. Upcott* (1869), 33 J.P. 290. At the earliest opportunity is to be construed as meaning within a reasonable time, the circumstances of the case and the opportunities of the defendant to publish it being considered; *Cotton v. Beatty* (1863), 13 C.P. 243. A party upon whom it is incumbent to do a thing within a reasonable time duly fulfils his obligation notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably; *Hick v. Raymond* (1893), A.C. 22, 32. The question whether the apology had been inserted within a reasonable time is for the jury, and where an apology in a daily newspaper was not published until the declaration was served six weeks after the first publication, the jury having found for the defendant and there being no evidence of malice or gross negligence, the Court refused to disturb the verdict though of opinion that the apology was too late; *Cotton v. Beatty* (1863), 13 C.P. 243. The apology must be full, though it need not be abject, and must be such as an impartial person would consider sufficient under the circumstances. It should be published as far as possible to the same persons as the libel and be made as publicly as the charge, and the defendant should do his utmost to stop the further publication of the libel. *Risk Allah Bey v. Johnstone* (1868), 18 L.T. 620. It should be printed in ordinary type where it will be seen, and not hidden away among the advertisements; *Lafone v. Smith* (1858), 3 H. & N. 735. The question of sufficiency is for the jury; *Risk Allah Bey v. Johnstone* (1868), 18 L.T. 620. An apology, payment into Court and justification may be pleaded together. *Hawksley v. Bradshaw* (1880), 5 Q.B.D. 302. If a sufficient apology is made and accepted after action brought, the plaintiff should at once move for the costs of the action; *Eastwood v. Henderson* (1897), 17 P.R. 578.

Slander Imputing Unchastity. It is not sufficient on an application under s. 5 for security for costs for a defendant to swear that he has a good defence. Such defence must be shown either by his affidavit or by his cross-examination thereon and affidavits in reply cannot be received; *Lancaster v. Ryckman* (1893), 15 P.R. 190. The onus is on the defendant to show that the plaintiff has not sufficient property to answer the costs; *Feaster v. Cooney* (1895), 15

P.R. 290. Where the slander charged was "you are a blackguard, you are a bad woman" and the innuendo was unchastity and the defendant did not recollect his exact words, but denied the meaning alleged, it was held that he had not shown a good defence on the merits; *Paladino v. Gustin* (1897), 17 P.R. 553.

Notice of Action. In an action against a newspaper notice of action is necessary unless the libel is on a candidate for a public office. A notice addressed to the editor is sufficient. *Burwell v. London Free Press Co.* (1895), 27 O.R. 6. The plaintiff's claim will be confined to the statements complained of in the notice, and allegations referring to portions not specified will be struck out; *Obernier v. Robertson* (1892), 14 P.R. 553; But in a subsequent case it was held that paragraphs as to which a notice of action was necessary could not be summarily struck out; *Connec v. Weidman* (1894), 16 P.R. 239.

Actual Damages only. In an action against a newspaper actual damages only can be recovered if,

- (1) The article was published in good faith.
- (2) There was reasonable ground to believe it was for the public benefit.
- (3) It did not involve a criminal charge.
- (4) Its publication took place in mistake or misapprehension of the facts.
- (5) A full and fair retraction took place in the next regular issue published within three days after the receipt of the notice.

Payment into Court. Prior to the Judicature Act the law did not permit payment into Court in actions of libel except in action, or libel contained in a newspaper; See *Harrison, C.L.P.A.* 119 n. The defendants should state as to what part of the cause of action the money is paid; *Mackay v. Manchester Press Co.* (1890), 54 J.P. 22. If the jury find the damages at a less sum than the amount paid in, the plaintiff is nevertheless entitled to the full sum paid in; *Dunn v. Devon and Exeter Newspaper Co.* (1895), 1 Q.B. 211 n. The plaintiff cannot withdraw the money and proceed for more; *Harris v. Arnott* (1895), 24 L.R. Ir. 404. The payment is not an admission of liability; *Jones v. Mackie* (1897), L.R. 3 Ex. 1. Notwithstanding the concluding words of s. 7, the plaintiff in his reply may traverse only so much of the plea as may be necessary; *Barry v. McGrath* (1899), 17 W.R. 163. In England, except under Lord Campbell's Act, payment into Court cannot be pleaded with another defence; *Order XXII, R. 1*; see *Fleming v. Dollar* (1889), 23 Q.B.D. 388; *Oxley v. Wilkes* (1898), 2 Q.B. 56.

Reports of Public Meetings. Section 8 (1) is similar to Imperial Statute 44 & 45 V. c. 60, s. 2; see *Odger on Libel and Slander*, 2nd Ed. 376-383.

Reports of Judicial Proceedings. The only English equivalent for s. 9 is 51 & 52 V. c. 64 (1888), the language of which is somewhat different. At common law fair reports of judicial proceedings are privileged, except (1) where the Court has prohibited the publication; *Brook v. Evans* (1869), 29 L.J.Ch. 616; *Levy v. Lawson* (1858), E.B. & E. 282; or (2) where the subject matter is an obscene or blasphemous libel or the proceedings are otherwise unfit for publication; *Re Evening News* (1886), 3 T.L.R. 255; *Steele v. Brennan* (1872), L.R. 7 C.P. 261. Section 9 gives newspapers an absolute privilege, except where they fail to insert on proper request a reasonable letter or statement of explanation or contradiction. A report of an *ex parte* application for a summons before a magistrate is privileged; *Usill v. Hales* (1878), 3 C.P.D. 319; *Kimber v. Press Association* (1893), 1 Q.B. 65; but not of an observation by a magistrate's clerk; *Delegal v. Highley* (1837), 8 C. & P. 444; or of matters outside the jurisdiction of the magistrate; *McGregor v. Thwaites* (1824), 3 B. & C. 24. A Parliamentary committee of inquiry is a Court of Justice; *Kane v. Mulvains* (1866), Ir. 2 C.L. 402.

The report need not be verbatim; *Hoare v. Silverlock* (1850), 9 C.B. 20; *Andrews v. Chapman* (1863), 3 Car. & K. 286. A report of the judgment alone published *bona fide* and without malice is privileged; *MacDougall v. Knight* (1886), 17 Q.B.D. 636; 14 App. Cas. 194; *MacDougall v. Knight* (No. 2) (1890), 25 O.B.D. 1. A statement of counsel alone without the evidence; *Saunders v. Mills* (1829), 6 Bing. 213; *Kane v. Mulvains* (1866), Ir. 2 C.L. 402; or a highly colored account with observations, conclusions and insinuations; *Styles v. Nokes* (1806), 7 East 493; or the result of the evidence; *Lewis v. Walter* (1821), 4 B. & Ald. 605; 23 R.R. 415; or an unfair comment; *Risk Allah Bey v. Whitehurst* (1868), 18 L.T. 615; or a libellous heading; *Lewis v. Clement* (1821), 3 B. & Ald. 792, is not a fair report.

It is a question for the jury whether the report is fair; *Turner v. Sullivan* (1862), 6 L.T. 130; *Mihisich v. Lloyds* (1877), 36 L.T. 423.

Security for Costs. Where the action is for a libel contained in a newspaper not involving a criminal charge the defendant is entitled to security for costs upon showing:—

- (1) The nature of the action and defence.
- (2) That the plaintiff has not sufficient property to ensure the costs of defence.
- (3) That he has a good defence on the merits.
- (4) Either that he has a good defence on the merits, or that the grounds of action are trivial or frivolous.

If the libel involves a criminal charge the defendant must show in addition to the three first mentioned facts either that the action is trivial or frivolous, or that the article was published in good faith, and that there was reasonable ground to believe it was for the public benefit, and that the publication took place in mistake or misapprehension of the facts, and that a full and fair retraction was made in proper time.

Sufficient Property. The onus is on the defendant to show that the plaintiff has not sufficient property. Where plaintiff swore he had property to the extent of \$800, over debts; *Bready v. Robertson* (1890) 14 P. R. 7; where plaintiff showed she had property to the value of \$500 over exemptions, and it not appearing she owed any debts; *Feaster v. Cooney* (1893) 15 P. R. 290; and where plaintiff had an equity of redemption to the extent of \$800 (at his own uncontradicted valuation) in mortgaged real estate; *Belair v. Buchanan* (1897) 17 P. R. 413, 476 the defendant was not entitled to security.

Good Defence on Merits. If the defendant shows a *prima facie* defence, e. g. a fair report of judicial proceedings or privilege, or justification, the statute is satisfied; *Swain v. Mail Printing Company* (1894) 16 P. R. 132, and the merits of the case are not to be tried upon the application; *ib.*; *Lancaster v. Ryckman* (1893) 15 P. R. 199; nor will affidavits in answer from the plaintiff be received; *ib.*; *Bartram v. London Free Press Printing Co.* (1897) 18 P. R. 11. But where a libel referred to the plaintiff, and the defendants did not show anything but a denial of the charge of defaming the plaintiff, security was refused; *Lennox v. Star Printing Co.* (1895) 16 P. R. 488, and see *Paladino v. Gustin* (1897) 17 P. R. 553; *supra*, but no nice question of law or any reasonable fact in controversy going to the root of the action should be determined; *Southwick v. Hare* (1893) 15 P. R. 222.

Criminal Charge. As a corporation cannot be guilty of a crime involving malice or the intention of the offender, a charge of bribery against the corporation is not a "criminal charge" so as to free it from the liability to give security; *Georgian Bay Ship Canal Co. v. World Newspaper Co.* (1894) 16 P. R. 320; but a charge of blackmail against an individual is a criminal charge, *MacDonald v. World Newspaper Co.* (1894) 16 P. R. 324. Calling the plaintiff an "unmitigated scoundrel" is not a criminal charge; *Bennett v. Empire Printing Co.* (1894) 16 P. R. 63; where the words *per se* do not involve a criminal charge or are not defamatory, but the innuendo charged is that a criminal offence was intended, security will be refused; *Smyth v. Stephenson* (1897) 17 P. R. 374.

Trivial or Frivolous. Where it was shewn that the article did not refer to the plaintiff, the action was held to be frivolous; *Graeme v. Globe Printing Co.* (1890) 14 P. R. 72. The Court cannot infer that the action is frivolous because a good defence is shown and there is no affidavit by the plaintiff denying the charge; *MacDonald v. World Newspaper Co.* (1894) 16 P. R. 324.

Limitation. The day on which the publication comes to the notice or knowledge of the plaintiff will be excluded in the computation of the three months mentioned in s. 13; *Hanns v. Johnston* (1883) 3 O. R. 100.

Consolidation of Actions. Sections 14 and 16 are taken from Imperial Statute 51 and 52, V., c. 64, ss. 5 and 6. The order for consolidation may be made before the defences are delivered; *Stone v. Press Association* (1897) 2 Q. B. 159.

Finality of order for Security. It is only when the order granting or refusing security is made in an action against an Ontario newspaper by a Judge of the High Court that it is final. An order of the Master in Chambers or of a Local Judge may be appealed from to a Judge in Chambers; *Holmsted & Langton v. 1326.*

Remedy Over. The concluding portion of s. 17 (1) is difficult to understand. There is no right to indemnity for publishing a libel and a contract express or implied for such indemnity is void; *Odger on Libel* 2nd. Ed. p. 8.

CHAPTER 69.

An Act respecting the Action for Seduction.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Action when maintainable by father or mother.

1. The father or, in case of his death, the mother (whether she remains a widow or remarries) of any unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise. R. S. O. 1887, c. 58, s. 1.

Proof of service dispensed with.

2. Upon the trial of an action for seduction brought by the father or mother, it shall not be necessary to prove any act of service performed by the person seduced, but the same shall in all cases be presumed, and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had, before the seduction, abandoned her, and refused to provide for and retain her as an inmate, then any other person who might at Common Law have maintained an action for the seduction may maintain such action. R. S. O. 1887, c. 58, s. 2.

When action maintainable by master, etc.

3. Any person, other than the father or mother, who by reason of the relation of master, or otherwise, would have been entitled at Common Law to maintain an action for the seduction of an unmarried female, may still maintain such action, if the father or mother be not resident in Ontario at the time of the birth of the child which is born in consequence of the seduction, or being resident therein does not bring an action for the seduction within six months from the birth of the child. R. S. O. 1887, c. 58, s. 3.

Where father or mother not resident in Ontario.

4. In case the father and mother of any unmarried female who has been seduced are both dead and such unmarried female is under the age of 21, any person who at the time of the birth of the child which is born in consequence of the seduction, was the legal guardian of, or stood in loco parentis^[118] to such unmarried female, may maintain an action for the seduction notwithstanding that such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise.

NOTES.

Father may bring action. The right of action at common law is based upon the loss of service of the plaintiff's servant consequent upon a wrongful act of the defendant. It was therefore necessary that the female seduced should be the servant of the plaintiff at the time of the seduction; *Davies v. Williams* (1847) 10 Q.B. 725; *Hedges v. Tagg* (1872) L.R. 7 Ex. 283. S. 1 alters the law by giving the right of action to the father notwithstanding the fact that she is not at the time of the seduction his servant. The master cannot bring an action unless the father omits to do so for six months from the birth of the child; *Whitfield v. Todd* (1844) 1 U.C.R. 223; *Cross v. Goodman* (1860) 20 U.C.R. 242.

Or in case of his death the mother. If the father were living at the time of the seduction the act gives the mother no right of action even though he die before the birth of the child; *Smart v. Hay* (1862) 12 C.P. 528; and if the father die after the issue of the writ, the right of action does not survive to the mother; *Healey v. Crummer* (1861) 11 C.P. 527.

Mother's rights. Where the seduction takes place after the death of the father the statute gives the right of action to the mother if the daughter was then "serving or residing with another person on hire or otherwise." It was not necessary for the statute to give a right of action to either the father or mother if the daughter were serving or residing with them. This right existed at common law; *Hogan v. Aikman* (1870) 30 U.C.R. 14, 20. If the seduction takes place before the mother's remarriage, she is the proper person to bring the action, *Kelly v. Bull* (1864) 23 U.C.R. 278. If the mother has remarried and the daughter lives with her and the step-father, she is not residing with "another" within the Statutes and the step-father may maintain the action as at common law, and within the six months from the birth of the child, *McIntosh v. Thyhurst* (1865) 24 U.C.R. 443; *Smith v. Crooker* (1863) 23 U.C.R. 84; *Green v. Wright* (1865) 24 U.C.R. 245, and the mother cannot sue; *Waters v. Powers* (1869) 29 U.C.R. 336, but *quære* see *Meyer v. Bell* (1887) 13 O.R. 35; if the daughter, however, is residing with "another" the mother may bring the action, *Hogan v. Aikman* (1870) 30 U.C.R. 14; *Meyer v. Bell* (1887) 13 O.R. 35.

Unmarried Female. A widow is not an unmarried female, *Kirk v. Long* (1858) 7 C.P. 363; *Anderson v. Rannie* (1862) 12 C.P. 536; but at common law an action may be maintained even for the seduction of a married woman who is the servant of the plaintiff and her evidence to shew non-access of her husband is sufficient, *Mulligan v. Thompson* (1892) 23 O.R. 54.

Illegitimate Child. Neither the father nor mother of an illegitimate child have any right of action under the statute; an action by either of them would be governed by the common law rules, *Biggs v. Burnham* (1844) U.C.R. 106; *Muckleroy v. Burnham* (1842) 1 U.C.R. 351; *Hicks v. Ross* (1865) 25 U.C.R. 50.

Service Presumed. The statute has virtually changed the nature of the action from one resting on the relation of master and servant to that of parent and child; *Lake v. Bemiss* (1854) 4 C.P. 430. It is not necessary that the daughter should be living with the parent at the time the illness occurred; *Harrison v. Prentice* (1897) 24 A.R. 677.

Loss of service must be shown. Although it is not permissible under the Statute to disprove that the daughter performed no service for the plaintiff, it is still necessary to show that either pregnancy or illness followed the seduction, sufficient to interfere with the service which is presumed to be due to the father or mother; *Kimball v. Smith* (1849) 5 U.C.R. 32; *L'Esperance v. Duchene* (1851) 7 U.C.R. 146; *Westcott v. Powell* (1864) 2 E. & A. 525; *Harrison v. Prentice* (1897) 24 A.R. 677.

Abandonment of Daughter. Mere abandonment will not deprive the parent of the right of action unless perhaps, where the right of action has vested in some other person, *James v. Hawkins* (1875) 25 C.P. 346; *Hogan v. Aikman* (1870) 30 U.C.R. 14, 21.

Absence of Father from Ontario. The absence of the father from Ontario does not deprive him of his right of action, *Cromie v. Skene* (1869) 19 C.P. 328.

Actions by Masters under sec. 3. Where a mother brings an action by reason of the father residing out of the province she must prove the relationship of servant and loss of service as at common law; *Gould v. Erskine* (1891) 20 O. R. 347, and the same rule applies to brothers or persons *in loco parentis* *McKay v. Burley* (1859) 18 U.C.R. 251; *Paterson v. Wilcox* (1870) 20 C.P. 355; *Tweedlie v. Bog* (1877) 27 C.P. 561; but slighter evidence of the relationship of servant will be sufficient, and the damages will not be confined to the mere loss of service; *Abernethy v. McPherson* (1876) 26 C. P. 516; *Straughan v. Smith* (1890) 19 O.R. 558.

When parent's right of action complete. A complete case of action accrues to the parent when pregnancy or illness follows the seduction and an action may be brought before the birth of the child; *Westcott v. Powell* (1864) 2 E. A. 525 and the right will not be divested by the daughter's marriage before the birth of the child, *Evans v. Watt* (1883), 2 O.R. 166.

Pleading. It is not necessary to allege that the action is brought under the Statute; *McLean v. Ainslie* (1839) 5 O.S. 456. In actions by the mother, persons *in loco parentis* or master, the death of the father or his absence or failure to bring an action need not be alleged by the plaintiff, but if intended to be relied on must be pleaded by the defendant, *Kelly v. Bull* (1864) 23 U.C. R. 278; *Nickells v. Goulding* (1861) 21 U.C.R. 306; *Ford v. Gourlay* (1878) 42 U.C.R. 552, and where a defendant set up that the cause of action was in another, but did not aver that that other sought to proceed by action, it was held that the defence could not be struck out; *Daley v. Byrne* (1892) 15 P.R. 4.

Abatement. Formerly a cause of action for seduction did not pass to the personal representative of the parent or party injured; *Ball v. Goodmen* (1859) 10 C.P. 174; *Udy v. Stewart* (1836) 10 O.R. 591 but now the cause of action survives; R.S.C. (1897) c. 129, s. 10.

CHAPTER 88.

An Act to protect Justices of the Peace and others from Vexatious Actions.

MALICE, ETC., WHEN TO BE ALLEGED
IN ACTIONS AGAINST JUSTICES,
ETC., ss. 1, 2.

APPLICATION OF ACT, s. 1 (2).

WHERE CONVICTION BY ONE JUSTICE
AND WARRANT THEREON BY AN-
OTHER, ACTION TO BE AGAINST
CONVICTING JUSTICE, s. 3.

NO ACTION TO LIE—

Before conviction is quashed, 4.

Where warrant after summons, not
followed by conviction, etc., s. 5.

Where Justice acts under order
of a Judge, s. 6.

After conviction affirmed on ap-
peal, s. 7.

Where Act done under Statute
held to be *ultra vires*, etc., s. 8.

DEFECTS IN FORM NOT TO PREVENT
JUSTICES FROM CLAIMING PRO-
TECTION, s. 9.

ACTION WHERE OFFENCE NOT PRO-
PERLY DESCRIBED IN INFORM-
ATION OR WARRANT, s. 10.

CONDITION ON QUASHING CONVIC-
TION, s. 11.

SETTING PROCEEDINGS ASIDE, s. 12.

LIMITATION OF ACTIONS, s. 13.

PROCEDURE IN ACTIONS, ss. 14-22.

PROTECTION OF PERSONS OBEYING
WRIT OF MANDAMUS, s. 23.

ACTION NOT TO LIE FOR CERTAIN
MISTAKES AS TO JURISDICTION,
s. 24.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts
as follows:—

1.—(1) In case an action is brought against a Police Magistrate or other Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, or against any other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the Common Law or is imposed by any Act either of the Imperial or Dominion Parliament, or of the Legislature of this Province, it shall be expressly alleged in the statement of claim that the act was done maliciously and without reasonable and probable cause; and if at the trial of the action, the plaintiff fails to prove such allegation, he shall be non-suited, or a verdict or judgment shall be given for the defendant.

(2) So far as applicable, sections 1 to 23 of this Act shall apply for the protection of every officer and person mentioned in the preceding subsection, for anything done in the execution of his office as therein expressed. R. S. O. 1887, c. 73, s. 1.

When action lies without allegation of malice, etc.

2. For any act done by a Justice of the Peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made or warrant issued by the Justice in such matter, any person injured thereby may maintain an action against the Justice in the same case as he might have done before the passing of this Act, without making any allegation in his statement of claim that the act complained of was done maliciously and without reasonable and probable cause. R. S. O. 1887, c. 73, s. 2.

If one Justice makes a conviction, etc., and another grants a warrant, action must be against the former.

3. Where a conviction or order has been made by a Justice of the Peace, and a warrant of distress or of commitment has been granted thereon by some other Justice of the Peace, *bona fide* and without collusion, no action shall be brought against the Justice who granted the warrant by reason of any defect in the conviction or order, or for any want of jurisdiction in the Justice who made the same, but the action (if any is brought) shall be against the Justice who made the conviction or order. R. S. O. 1887, c. 73, s. 3.

No action for anything done under a conviction or order until the same is quashed.

4. No action as mentioned in this Act shall be brought for anything done under a conviction or order until the conviction or order has been quashed, either upon appeal or upon application to the High Court; nor shall any such action be brought for anything done under any warrant issued by such Justice to procure the appearance of the party, and which has been followed by a conviction or order in the same matter, until the conviction or order has been quashed as aforesaid. R. S. O. 1887, c. 73, s. 4.

No action for anything done under a warrant to compel appearance, if a summons previously served and not obeyed.

5. In case the last mentioned warrant has not been followed by a conviction or order, or it is a warrant upon an information for an alleged indictable offence, if a summons was issued previously to the warrant, and the summons was served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons, in such case no such action shall be maintained against the Justice for anything done under the warrant. R. S. O. 1887, c. 73, s. 5.

If a justice refuses to do any act, the High Court or the County Judge may order him to do it, and no action shall then lie against him for doing it.

6. In all cases where a Justice of the Peace refuses to do any act relating to the duties of his office as such Justice, the party requiring the act to be done may, upon an affidavit of the facts, apply to the High Court or to the Judge of the County Court of the county or united counties in which the Justice resides, for an order *nisi* calling upon the Justice, and also the party to be affected by the act, to shew cause why the act

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should not be done; and if, after due service of the order, good cause is not shewn against it, the Court or Judge may make the same absolute, with or without or upon payment of costs, as may seem meet, and the Justice, upon being served with the order absolute, shall obey the same, and shall do the act required; and no action or proceeding shall be commenced or prosecuted against the Justice for having obeyed the order and done the act required as aforesaid. R. S. O. 1887, c. 73, s. 6.

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7. In case a Justice of the Peace has granted a warrant of distress or a warrant of commitment upon any conviction or order which, either before or after the granting of the warrant has been confirmed upon appeal, no action shall be brought against the Justice by reason of any defect in the conviction or order for anything done under the warrant. R. S. O. 1887, c. 73, s. 7.

After conviction, etc., confirmed on appeal, no action to lie for an act done under a warrant.

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8—(1) No action shall be brought against any Judge, Stipendiary or Police Magistrate, Justice of the Peace, or officer, for any act or thing by him done under the supposed authority of a statute or statutory provision of the Province, or of the Dominion of Canada, which statute or statutory provision was beyond the legislative jurisdiction of the Legislature of the Province or of the Parliament of Canada, as the case may be, provided the action would not lie against him, if the statute or statutory provision had been within the legislative jurisdiction of the Parliament or Legislature, which assumed to enact the same.

Protection to those acting under ultra vires statutes

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(2) Where, notwithstanding the above subsection, an action is sustainable against a Judge, Stipendiary or Police Magistrate, Justice of the Peace, or officer, for any act or thing by him done under the authority of a statute or statutory provision, of the description in the said subsection mentioned, the action shall only be sustainable subject to the like provisions as the action would be subject to if the statute or statutory provision were valid; and the like damages, and no more, shall be recoverable in such action as under the like circumstances could have been recovered if the statute or statutory provision had been valid. R. S. O. 1887, c. 73, s. 8.

Cases wherein above does not prevent action.

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9. No defect in form, in an information or warrant taken before or signed by a Justice of the Peace, shall prevent the Justice from claiming the benefit and protection of this Act if the Court before which, or the Judge before whom, the action is tried shall be of opinion that the Justice acted in good faith, and that the informant or complainant intended, by the facts stated to the Justice, to charge the commission of an offence which, if the same had been set forth in proper form in the information or warrant, would have been one within the jurisdiction of the Justice; and in such case the informant or com-

Defects in form of informations or warrants not to prevent Justices from claiming protection hereunder.

plainant shall be liable to prosecution, as if the information had charged in proper form the commission of the offence so intended to be charged. R. S. O. 1887, c. 73, s. 9.

Actions when information does not contain a proper description of the offence.

10. No person who has in good faith as aforesaid intended to charge another person, who has been arrested by the direction of the person so charging the said offence, under a warrant signed by a Justice of the Peace, with the commission of any offence, shall be liable to be sued for a trespass, in consequence only of the information sworn before a Justice of the Peace, or the warrant signed by him not containing a proper description of the offence. R. S. O. 1887, c. 73, s. 11.

Condition on quashing convictions.

11. Where an order is made by the High Court quashing a summary conviction the Court may, if it thinks fit so to do, provide that no action for a trespass shall be brought against the Justice of the Peace who made the conviction. R. S. O. 1887, c. 73, s. 10.

If any action is brought contrary to this Act, Judge may set aside the proceedings.

12. In case an action is brought, where by this Act it is enacted that no action shall be brought under the particular circumstances, a Judge of the Court in which the action is pending shall, upon application of the defendant, and upon an affidavit of the facts, set aside the proceedings in the action, with or without costs, as to him seems meet. R. S. O. 1887, c. 73, s. 12.

Limitation of actions.

13. No action shall be brought against a Justice of the Peace for anything done by him in the execution of his office unless the same is commenced within six months next after the act complained of was committed. R. S. O. 1887, c. 73, s. 13.

Notice of action to be given.

14. No such action shall be commenced against a Justice of the Peace until one month at least after a notice in writing of the intended action has been delivered to him, or left for him at his usual place of abode, by the person intending to commence the action, or by his solicitor or agent, in which notice the cause of action, and the Court in which the same is intended to be brought, shall be clearly and explicitly stated; and upon the back thereof shall be endorsed the name and place of abode of the person intending to sue, and also the name and place of abode or of business of his solicitor or agent, if the notice is served by the solicitor or agent. R. S. O. 1887, c. 73, s. 14.

Place of trial.

15. Every such action shall be tried in the county where the act complained of was committed, and if brought in a County or Division Court, the action shall be brought in the Court of the county or division within which the act complained of was committed, or in which the defendant resides, and

Defendant may plead not guilty by statute.

the defendant may plead not guilty by statute, and may, at the trial of the action, give any special matter of defence, excuse or justification in evidence. R. S. O. 1887, c. 73, s. 15.

16. No action shall be brought in any County or Division Court against a Justice of the Peace for anything done by him in the execution of his office if the Justice objects thereto; and if, within six days after being served with a notice of the action, the Justice, or his solicitor or agent, gives a written notice to the plaintiff in the intended action that he objects to being sued in such County or Division Court for such cause of action, no proceedings shall afterwards be had in such County or Division Court in the action, but it shall not be necessary to give another notice of action in order to sue the Justice in any other Court. R. S. O. 1887, c. 73, s. 16.

Action not to be brought in County or Division Court, if the Justice objects.

17. In every such case, after notice of action has been given as aforesaid, and before an action has been commenced, the Justice to whom the notice has been given may tender to the person complaining, or to his solicitor or agent, such sum of money as he thinks fit as amends for the injury complained of in the notice; and after the action has been commenced, and at any time before issue joined therein, the defendant, if he has not made a tender, or in addition to the tender, may pay into Court such sum of money as he thinks fit, and the tender and payment of money into Court, or either of them, may afterwards be given in evidence by the defendant at the trial under such defence of not guilty. R. S. O. 1887 c. 73, s. 17.

Tender and payment of money into Court by Justice.

18. If the jury (or the Judge, if the case be tried without a jury) at the trial be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into Court, a verdict or judgment shall be given for the defendant, and the sum of money, if any, so paid into Court, or so much thereof as is sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of Court to him, and the residue, if any, shall be paid to the plaintiff. R. S. O. 1887, c. 73, s. 18.

If Judge or jury think plaintiff entitled to no greater damages, verdict to be for defendant.

19. If at the trial of the action the plaintiff does not prove,

If plaintiff fails to prove certain particulars, he shall be non-suited or verdict given for the defendant.

1. That the action was brought within the time hereinbefore limited in that behalf; and (6 mos)

2. That notice as aforesaid was given one month before the action was commenced; and

3. The cause of action stated in the notice; and

4. That the cause of action arose in the county or district, the County Town of which is named in the statement of claim as the place of trial; and

5. Where the plaintiff sues in a County or Division Court, that the cause of action arose within the county or division for which such Court is held ;

Then, and in any such case, the plaintiff shall be nonsuited, or a verdict shall be given for the defendant. R. S. O. 1887, c. 73, s. 20.

Damages nominal in certain cases.

20. In case the plaintiff in such action is entitled to recover, and he proves the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he proves that he was imprisoned under the conviction or order, and seeks to recover damages for the imprisonment, and it is proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and with respect to the imprisonment that he has undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay, he shall not be entitled to recover the amount of the penalty or sum so levied or paid, or any sum beyond the sum of three cents as damages for the imprisonment, or any costs of suit whatsoever. R. S. O. 1887, c. 73, s. 21.

If plaintiff recovers verdict, etc., to be entitled to costs.

21. If the plaintiff in such action recovers a verdict or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs in the same manner as if this Act had not been passed. R. S. O. 1887, c. 73, s. 22.

If malice and want of probable cause alleged and plaintiff recovers, he shall be entitled to full costs.

When defendant is entitled to full costs, etc.

22. If in any case it is alleged in the statement of claim, or in the summons and particulars if the plaintiff sues in the Division Court, that the act complained of was done maliciously and without reasonable or probable cause, the plaintiff, if he recovers a verdict for any damages, or if the defendant allows judgment to pass against him by default, shall be entitled to his costs to be taxed as between solicitor and client; and in every action against a Justice of the Peace for anything done by him in the execution of his office, the defendant, if he obtains judgment, shall be entitled to his full costs in that behalf, to be taxed as between solicitor and client. R. S. O. 1887, c. 73, s. 23.

Persons obeying writ of mandamus, protected.

23. No action, or other proceeding shall be commenced or prosecuted against any person or persons whomsoever, for or by reason of anything done in obedience to a peremptory writ of mandamus issued by any Court having authority to issue writs of mandamus. R. S. O. 1887, c. 73, s. 24.

Action not to lie against stipendiary or police magistrates, etc.,

24.—(1) No action shall lie against a Stipendiary or Police Magistrate for or by reason of any process issued, or conviction made by, or any proceedings of any kind taken before him alone, or authorized by him, in good faith, in any case which,

by the law applicable thereto, was not cognizable by such Police Magistrate, or not by him sitting alone, or which should have been heard by two Justices of the Peace, or by the mayor of a city or town within the district, county, union of counties, or part of a district or county or union of counties, for which the Stipendiary or Police Magistrate was appointed.

for certain mistakes as to jurisdiction.

(2) This section shall not prevent an action from being maintained where and so far as the action would be maintainable against the mayor or Justices of the Peace if the process had been issued or conviction made by, or proceedings taken before, or authority given by him or them, in a matter in which he or they had jurisdiction.

(3) No action shall lie against a constable or peace officer for anything done by him under and by virtue of process issued or authority given, as in sub-section 1 mentioned, unless the action would be maintainable if the process had been issued or authority given by a person or persons legally qualified to issue the process or give the authority. R. S. O. 1887, c. 72, s. 29 (1-3).

NOTES.

Who are within the Act. The Act extends protection to all persons who act irregularly or illegally in the discharge of some duty and the following persons have been held to come within that designation:—

Justices of the Peace; *Marsh v. Boulton* (1848), 4 U. C. R. 354; *Sinden v. Brown* (1890), 17 A. R. 173; but not when acting as interested parties; *Cusick v. McRae* (1853), 11 U. C. R. 309.

Police magistrates; *Gordon v. Denison* (1894), 24 O. R. 576; 22 A. R. 315.

Constables; *Sage v. Duffy* (1852), U. C. R. 30; *Scott v. Reburn* (1894) 25 O. R. 450.

Customs Officers; *Wadsworth v. Murphy* (1844), 1 U.C.R. 190; 2 U.C.R. 120.

Path Masters; *Helliwell v. Taylor* (1858), 16 U. C. R. 279.

School Trustees; *Spry v. Mumby* (1862), 11 C. P. 285.

Collectors of Taxes; *Spry v. Mumby* (1862), 11 C.P. 285; *Howard v. Herring-ton* (1893), 20 A. R. 175.

Arbitrators between School Trustees and a teacher; *Kennedy v. Burness* (1858), 15 U. C. R. 487; *Hughes v. Pake* (1865), 25 U. C. R. 95.

Pound-keepers; *Davis v. Williams* (1863), 13 C. P. 365; *Denison v. Cunningham* (1874), 35 U. C. R. 383.

Mayor of a town for refusing to sign an order to enable plaintiff to obtain a saloon license; *Moran v. Palmer* (1863), 13 C. P. 528.

Registrars of deeds for exacting excessive fees; *Ross v. McLay* (1876), 40 U. C. R. 87.

Crown attorneys; *McDougall v. Peterson* (1876), 40 U. C. R. 95.

County Court Clerk; *Dews v. Riley* (1851), 11 C. B. 434.

Inspector of fisheries; *Venning v. Steadman* (1884), 9 S. C. R. 206.

License commissioners; *Leeson v. License Commissioners* (1890), 19 O. R. 67.

Within his jurisdiction. If a matter is within the jurisdiction of the justice, the act of the justice is not a trespass; but must be disposed of upon the same principles as the old action upon the case; *Haacke v. Adamson* (1864), 14 C. P. 201. The magistrate must have jurisdiction both over the person of the accused and over the offence charged; *Caudle v. Seymour* (1841), 1 Q. B. 889; *Barton v. Bricknell* (1850), 13 Q. B. 393; *Connors v. Darling* (1864), 23 U. C. R. 541; *Appleton v. Lepper* (1869), 20 C. P. 138; *Stoness v. Lake* (1877), 40 U. C. R. 320. To give jurisdiction an information must be laid or be waived, but it is not necessary that it should be in writing; *Stoness v. Lake* (1877), 40 U. C. R. 320, and cases there cited; *McGuinness v. Dafee* (1896), 23 A. R. 704. For a judicial determination of matters properly before him it is apprehended that a justice is not liable; *Paley on Convictions*, 7th Ex. 385; *Dickson v. Crabb* (1865), 24 U. C. R. 494; *Somerville v. Mirehouse* (1860), 1 B. & S. 652. It is only when a magistrate acts irregularly or illegally that he requires protection. Where costs are ordered to be paid to a party instead of to the Clerk of the Peace it is merely erroneous procedure, and not an excess of jurisdiction; *R. v. Binney* (1853), 1 E. & B. 810. Issuing a warrant without a formal order; *Ratt v. Parkinson* (1851), 20 L. J. M. C. 208; failing to state the amount of costs in a warrant; *Dickson v. Crabb* (1865), 24 U. C. R. 494; directing a distress and in default imprisonment in the stocks (which last was improper); *Barton v. Bricknell* (1850), 13 Q. B. 393, requiring sureties to keep the peace instead of for good behavior; *Haylock v. Sparke* (1853), 1 E. & B. 471, refusing to take bail on a charge of misdemeanor; *Linford v. Fitzroy* (1849), 14 Q. B. 240, or issuing a warrant for the arrest of a witness; *Gordon v. Denison* (1894), 24 O. R. 576; 22 A. R. 315, will not make a justice liable unless done maliciously and without reasonable or probable cause.

Malice. The malice required in actions within s. 1 is of the kind known as express malice. It signifies an intent to injure, actuated either by spite or ill will towards an individual or by indirect or improper motives; *Hicks v. Faulkner* (1878), 8 Q. B. D. 175. It is a question of fact for the jury and may be

inferred from the absence of reasonable and probable cause: *Stephen's Malicious Prosecutions*, 34.

Want of Reasonable and Probable Cause. If a man honestly believes in a case laid before a judicial tribunal, such belief being based on a honest conviction of the existence of circumstances which would lead any fairly cautious man to such belief, he has reasonable and probable cause; *Walker v. South Eastern Ry. Co.* (1870) L. R. 5 C. P. 640; *Lister v. Perryman* (1870) L. R. 4 H. L. 521; *Bank of British North America v. Strong* (1876) 1 App. Cas. 307; *Shaw v. McKenzie* (1881) 6 S. C. R. 181; *Hicks v. Faulkner* (1878) 8 Q. B. D. 167; *Abraham v. North Eastern Ry. Co.* (1883) 11 Q. B. D. 440; 11 App. Cas. 247; *McGill v. Walton* (1888) 15 O. R. 389; *Webber v. McLeod* (1888) 16 O. R. 609; *Lea v. Charrington* (1889) 23 Q. B. D. 272; *Hamilton v. Cousineau* (1892) 19 A. R. 203; *Brown v. Hawkes* (1891) 2 Q. B. 718; *Archibald v. McLaren* (1892) 21 S. C. R. 588. The magistrate has nothing to do with the guilt or innocence of the accused except as it appears from the evidence; *Burley v. Bethune* (1814) 5 Taunt. 580.

Acting without or in excess of Jurisdiction. When a magistrate acts without or in excess of his jurisdiction, an action of trespass will lie whether the justice was acting judicially or ministerially; *Paley on Convictions*, 7th E. 390. As has been seen a magistrate who issues a warrant without an information being laid acts without jurisdiction unless the same is waived; *Appleton v. Lepper* (1869) 20 C. P. 138; *Friel v. Ferguson* (1865) 15 C. P. 584; *R. v. Hughes* (1879) 4 Q. B. D. 614; *McGuinness v. Dafoe* (1896) 23 A. R. 704, and so if he issues a warrant on a deposition taken in his absence, he not at the time seeing, examining or hearing the deponent; *Caudle v. Seymour* (1841) 1 Q. B. 889. A commitment to gaol by parol is not good except for such period as is necessary for making out the warrant; *Hutchinson v. Lowndes* (1832) 4 B. & Ad. 118. Issuing a warrant for the arrest of a prosecutor as a witness on a charge of assault is a trespass as the prosecutor is not bound to prosecute such a charge, *Cross v. Wilcox* (1876) 39 U. C. R. 187. An information against a person for keeping a disorderly house will not justify a warrant to arrest all persons found therein; *Cleland v. Robinson* (1861) 11 C. P. 416. A justice who issues without jurisdiction a warrant to arrest a person in another county is responsible for the arrest; *Jones v. Grace* (1889) 17 O. R. 681.

Quashing Conviction. Before an action can be brought for anything done under a conviction, the conviction must be quashed, whether there was jurisdiction or not; *Arscott v. Lilley* (1886) 11 O. R. 285; 14 A. R. 283. But neither a conviction not under seal; *Bond v. Connée* (1887) 15 O. R. 716; 16 A. R. 398; a warrant to arrest a witness; *Gordon v. Denison* (1894) 24 O. R. 576, 22 A. R. 315, nor an order for the destruction of liquors, under R. S. O., c. 39 need be quashed, but it would be necessary to quash an adjudication of forfeiture, *Bond v. Connée* ib. Where an arrest took place under an invalid warrant issued without jurisdiction, it was not necessary to quash the conviction; *Jones v. Grace* (1889) 17 O. R. 681. An amendment of a conviction on appeal by striking out "hard labor" is not a quashing thereof; *McLellan v. McKinnon* (1882) 1 O. R. 219; nor is the discharge on a *habeas corpus* of the party arrested; *Hunter v. Gilkison* (1884) 7 O. R. 725.

NOTICE OF ACTION.

To whom notice must be given. (1) Notice must be given to all persons intending to act in pursuance of a statute, *Briggs v. Evelyn* (1792) : H.B. 1. 114; 3 K.R. 354.

(2) Even where a party acts without jurisdiction he is entitled to notice if he acted in the honest belief that he was acting in the execution of his duty, *Sinden v. Brown* (1890), 17 A.R. 173; *Herman v. Seneschal* (1862), 13 C.B.N.S. 392; *Selmes v. Judge* (1871), L.R. 6 Q.B. 724; *Roberts v. Orchard* (1863), 2 H. & C. 706; *Leete v. Hart* (1868), L.R., 3 C.P. 322; *Calder v. Halket* (1840), 3 Moo. P.C. 28; *Booth v. Clive* (1851), 10 C.B. 827; *McGuinness v. Dafoe* (1896), 23 A.R. 704.

(3) If a person has the right to do an act if a certain state of facts exists and is under the statute authorizing the act, entitled to notice of action, if he acted in pursuance of the statute, the right to notice depends upon whether he bona fide believed in the existence of a state of facts which, had they existed,

would have afforded a defence to the action, and such is the proper question to be submitted to the jury; *McGuinness v. Dafoe* (1896), 23 A.R., at p. 712; *Heath v. Brewer* (1864), 15 C.B.N.S. 803; *Griffith v. Taylor* (1877), 2 C.P.D. 194, and the defendant must show some facts which might give rise to that belief, but it is not necessary that the belief should be reasonable; *Chamberlain v. King* (1871), L.R. 6 C.P. 474.

(4) An officer is not deprived of the protection of a statute because he is indemnified; *White v. Morris* (1852), 11 C.B. 1015; *Dale v. Cool* (1854), 4 C.P. 460; *Lough v. Coleman* (1869), 29 U.C.R. 367.

(5) If it is equivocal in what capacity a party acted, notice must be given; *Briggs v. Evelyn* (1792), B. H. Bl. 114; 3 R.R., 354; *Morgan v. Palmer* (1824), 2 B. & C. 729; 26 R.R., 537; but see *Venning v. Steadman* (1884), 9 S.C.R. 206.

Notice is not necessary in the following cases:

(1) Where the act is not done in the capacity of officer, but is wholly *diverso intuitu*, *Irving v. Wilson* (1791), 4 T.R. 485; 2 R.R. 444; or wholly alien to his jurisdiction, *Agnew v. Johnson* (1877), 13 Cox. C.C. 625.

(2) Where the officer acts colorably and vexatiously from a malicious or corrupt feeling without believing he had authority to do the act; *Bross v. Huber* (1859), 18 U.C.R. 282.

(3) Where there is no evidence of honest belief in the right to do the act; *Friel v. Ferguson* (1805), 15 C.P. 584; *Ibbottson v. Henry* (1885), 8 O.R. 625; *Kelly v. Archibald* (1895), 26 O.R. 608; 22 A.R. 522; and if there is evidence of want of good faith the question must be submitted to the jury if the plaintiff desires it; *Neill v. McMillan* (1866), 25 U.C.R. 485; *Stewart v. Cowan* (1877), 40 U.C.R. 346; *Allen v. McQuarrie* (1879), 44 U.C.R. 62; *Sinden v. Brown* (1890), 17 A.R. 188.

(4) Where the action is to recover back an unlawful fee illegally exacted; *Morgan v. Palmer* (1824), 2 B. & C. 729; 26 R.R. 537; or for an excess of money made; *Dale v. Cool* (1857), 6 C.P. 544; *McLeish v. Howard*, 3 A.R. 503.

(5) Where the party has not been legally appointed to the office which would give the right to do the act; *Tarrant v. Baker* (1853), 14 C.B. 199.

(6) In actions of replevin; *Fletcher v. Wilkins* (1805), 6 East 283; *Lewis v. Teal* (1871), 32 U.C.R. 108; *Applegarth v. Graham* (1858), 7 C.P. 171; *Kennedy v. Hall* (1858), 7 C.P. 218; *Folger v. Minton* (1853), 10 U.C.R. 423; *Gay v. Matthews* (1862), 4 B. & S. 425, p. 7; where the principal object of the action is an injunction; *Flower v. Local Board of Low Leyton* (1877), 5 Ch.D. 347; *Chapman v. Guardians of Auckland Union* (1889), 23 Q.B.D. 294, p. 8; an action *in rem* (1889) *The Longford* 14 P.D. 34, an action to recover land; *Foat v. Mayor of Margate* (1882), 11 Q.B.D. 299, p. 9.

It is for the Judge to decide whether nature of action was necessary; *Kirby v. Simpson* (1854), 10 Ex. 358.

The Action. The notice of action where necessary is a condition precedent to the right of suing; *Clarkson v. Musgrave* (1881), 9 Q.B.D. 390; but the want of notice must be raised by the statement of defence; *Verratt v. McAnlay* (1884), 5 O.R. 313; *McKay v. Cummings* (1884), 6 O.R. 400; *Bond v. Connee* (1889), 16 A.R. 398 and in the Division Court by notice of a statutory defence; *Smith v. Pritchard* (1848), 2 C. & K. 699; *Allwright v. Perks* (1893), 9 T.L.R. 235.

Form of notice of action. Where the act is within the jurisdiction of the officer, the notice must allege that the act was done maliciously and without reasonable or probable cause, *Taylor v. Nesfield* (1854), 3 E. & B. 724; *Kelly v. Archibald* (1895), 26 O.R. 608; 22 A.R. 522; *Howell v. Armour* (1885), 7 O.R. 363; *Scott v. Reburn* (1894), 25 O.R. 450; but a notice intended to state a cause of action under the first section may be good as a notice of action for trespass if the act was done without jurisdiction; *McGuinness v. Dafoe* (1896), 23 A.R. 704. The notice must state the time and place; *Moore v. Gidley* (1872), 32 U.C.R. 233; *Oliphant v. Leslie* (1865), 24 U.C.R. 398; *Martins v. Upcher* (1842), 3 Q.B. 662, (1892) 1 Q.B. 614; *Parkyn v. Staples* (1869), 19 C.P. 240; *Sprung v. Anderson* (1873), 23 C.P. 152; *Scott v. Reburn* (1894), 25 O.R. 450; but where reasonable particularity is used as sufficiently to identify the act or acts complained of it is a sufficient compliance, so that a mistake as to the date or precise locality not calculated to deceive

will not vitiate it; *Green v. Hutt* (1882), 51 L. J., Q. B. 640; *Langford v. Kirkpatrick* (1878), 2 A. R. 513; *Bond v. Connec* (1889), 15 O. R. 716; 16 A. R. 398, affirmed in Supreme Court, see 17 A. R. appendix; *Madden v. Kensington Vestry* (1892), 1 Q. B. 614. It is not necessary to state in what court the action will be brought; *Hanns v. Johnston* (1883), 3 O. R. 100; but if a court is named the writ must issue therefrom; *Buck v. Hunter* (1861), 20 U. C. R. 436. The notice need not be in one document; it may be contained in a series of letters, if in the result the cause of action, and other particulars required are disclosed; *Lamley v. Mayor of East Retford*, 55 J. P. 133. A reference to a statute which does not apply will not invalidate the notice; *MacGregor v. Galworthy* (1850), 3 C. & K. 8. The plaintiff will be confined to the cause mentioned in the notice; *Obernier v. Robertson* (1892), 14 P. R. 553. A defect in the notice may be waived; *Donaldson v. Haley* (1893), 13 C. P. 87.

Within six months. The day of doing the act must be excluded; *Young v. Higgon* (1840), 6 M. & W. 49; *Hanns v. Johnston* (1883), 3 O. R. 100, *Re Gallant* (1891), 11 C. L. T. 138; *Hardy v. Ryle* (1829), 9 B. & C. 603; *Edgar v. Magee* (1882), 1 O. R. 287.

Service of notice of action. The words "place of abode" are wider than place of residence, and a notice is sufficiently served if left at the officer's place of business; *Mason v. Bibby* (1864), 2 H. & C. 881; *Bond v. Connec* (1889), 16 A. R. 398. It may be served by any literate person; *Cuming v. Tomis* (1844), 7 M. & G. 29.

Venue. Although local venue in actions against officers was for a long time considered to be abolished it is now clear that every such action must in the High Court be tried in the County where the action was committed, and in the County and Division Courts must be brought in the County or Division where the act was committed, see C. R. 529; *Holmsted & Langton p. 693*. Where the venue was changed by order to the proper county by consent it was held that the defendant could not object; *Bond v. Connec* (1889), 16 A. R. 398.

Actions brought against a person for anything done in pursuance of the act respecting private lunatic asylums must be brought in the county where the cause of action arose; R.S.O. c. 318, s. 89; and actions for anything done under The Prisons and Asylums Inspection Act must be laid and tried in the county where the fact was committed; R.S.O. c. 321, s. 28.

Not guilty by Statute. The plea should refer to the statute which allows the plea as well as any other statute relied upon by the defence; *Van Natter v. Buffalo & Lake Huron Ry. Co.* (1868), 27 U. C. R. 581, and if it is intended to rely upon the want or insufficiency of notice of action, section 14 should be specially mentioned; *Bond v. Connec* (1884), 15 O. R. 716; (1889), 16 A. R. 398, but if the plaintiff is not taken by surprise, an amendment is almost a matter of course; *Edwards v. Hodges* (1855), 15 C. B. 477; *Van Natter v. Buffalo & Lake Huron Ry. Co.* (1868), 27 U. C. R. 581. The defendant may go into any defence that could be specially pleaded whether founded entirely on the statute or partly on the statute and partly not, and into any defence wholly independent of the statute, which could be set up at common law under the general issue; *Maund v. Monmouthshire Canal Co.* (1842), Car. & M. 606; *Ross v. Clifton* (1841), 11 A. & E. 631; *Fisher v. Thames Junction Ry. Co.* (1837), 5 Dowl. 773; *Doan v. Michigan Central Ry. Co.* (1880), 17 A. R. 481. The plaintiff cannot oust the defendant of his plea by waiving the tort and suing in contract; *Calvert v. Moggs* (1839), 10 A. & E. 632.

Tender of amends. A tender of amends will not cure a defect in a notice of action; *Martins v. Uppcher* (1842), 1 Dowl. N. S. 555. The tender may be given in evidence under the plea of not guilty by statute; *Moore v. Holditch* (1850), 7 U. C. R. 307. The sum tendered need not be paid into Court; *Jones v. Gooday* (1842), 9 M. & W. 736.

Payment into Court. In a plea of payment into Court, the character in which the payment is made need not be stated; *Aston v. Perkes* (1846), 15 M. & W. 385. Leave may be granted to withdraw the general issue and to pay money into Court; *Devaynes v. Boys* (1816), 7 Taunt 33; *Nestor v. Newcome* (1824), 3 B. & C. 159.

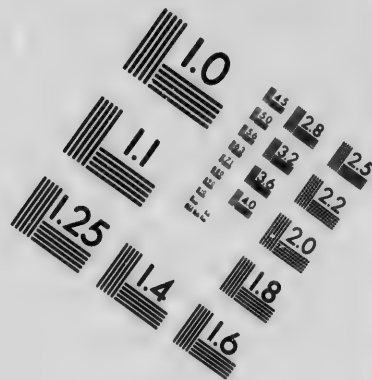
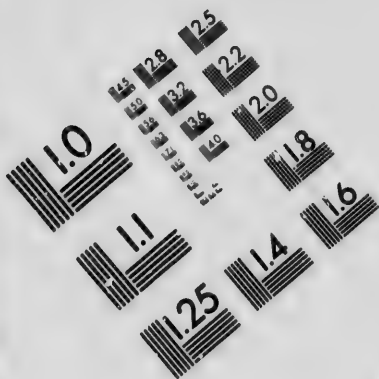
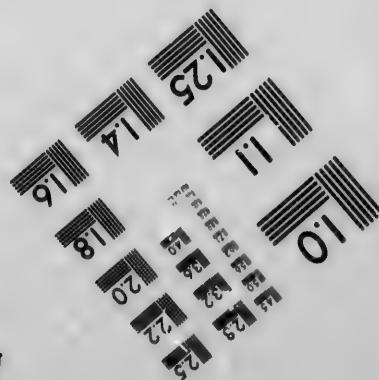
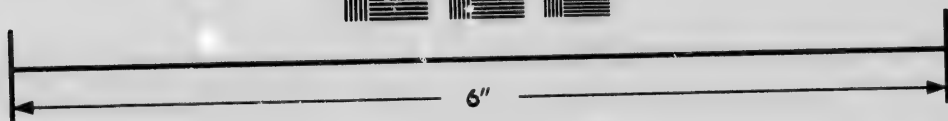
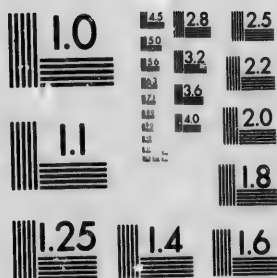


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Suing in County or Division Court. If the officer has given the proper notice objecting to being sued in an inferior Court, the action cannot be removed by *certiorari* into the High Court; *Weston v. Sneyd* (1857), 1 H. & N. 703.

Where plaintiff proved to be guilty. Where the plaintiff is shewn to be guilty of the offence the damages are limited to three cents. The section (20) applies only to cases where the conviction has been quashed; *Rogers v. Jones* (1834), 3 B. & C. 409; 27 R. R. 389. It is not confined to cases where the justices have jurisdiction; *Bross v. Huber* (1858), 15 U. C. R. 625; but applies to actions both in trespass and case; *Haacke v. Adamson* (1864), 14 C. P. 201. Where the justices were not authorized to impose "hard labor" and the turnkey swore that the plaintiff did no hard work in jail it was held that the fact that he was put to some compulsory work was sufficient to show that he suffered greater punishment than that imposed by law; *Graham v. McArthur* (1866), 25 U. C. R. 478.

Costs. Where a jury finds no damages, the officer is entitled to his full costs as between solicitor and client, and the court has no jurisdiction to deprive him thereof; *Arscott v. Lilley* (1887), 14 A. R. 283. If the justice has not objected to the action being brought in an inferior court the plaintiff's costs, if he succeeds, will be taxed on the scale applicable to the court in which the action might have been brought with right of set-off; *Ireland v. Pitcher* (1886), 11 P. R. 403. Costs "as between solicitor and client" mean such costs as could be taxed against a resisting client under a general retainer only to prosecute or defend the action; *Cousineau v. London Fire Ins. Co.* (1888), 12 P. R. 512; *Heaslip v. Heaslip* (1891), 14 P. R. 21, 165.

CHAPTER 160.

An Act to secure Compensation to Workmen in certain cases.

<p>SHORT TITLE, s. 1.</p> <p>INTERPRETATION, s. 2.</p> <p>CLAIMS AGAINST EMPLOYERS, ss. 3, 4.</p> <p>INJURY BY RAILWAYS, s. 5.</p> <p>COMPENSATION :</p> <p style="padding-left: 20px;">Exceptions negating right to recover, s. 6.</p> <p style="padding-left: 20px;">Limit of amount, s. 7.</p> <p style="padding-left: 20px;">How compensation may be distributed, s. 8.</p> <p style="padding-left: 20px;">Limit as to time for recovery, s. 9.</p> <p>DEFENCES UNDER AGREEMENTS, s. 10.</p>	<p>LIABILITY OF PERSONAL REPRESENTATIVE, s. 11.</p> <p>DEDUCTION OF PENALTIES FROM COMPENSATION, s. 12.</p> <p>NOTICE OF INJURY, s. 13.</p> <p>DEFENCE OF WANT OF NOTICE, OR NOT EMPLOYER, s. 14.</p> <p>PARTICULARS OF DEMAND, s. 15.</p> <p>APPOINTMENT OF ASSESSORS, ss. 16-24.</p> <p>CONSOLIDATION OF ACTIONS, ss. 25-30.</p> <p>ADMISSIONS BY NOTICE, s. 31.</p> <p>COMPUTATION OF TIME, s. 32.</p> <p>FORMS AND RULES, s. 33.</p>
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows :—

1. This Act may be known and cited as "The Workmen's Compensation for Injuries Act." 55 V. c. 30 s. 1.

2. Where the following words occur in this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

1. "Superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour. "Superintendence."

2. "Employer" shall include a body of persons corporate or unincorporate, and also the legal personal representatives of a deceased employer, and the person liable to pay compensation under section 4 of this Act. 55 V. c. 30, s. 2 (1, 2). "Employer."

3. "Workman" does not include a domestic or menial servant or servant in husbandry, gardening or fruit growing, where the personal injury caused to any such servant has been occasioned by or has arisen from or in the usual course of his work or employment as a domestic or menial servant, or as a "Workman"

servant in husbandry, gardening or fruit-growing, but, save as aforesaid, means any railway servant and any person who being a labourer, servant, journeyman, artificer, handicraftsman, miner or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract is made before or after the passing of this Act, is expressed or implied, oral or in writing, and is a contract of service or a contract personally to execute any work or labour. 56 V. c. 26, s. 1.

"Packing."

4. "Packing" shall mean a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where filled in, shall extend to within one and a half inches of the crown of the rails in use on any railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

"Railway servant."

5. "Railway servant" shall mean and include a railway servant, tramway servant and street railway servant. 55 V. c. 30, s. 2 (4-5).

When workman to have claim against employer.

3. Where personal injury is caused to a workman—

1. By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer; or

2. By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

3. By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

4. By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or

5. By reason of the negligence of any person in the service of the employer who has the charge or control of any points signal, locomotive, engine, machine, or train upon a railway, tramway or street railway;

the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons

entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work. 55 V. c. 30, s. 3.

4.—(1) Where the execution of any work is being carried into effect under any contract, and Employer, who to be deemed.

- (a) The person for whom the work, or any part thereof, is done, owns or supplies any ways, works, machinery, plant, buildings, or premises used for the purpose of executing the work; and
- (b) By reason of any defect in the condition or arrangement of such ways, works, machinery, plant, buildings or premises, personal injury is caused to any workman employed by the contractor or by any sub-contractor; and
- (c) The defect or the failure to discover or remedy the defect arose from the negligence of the person for whom the work or any part thereof is done, or of some person being in his service and entrusted by him with the duty of seeing that such condition or arrangement is proper;

the person for whom the work, or that part of the work is done shall be liable to pay compensation for the injury as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this Act. Provided, always, that any such contractor or sub-contractor shall be liable to pay compensation for the injury as if this section had not been enacted, so however that double compensation shall not be recoverable for the same injury.

(2) Nothing in this section contained shall affect any rights or liabilities of the person for whom the work is done and the contractor and sub-contractor (if any) as between themselves. 55 V. c. 30, s. 4.

5. Where within this Province personal injury is caused to a workman employed on or about any railway, Injuries by railways.

- 1. By reason of the lower beams or members of the superstructure of any highway, or other overhead bridge, or any other erection or structure over said railway, not being of a sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet between the top of the highest freight cars then running on such railway, and the bottom of such lower beams or members; or,

2. By reason of the space between the rails in any railway frog, extending from the point of such frog backward to where the heads of such rails are not less than five inches apart, not being filled in with packing; or,
3. By reason of the space between any wing-rail and any railway frog, and between any guard-rail and any other rail fixed and used alongside thereof as aforesaid, and between all wing-rails where no other rail intervenes, (save only where the space between the heads of any such wing-rail and railway frog as aforesaid, or between the heads of any such guard-rail and any other rail fixed and used alongside thereof as aforesaid, or between the heads of any such wing-rails where no other rail intervenes as aforesaid, is either less than one and three-quarters of an inch or more than five inches in width), not being at all times during every month of April, May, June, July, August, September, October, and November filled in with packing;

such injury shall be deemed and taken to have been caused by reason of a defect within the meaning of clause numbered 1 of section 3 of this Act, but nothing in this section contained shall be taken or construed, as in any respect, or for any purpose restricting the meaning of the said clause. 55 V. c. 30, s. 5. 60 V. c. 15, Sched. A (57).

Exceptions
to preceding
provisions.

6. A workman, or his legal representatives, or any person entitled in case of his death, shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

1. Under clause 1 of section 3, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person entrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, building or premises are proper.

2. Under clause 4 of section 3, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided, that where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, either by the Lieutenant-Governor in Council, or under and pursuant to any provision in that behalf of any Act of the Legislature of Ontario, or of the Parliament of Canada, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law.

3. In any case where the workman knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give or cause to be given within a reasonable

time, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. Provided, however, that such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury.

55 V. c. 30, s. 6. 60 V. c. 14, s. 85.

7. The amount of compensation recoverable under this Act shall not exceed either such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury of a person in the same grade employed during those years in the like employment within this Province, or the sum of fifteen hundred dollars, whichever is larger; and such compensation shall not be subject to any deduction or abatement, by reason, or on account, or in respect of any matter or thing whatsoever, save such as is specially provided for in section 12 of this Act. 55 V. c. 30, s. 7.

Limit of amount of compensation.

8. When in any action under this Act compensation is awarded in the case of the death of a workman for an injury sustained by him in the course of his employment, the amount recovered, after deducting the costs not recovered from the defendant may, if the Court or Judge before whom the action is tried so directs, be divided between the wife, or husband, parent and child of the deceased in such shares as the Court or Judge, with or without assessors, as the case may be, or if the action is tried by a jury, as the jury may determine. 55 V. c. 30, s. 8.

Distribution of compensation.

9. Subject to the provisions of sections 13 and 14, an action for the recovery, under this Act, of compensation for an injury shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice. 55 V. c. 30, s. 9.

Limit of time for recovery of compensation.

*notice within 12 weeks.
+ action within 6 months.
cf. s. 5.*

10. No contract or agreement made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this Act of compensation for any injury,

a Contract by workman when to constitute a defence to action for compensation.

1. Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor

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2. Unless such other consideration was in the opinion of the Court or Judge before whom such action is tried, ample and adequate; nor

3. Unless, in the opinion of the Court or Judge, such contract or agreement, in view of such other consideration was not on the part of the workman, improvident, but was just and reasonable;

and the burden of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that the contract was just and reasonable and was not improvident as aforesaid, shall, in all cases, rest upon the defendant; Provided always that notwithstanding anything in this section contained, no contract or agreement whatsoever made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this Act of compensation for any injury happening or caused by reason of any of the matters mentioned in section 5 of this Act. 55 V. c. 30, s. 10.

Proviso.

Liability
personal repre-
sentative.

11. Notwithstanding anything contained in this Act, an action under section 3, 4 or 5 shall lie against the legal personal representatives of a deceased employer. 55 V. c. 30, s. 11.

Money pay-
able under
penalty to be
deducted from
compensation.

12. There shall be deducted from any compensation awarded to any workman or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or damages, or part of a penalty or damages which may in pursuance of any other Act, either of the Parliament of Canada, or of the Legislature of Ontario, have been paid to such workman, representatives or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or damages, or part of a penalty or damages under any such Act, either of the said Parliament, or of the said Legislature, in respect of the same cause of action, such workman, representatives or persons shall not, so far as the said Legislature has power so to enact, be entitled thereafter to receive in respect of the same cause of action, any such penalty or damages, or part of a penalty or damages, under any such last-mentioned Act. 55 V. c. 30, s. 12.

Form and ser-
vice of notice
of injury.

13.—(1) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers.

(2) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(3) The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(4) Where the employer is a body of persons corporate or unincorporate the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body.

(5) The want or insufficiency of the notice required by this section, or by section 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury if the Court or Judge before whom such action is tried, or, in case of appeal, if the Court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence. 9. sec. 9.

(6) A notice under this section shall be deemed sufficient if in the form or to the effect following:—

To A. B., of *(here insert employer's address)*

or

To the

Company, *(or as the case may be.)*

Take notice, that on the day of 18 , C. D., of *(insert address of injured person)* a workman in your employment sustained personal injury, *(add, of which he died, if such be the case,)* and that such injury was caused by *(state shortly the cause of injury, e.g., the fall of a beam.)*

(Date.)

Yours, etc.,

X. Y.

55 V. c. 30, s. 13.

14. If the defendant in any action against an employer for compensation for an injury sustained by a workman in the course of his employment intends to rely for a defence on the want of notice or the insufficiency of notice, or on the ground that he was not the employer of the workman injured, he shall, not less than seven days before the hearing of the action, or such other time as may be fixed by the rules regulating the practice of the Court in which the action is brought, give notice to the plaintiff of his intention to rely on that defence, and the Court may, in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an

Defence of want of notice or not the plaintiff's employer.

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adjournment of the case for the purpose of enabling such notice to be given; and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with sections 9 and 13 of this Act. 55 V. c. 30. s. 14.

Particulars of demand.

15. In an action brought under this Act the particulars of demand or statement of claim shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed; and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff, and where the injury of which the plaintiff complains shall have arisen by reason of the negligence, act, or omission of any person in the service of the defendant, the particulars shall give the name and description of such person. 55 V. c. 30, s. 15.

Application for appointment of assessors.

16.—(1) Upon the trial of an action for recovery of compensation under this Act before a Judge without a jury, one or more assessors may be appointed by the Court or Judge for the purpose of ascertaining the amount of compensation; and the remuneration (if any) to be paid to such assessors shall be fixed and determined by the Judge at the trial.

(2) Any person who shall, as hereinafter provided, be appointed to act as an assessor in such action, shall be qualified so to act.

(3) In such action, a party who desires assessors to be appointed shall, ten clear days at least before the day for holding the Court at which the action is to be tried, file an application stating the number of assessors he proposes to be appointed, and the names, addresses and occupations of the persons who may have expressed their willingness in writing to act as assessors. If the applicant has obtained the consent of the other party to the persons named being appointed, he shall file such consent with his application.

(4) Where the application for the appointment of assessors has been made by one party to an action only, he shall, eight clear days at least before the day for holding the Court at which the action is to be tried, serve a copy of the application, so filed, upon the other party, who may then either file an application for assessors, or file objections to one or more of the persons proposed.

(5) An application for the appointment of assessors may be in the form following, or to the like effect, namely :—

In the (*describing the Court*)

"The Workmen's Compensation for Injuries Act."

BETWEEN,

and

Plaintiff,

Defendant.

The plaintiff (*or defendant*) applies to have an assessor (*or assessors*) appointed to assist the Court in ascertaining the amount of compensation to be awarded to the plaintiff, should the judgment be in his favour, and he submits the names of the following persons, who have expressed their willingness in writing to act as assessors should they be appointed.

(*Here set out the names, addresses and occupations of the persons above referred to.*)

(*If the other party consents to the appointment add the following*):—

The defendant (*or plaintiff*) consents to the appointment of any of the persons above named to act as assessors in this action, as appears by his consent thereto filed herewith.

Dated this

day of

A. B.

The above named plaintiff, (*or as the case may be.*)

(6) Where separate applications are filed by the parties, no objection to the persons proposed shall be made by either party, but the Court or Judge may appoint from the persons named in each application one or more assessor or assessors, provided that the same number of assessors be appointed from the names given in such applications respectively. 55 V.c. 30, s. 16 (1-6)

17. In case any such action is brought in a Division Court the applications for the appointment of assessors, together with any objections made to the persons proposed, shall be forwarded by the clerk of the Court to the Judge. 55 V. c. 30, s. 16 (7).

Assessors in
Division
Court.

18. Where application for the appointment of assessors is granted, the Court or Judge shall appoint such of the persons proposed for assessors as by the Court or Judge may be deemed fit, subject to the provisions contained in this Act. 55 V. c. 30, s. 16 (8).

Appointment
by Court or
Judge.

19. In such action where an application for the appointment of assessors has been filed, the Court or Judge may, at any time prior to the trial thereof, nominate one or more additional persons to act as assessors in the action. Where no application for assessors has been made, the Court or Judge may appoint one or more persons to act as assessor or assessors in the action before or on the trial of the action. 55 V. c. 30, s. 16 (9).

Additional
assessors.

20. If at the time and place appointed for the trial all or any of the assessors appointed do not attend, the Court or Judge may either proceed to try the action with the assistance of such

Where as-
sessors do not
attend at
trial.

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of the assessors, if any, as do attend, or may adjourn the trial generally, or upon any terms which the Court or Judge may think fit, or may appoint any person who may be available and who is willing to act, and who is not objected to, or who, if objected to is objected to on some insufficient ground, or the Court or Judge may try the action without assessors. 55 V. c. 30, s. 16 (10).

Deposit of
assessor's fee.

21. Every person requiring the Court or Judge to be assisted by assessors shall at the time of filing his application deposit therewith the sum of \$4 for every assessor proposed, and such payments shall be considered as costs in the action, unless otherwise ordered by the Court or Judge: Provided, that where a person proposed as an assessor shall have in writing agreed and consented that he will not require his remuneration to be so deposited, no deposit in respect of such person shall be required. 55 V. c. 30, s. 16 (11).

Proviso.

By whom cost
of additional
assessors
borne.

22. Where an action is tried by the Court or Judge with the assistance of assessors in addition to or independently of any assessors proposed by the parties, the remuneration of such assessors shall be borne by the parties, or either of them, as the Judge or Court shall direct. 55 V. c. 30, s. 16 (12).

Where trial
does not take
place.

23. If after an assessor has been appointed the action shall not be tried, the Court or Judge shall have power to make an allowance to him in respect of any expense or trouble which he may have incurred by reason of his appointment, and direct the payment to be made out of any sum deposited for his remuneration. 55 V. c. 30, s. 16 (13).

Duty of
assessors.

24. The assessors shall sit with and assist the Court or Judge when required with their opinion and special knowledge for the purpose of ascertaining the amount of compensation, if any, which the plaintiff shall be entitled to recover. 55 V. c. 30, s. 16 (14).

Consolidation
of actions.

by order.

25.—(1) Where several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act or omission, the defendant shall be at liberty to apply to the Judge that the said actions shall be consolidated.

(2) Applications for consolidation of actions shall be made upon notice to the plaintiffs affected by such consolidation. 55 V. c. 30, s. 17 (1, 2).

Staying several
actions to
abide result
of one.

26.—(1) In case several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act or omission, the defendant may, on filing an undertaking to be bound so far as his liability for such

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negligence, act or omission is concerned by the decision in such one of the said actions as may be selected by the Court or Judge, apply to the Court or Judge for an order to stay the proceedings in the actions other than in the one so selected, until judgment is given in such selected action.

(2) Applications for stay of proceedings shall be made upon notice to the plaintiffs affected by stay of proceedings or *ex parte*. 55 V. c. 30, s. 17 (3, 4).

27. Upon the hearing of an application for consolidation of actions or for stay of proceedings, the Court or Judge shall have power to impose such terms and conditions and make such order in the matter as may be just. 55 V. c. 30, s. 17 (5).

Terms of consolidation or stay.

28. If an order shall be made by a Court or Judge upon an *ex parte* application to stay proceedings, it shall be competent to the plaintiffs affected by the order to apply to the Court or Judge (as the case may be) upon notice or ex parte, to vary or discharge the order so made, and upon such last mentioned application such order shall be made as the Court or Judge shall think fit, and the Court or Judge shall have power to dispose of the costs occasioned by such order as may be deemed right. 55 V. c. 30, s. 17 (6).

Varying order.

29. In case a verdict in the selected action shall be given against the defendant, the plaintiffs in the actions stayed shall be at liberty to proceed for the purpose of ascertaining and recovering their damages and costs. 55 V. c. 30, s. 17 (7).

Removal of stay.

30. Where two or more persons are joined as plaintiffs under section 25, and the negligence, act or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of compensation, if any, that each plaintiff is entitled to shall be separately found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person, and in such manner as the Court or Judge thinks fit; should the defendant fail to pay the several amounts of compensation and the costs awarded in the action, execution may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amounts awarded, a dividend shall be paid to each plaintiff, calculated upon the proportion of the amount awarded to the respective plaintiffs to the total amount realized after the deduction of all the costs of the action as aforesaid 55 V. c. 30, s. 17 (9).

Damages to be separately assessed.

Execution.

31. A defendant may by notice to the opposite party to be given or served at least six days before the day appointed for the trial of the action, admit the truth of any statement of his liability for any alleged negligence, act or omission as set

Admissions by notice.

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forth or contained in the plaintiff's statement or particulars of claim in the action, and after such notice given the plaintiff shall not be allowed any expense thereafter incurred for the purpose of proving the matters so admitted. 55 V. c. 30, s. 17 (8).

Where time
expires on
a holiday.

32. Where the time for doing any act, taking any proceeding, or giving any notice under or required by this Act expires on a holiday such act, or proceeding, or notice shall, so far as regards the time of doing, taking or giving the same, be held to be duly and sufficiently done, taken or given, if done, taken or given, on the day next following which is not a holiday 55 V. c. 30, s. 18; 60 V. c. 3, s. 3.

Forms and
rules.

33. In an action brought in any Court to recover compensation under this Act, the forms and methods, and the rules and orders in force in the Court shall, subject to and save as otherwise provided by the terms and provisions of this Act, apply to and regulate all matters of pleading, practice and procedure in such action, and notwithstanding anything in this Act contained, the forms and method, and the pleadings, practice and procedure in any such action shall conform to and be regulated by any rules or orders in that behalf hereafter lawfully and duly made or prescribed with respect to actions brought in any such Court. 55 V. c. 30, s. 19.

NOTES.

Change made by the Act. The effect of the Act is to remove in a limited number of cases the doctrine of common employment. At common law the master was responsible to the servant for his personal negligence, but was not liable for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service.

The principle of the Workmen's Compensation Act is to remove the doctrine one step and make the master answerable for the conduct of those to whom he has delegated his authority; *Morrison v. Baird* (1882) 10 *Rettie* 271.

Defences given to the Master. At common law a master who employs a servant in a work of dangerous character is bound to take all reasonable precautions for the workman's safety. For defective machinery or a defective system of using machinery, he is responsible, and his ignorance would not bar the workman's claim, as he is bound to see that his works and machinery were free from defect; *Smith v. Baker* (1891) A.C. 348; *Webster v. Foley* (1892) 21 S. C.R. 580; *Fairweather v. Owen Sound Quarry Co.* (1895) 26 O.R. 604; but see *Griffith v. St. Katharines Dock Co.* (1884) 13 Q.B.D. 259. By s. 6 (3) knowledge of the defect or negligence by the workman and his failure without reasonable cause to give information thereof within a reasonable time is a defence unless the workman was aware that the employer or some person superior to the workman in the service of the employer knew of the defect or negligence.

Other new defences are the want of notice of action and a limitation of six months to bring the action, except in cases of death. ss. 9 and 13.

Workmen not within the Act:

(a) Domestic or menial servants and
(b) Servants in husbandry, gardening or fruit growing,
(c) Persons not engaged in manual labor except railway servants, are not entitled to the benefit of the Act. It is a question for the jury whether the hiring of the workman was as a servant in the excepted class and whether the work he was engaged in was in the usual course of his employment as such; *Reid v. Barnes* (1894) 25 O.R. 223. An omnibus conductor *Morgan v. London General Omnibus Co.* (1884) 12 Q.B.D. 201; 13 Q.B.D. 832, and a grocers assistant *Bound v. Lawrence* (1892) 1 Q.B. 226, have been held to be outside the act. A potman in a public house is substantially a menial or domestic servant; *Pearce v. Lansdowne* (1893) 62 L.J., Q.B. 441. A man promised a job on the following day is not a workman; *Cowler v. Moresby Coal Co.* (1885) 1 T.L.R. 575.

Superintendence. An employer is liable for the negligence of a servant who has any superintendence entrusted to him while in the exercise of such superintendence. The English act makes the master responsible for such a superintendant only when he is not ordinarily engaged in manual labor. Under the Ontario Act a workman may be a superintendant although ordinarily engaged in manual labor, s. 2(1). Superintendence means such general superintendence over workmen as is exercised by a foreman or person in like position to a foreman. The onus is on the plaintiff to show what the negligent man's duties were. It then becomes the duty of the Judge to determine whether there is any evidence that he had such superintendence and control as to make his orders imperative; *Garland v. Toronto* (1896) 23 A.R. 238. The employer is responsible for the negligence of a clerk of the works employed by him; *Kearney v. Nichols* (1883) 76 L. T. Journal 63; also for the failure of a foreman to notify a workman that a shaft has been disconnected; *Aitken v. Newport Dock Co.* (1887) 3 T.L.R. 527. The negligence must be whilst in the exercise of superintendence; *Shaffers v. General Steam Navigation Co.* (1883) 10 Q.B.D. 356; *Harris v. Tinn* (1889) 5 T.L.R. 221; *Osborne v. Jackson* (1883) 11 Q.B.D. 619.

Workman. A driver who supplies his own waggon, the employer supplying the horses is a workman; *Yarmouth v. France* (1887) 19 Q.B.D. 647, and so is a slater who works by the piece, and who is injured by unsafe scaffolding supplied by his employer; *Stuart v. Evans* (1883) 49 L. T. 138. A man loaned by his employer to another whose orders he was bound to obey is a workman of the borrower within the act; *Wild v. Waygood* (1892) 1 Q.B. 783.

Railway Servants. Railways under the legislative jurisdiction of the Dominion Parliament are subject to the Act; *Canada Southern Railway Co. v. Jackson* (1890) 17 S.C.R. 316; except where they relate to the construction or arrangement of the railway itself, e.g. *s. 5*; *Monkhouse v. Grand Trunk Ry. Co.* (1888) 8 A.R. 637; *Washington v. Grand Trunk Ry. Co.* (1897) 24 A.R. 183. The provisions of the Dominion Railway Act, (51 V. c. 29, s. 289) are *intra vires* and a workman suing thereunder is not restricted to the amount of compensation provided by the Workmen's Compensation Act; *Curran v. Grand Trunk Railway Co.* (1898) 34 C.L.J. 784.

What is a Defect.

Defect. Many cases have arisen as to what is a defect. A machine may be dangerous but not defective. The Act is not directed against dangerous machines but against the negligence of employers. It must be a defect in the condition of the machine having regard to the use to which it is to be applied, or to the mode in which it is to be used. It may be a defect either in the original construction of the machine or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer; *Walsh v. Whitely* (1888), 21 Q.B.D. 371.

A lack or absence of something essential to completeness is a defect; per *Bruce, J.*, *Tate v. Latham* (1897), 1 Q.B. 506.

The following are instances of neglect for which the master was held to be responsible:

Where the sides of a lift were not fenced to prevent coke falling therefrom, and a lower platform was not roofed to protect those working upon it from falling coke and a workman was killed. *Heske v. Samuelson* (1883), 12 Q.B.D. 30. A ladder which was used to support a scaffold and was insufficient for that purpose; *Cripps v. Judge* (1884), 13 Q.B.D. 583.

A ladder which had to be placed against a pipe was unsafe by reason of being without hooks or stays which were necessary owing to a bend in the pipe; *Weblin v. Ballard* (1886), 17 Q.B.D. 122.

A roller which could be made in one piece was made in several sections, with interstices into which jute sometimes got and had to be removed by hand; *Paley v. Garnett* (1885), 16 Q.B.D. 252.

A bolt, sound in itself, is defective when used to bear a weight too heavy for it; *Irwin v. Dennystown Forge Co.* (1885), 22 Sc.L.R. 379.

A kicking horse; *Yarmouth v. France* (1887), 19 Q.B.D. 647.

A horse liable to fall; *Haston v. Edinburgh St. Tramways Co.* (1887), 14 Rettie 621; *Fraser v. Hood* (1887), 15 Rettie 178.

A low railroad bridge; *Hooper v. Columbia R.R. Co.* (1884), 53 Amer. R. 661.

A too narrow passage; *Mitchell v. Holdsworth* (1883), 76 L.T. 101.

A loose screw which caused a guard to slip by which plaintiff's hand came in contact with a saw; *Amos v. Duffy* (1890), 6 T.L.R. 339.

A machine perfectly effective for the purpose for which it is used may be defective if unnecessarily dangerous; *Morgan v. Hutchins* (1890), 59 L.J.Q.B. 197; or if proper means to secure safety in the operation for which it is used are absent; *Stanton v. Scrutton* (1893), 62 L.J.Q.B. 405.

A machine which would not go without touching; *Sanders v. Barker* (1890), 6 T.L.R. 324.

Swinging stones (which sometimes fell) over the heads of workmen, without any system of warning; *Smith v. Baker* (1891), A.C. 325.

Neglect to shore up wall of building being pulled down; *Brannigan v. Robison* (1892), 1 Q.B. 344; or the sides of a drain; *McColl v. Black* (1891), 18 Rettie 507.

Unfenced and unlighted tank, which was usually lighted, on a ship in course of construction; *Jamieson v. Russell* (1892), 19 Rettie 1898.

Neglect to supply proper waste for cleaning machinery, or to stop machinery while cleaning going on; *Thompson v. Wright* (1892), 22 O.R. 127.

Neglect to perform statutory duty, as by fencing or guarding a revolving shaft, is a defect in arrangement; *McGloherly v. Gale Manufacturing Co.* (1892), 19 A.R. 117; *O'Connor v. Hamilton Bridge Co.* (1894), 25 O.R. 12; 21 A.R. 596; 24 S.C.R. 598; *Kervin v. Canadian Cotton Mills Co.* (1896), 28 O.R. 73; 25 A.R. 36.

Worn out blocks supplied to plaintiff to check sawlogs on rollway; *Webster v. Foley* (1892), 21 S.C.R. 580.

Crane occasionally slipping without cause; *Bacon v. Dawes* (1887), 3 T.L.R. 557.

Piece of iron flying out of furnace when door opened; *McGuire v. Cairns* (1889), 17 Rettie 540.

Door crushing man's fingers in closing; *Johnstone v. Mitchell* (1884) 24 Sc.L.R. 698.

A pulley from which the belt was in the habit of slipping off; *Baxter v. Wyman* (1887), 4 T.L.R. 255.

Failure to stretch a tarpaulin to prevent iron falling on workmen working below; *Thrusell v. Handyside* (1888), 20 Q.B.D. 359.

Failure by a loom fixer to examine a loom although notified that something was wrong; *Canadian Cotton Mills Co. v. Talbot* (1897) 27 S.C.R. 198.

Bolts not sufficiently strong fastening the cover of a tank for boiling soap, which insufficiency probably caused an explosion; *Badcock v. Freeman* (1894), 21 A.R. 633.

Having car buffers of unequal heights so that in coupling, the buffers overlapped and offered no protection to the person making the coupling; *Bond v. Toronto Railway Co.* (1895), 24 S.C.R. 715; *Donohue v. Brooklyn City R. Co.* (1856), 14 N.Y. Super. Ct. 639; or not providing suitable links to couple them; *Denver T. & G. R. Co. v. Simpson* (1891), 16 Col. 55.

Neglect to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery while the plaintiff was working near it making repairs; *Matthews v. Bouchard* (1898), 28 S.C.R. 580.

Insufficient or loose planking across a hole over which workmen were required to pass; *Bromley v. Cavendish Spinning Co.* (1887), 2 T.L.R. 881; *Caldwell v. Mills* (1893), 24 O.R. 462.

An unfenced aperture for a stairway; *Wood v. Darrall* (1886), 2 T.L.R. 550.

The want of a guard to a circular saw; *Tate v. Latham* (1897), 4 Q.B. 502.

What is not a Defect.

No defect. On the other hand the following are instances where there was no defect:—

A lighted match blew into a barrel of gunpowder, and the workmen might have covered it up; *Mulligan v. McAlpine* (1888), 15 Rettie 78.

An iron bar was not put in the proper place; but there was no evidence of negligence of any person for whom the master was responsible; *Pooley v. Hicks* (1889), 5 T.L.R. 639.

An unfenced hole in a ship in course of construction; *Forsyth v. Ramage* (1891), 18 Rettie 21, or in a way where the workman knew of the hole but forgot it; *McShane v. Baxter* (1891), 7 T.L.R. 58, or should have gone a safe way; *Pritchard v. Lang* (1889), 5 T.L.R. 339, or in a way which he was not required to use in the course of his employment; *Finlay v. Miscampbell* (1890), 20 O.R. 29. An unfenced aperture impossible to fence while men were at work repairing a hoist, and which plaintiff could have seen; *Headford v. McClary Manufacturing Co.* (1893), 23 O.R. 335; 21 A.R. 164; 24 S.C.R. 291.

A barrel slipped, but the workman had performed the same operation safely for four years and there was no suggestion that other means ought to be taken; *Watt v. Neilson* (1888), 15 Rettie 722; but see *Previsti v. Gatti* (1888), 4 T.L.R. 487.

A well was left for a staircase in a building in course of erection; *Conway v. Clemence* (1885), 2 T.L.R. 80.

A way consisting of a well hole in a building in course of erection up which workmen came by a ladder is not defective because means are not taken to prevent rubbish being thrown down; *Pegram v. Dixon* (1886), 55 L.J., Q.B. 447; see *Ayres v. Bull* (1889), 5 T.L.R. 202.

An employer is not bound to supply the latest or most improved machinery or appliances. If an improvement is suggested the evidence must show that it is capable of being worked; *Butler v. Birnbaum* (1891), 7 T.L.R. 287; *Crafter v. Metropolitan Ry. Co.* (1866), L.R.O. 1 C.P. 300.

A safety catch on an elevator supplied by a competent contractor and the use of which is not unreasonable is not defective, even though it should be shown that a catch of different pattern had been long in use, and might have prevented the accident; *Black v. Ontario Wheel Co* (1890), 19 O.R. 578.

A wheel or pulley on which a workman had to place his hand while in motion was made with holes which caused the injury, and the evidence showed such wheels were sometimes made without holes, but commonly with them; *Walsh v. Whitely* (1888), 21 Q.B.D. 371.

A boy was injured by iron stanchions he was moving falling off a truck, the plant was held not to be defective because of the neglect to pack the stanchions so as to protect them for falling off; *Corcoran v. East Surrey Iron Works Co.* (1889), 58 L.J.Q.B. 145.

A bolt projected too far and plaintiff's finger was injured by it, but there was no evidence that from its length injury was likely to happen; *Bridges v. Ontario Rolling Mills Co.* (1890), 19 C.R. 731.

Where there is merely a latent defect not known to the employer, he is not liable, unless he could have discovered the same by the exercise of reasonable care; *Hanson v. Lancashire & Yorkshire Ry. Co.* (1872), 20 W.R. 297; *Badgerow v. Grand Trunk Ry. Co.* (1890), 19 O.R. 191.

The want of a guard to a saw is not a defect; *Hamilton v. Groesbeck* (1889), 19 C.R. 76; except, perhaps, where the Factory Act applies, *Sc.*; 18 A.R. 437; see *Kite v. London Tramways Co.* (Times 30 Jan. 1890), 19 O.R. 737; but see *Tate v. Latham* (1897), 1 Q.B. 502, in which the absence of a guard to a saw was held to be a defect. A defect in a way must be in its permanent or quasi-permanent condition. A mere temporary obstruction is not a defect; *McGiffin v. Palmer's Ship Building Co.* (1883), 10 Q.B.D. 5; *Pegram v. Dixon* (1886), 55 L.J.Q.B. 447, and if an obstruction is removed and placed at the side, the way is not defective; *McQuade v. Dixon* (1887), 2s Sc. L.R. 727.

The removal of the lid of a well in the ordinary course of occasional necessity is not a defect in the well. It may amount to actionable negligent user when the proper duty to give warning is a person exercising superintendence; *Willetts v. Watt* (1892), 2 Q.B. 92.

Ways. A way is a place used by the workmen in the performance of their duty in passing from one part of the premises to another. It need not be a defined path. *Willetts v. Watt* (1892), 2 Q.B. 92; *Caldwell v. Mills* (1893), 24 O.R. 462. An uneven depression filled with slips of wood covered by a thin covering of iron is a way; *Bowie v. Rankin* (1886), 13 Rettie 981. A place where it is not necessary for the workman to go in the performance of his duty is not a way for which the master will be responsible to him for its defective condition; *Findlay v. Miscampbell* (1890), 20 O.R. 29; *Headford v. McClary Manufacturing Co.* (1893), 23 O.R. 335; 21 A.R. 164; 24 S.C.R. 291; *Tooke v. Bergeron* (1897), 27 S.C.R. 1567; it must be established that the plaintiff had of necessity (reasonable and practical necessity) to pass over a dangerous way; *British Columbia Mills Co. v. Scott* (1894), 24 S.C.R. 702.

Works. The works need not be the employer's. Land or premises upon which he takes his workmen, and over which he has control are within the Act; *Brannigan v. Robinson* (1892), 1 Q.B. 344.

Machinery. Machinery includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. *Corning v. Burden* (1853), 15 How. (U.S.) 252. The machinery must be in proper condition for the purpose to which it is applied; *Heske v. Samuelson* (1883), 12 Q.B.D. 30.

Plant. Plant includes both animate and inanimate chattels. Whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale—but all goods and chattels fixed and moveable, live or dead which he keeps for permanent employment in his business; *Yarmouth v. France* (1888), 19 Q.B.D. 647. A ship carrying coals for a coal merchant is plant; *Carter v. Clarke* (1898), 14 T.L.R. 172. The plant need not however belong to the employer; *Bacon v. Dawes* (1887), 3 T.L.R. 557, but a ladder borrowed by the plaintiff without authority is not plant, for the condition of which the employer is responsible; *Perry v. Brass* (1889), 5 T.L.R. 252. An unauthorized application of the plant to purposes not intended will not make the employer liable; *Jones v. Burford* (1883), 1 T.L.R. 137.

A mere shell of a house could not be said to be builder's plant; *Conway v. Clemence* (1885), 2 T.L.R. 80.

Connected with Business of Employer. The ways, works, machinery, plant, buildings or premises alleged to be defective must be connected with, intended for, or used in the business of the employer, or in the furtherance of the employer's interests; *Collip v. Phillips* (1886) 81 L. T. Journal 7. The English Act does not contain the words "buildings or premises" or the words "intended for." In *Howe v. Finch* (1886) 17 Q. B. D. 187, it was held that the English Act did not extend to works in course of erection, which upon completion were to be used in the employer's business. A public street is not connected with the business of the employer within the meaning of the section so as to make him responsible for it as a defective way; *Stride v. Diamond Glass Co.* (1895) 26 O. R. 270.

Defect must cause the injury. The evidence must show that the injury was caused by the defect. Where the evidence does not show how the accident happened, but its cause is purely matter of speculation or conjecture, there can be no recovery; *Badgerow v. Grand Trunk Railway Co.* (1890) 19 O. R. 191; *Farmer v. Grand Trunk Railway Co.* (1891) 21 O. R. 299; *Montreal Rolling Mills Co. v. Corcoran* (1896) 26 S. C. R. 595; *Canada Paint Co. v. Trainor* (1898) 28 S. C. R. 352. If the injury is the result of a pure accident there can be no recovery; *Burland v. Lee* (1898) 28 S. C. R. 348, and if the facts are as consistent with reasonable care as with negligence the plaintiff must fail; *Gilbert v. North London Ry. Co.* (1883) 1 C. & E. 31; *Brunnell v. Canadian Pacific Ry. Co.* (1888) 15 O. R. 375.

Where a machine is the one generally in use or has been furnished by a competent contractor or works, e. g. scaffolding is erected by competent workmen, and no defect is apparent or could reasonably have been detected the master is not liable; *Claxton v. Mowlem* (1888) 4 T. L. R. 756; *Kiddle v. Lovett* (1885) 16 Q. B. D. 605; *Black v. Ontario Wheel Co.* (1890) 19 O. R. 578; *Moore v. Gimson* (1889) 58 L. J. Q. B. 169. A master is not compelled to discard an old machine to make room for a new invention; *Race v. Harrison* (1892) 9 T. L. R. 567, 10 T. L. R. 92; *Gill v. Thorneycroft* (1893) 10 T. L. R. 316; but if the machine is found to be defective, and the employer with full knowledge continues its use he will be liable; *Ross v. Cross* (1890) 17 A. R. 29. The particular act of negligence alleged must be proved; *Cowans v. Marshall* (1897) 28 S. C. R. 161.

Orders to which he is bound to Conform. The orders may be implied from the usual course of business; *Milward v. Midland Ry. Co.* (1885) 14 Q. B. D. 68, or from general prior orders; *Cox v. Hamilton Sewer Pipe Co.* (1887) 14 O. R. 300. The plaintiff must be bound to obey the order; *Bunker v. Midland Ry. Co.* (1883) 47 L. T. 476; *McManns v. Hay* (1882) 9 Rettie 425; and the scope of the authority of the person giving it will be enquired into; *Snowden v. Baynes* (1890) 25 Q. B. D. 193. Improper instructions as to the mode of performing his duty, given him by a party to whose orders he was bound to conform, will be sufficient to give the workman a remedy against the master; *Madden v. Hamilton Iron Forging Co.* (1889) 18 O. R. 55. The order need not be negligent in itself, nor the *causa causans* of the injury, but if the servant giving the order is negligent, and his negligence is closely connected with the order given so that while conforming to the order, the plaintiff is injured in consequence of that negligence, the master is responsible; *Wild v. Waygood* (1892) 1 Q. B. 783, so that if a servant having authority gives an order and negligently fails to take reasonable precautions for the safe conformity thereto the employer is liable; *Sweeney v. McGilvray* (1886) 24 Sc. L. R. 91.

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An order to go on in an unusual manner, with one workman instead of two is a negligent order; *Barber v. Burt* (1893) 10 T. L. R. 383.

The negligence of a person whose orders the plaintiff was not bound to obey will not entitle him to recover; *Howard v. Bennett* (1893) 58 L. J., B. Q. 129, even though he is older in the service; *Garland v. Toronto* (1896) 23 A. R. 238.

Where the instructions by the engineer in charge were not to work unless a look-out was kept, and the foreman ordered men to commence work when no look-out was kept, and a workman was killed by a train, it was held that the order was one to which he was not bound to conform; *Hooper v. Holme* (1896) 12 T. L. R. 537; 13 T. L. R. 6, but where there was a notice that machinery should not be cleaned while in motion and the jury found that the workman was bound to obey an order to clean it while in motion, the master was found liable; *Marley v. Osborne* (1893) 10 T. L. R. 388.

Acts or Omissions in Pursuance of By-Laws. The Ontario Acts differs from the English by including acts or omissions done or made in obedience to particular instructions given by "the employer" as well as by his delegates. If the working of a rule or by-law causes injury *prima facie* it is improper, unless approved as mentioned in sec. 6 (2). A servant assisting in feeding a saw and whose duty also was to attend to and not to neglect the engine, hearing steam blowing off suddenly and without notice left the saw; the wood became unsteady and the plaintiff who was taking it from the saw at the other end was injured. The Court found that the injury was not within sec. 3 (4); *Whately v. Holloway* (1890) 62 L. T. 639.

Instructions by Persons Delegated with Employer's Authority. These words refer to a manager or person in the position of a manager and not to a fellow servant who gives notice to do an act, e. g. "lower away"; *Claxton v. Moyle* (1888) 4 T. L. R. 756.

Charge or control of trains, &c. The Legislature by sec. 3 (5) has, with regard to locomotives and trains, taken away from the employer the defence of common employment. By this subsection the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous employments, and they said as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then quite apart from any question of superiority of employment and quite apart from the necessity of superintendence the employer may be liable; *McCord v. Cammell* (1896), A.C. 67, 63. The words "machine" and "tramway or street railway" are not in the English Act. The omission to ring the bell or going faster in station grounds than the law allows will make the employer liable under this section; *Canada Southern Railway Co. v. Jackson* (1890), 17 S.C.R. 316.

The section applies to temporary railways; *Doughty v. Firbank* (1883), 10 Q.B.D. 358. A steam crane fixed on a trolley and propelled by steam when it was desired to move it is not a locomotive or engine; *Murphy v. Wilson* (1883), 52 L.J.Q.B. 524; but where cars on a railway were moved for the purpose of unloading by a capstan set in motion by hydraulic power communicated to it from a stationary engine, the person having charge of the engine was held to be in charge of a train upon a railway; *Cox v. Great Western Ry. Co.* (1882), 9 Q.B.D. 106. A locomotive engine by itself or anything that is being drawn along a railway or is in course of being drawn upon a railway by that locomotive engine is included in a "train," see *Casey v. Canadian Pacific Ry. Co.* (1888), 15 O.R. 574; *McCord v. Cammell* (1896), A.C. 57. The person having charge or control is not necessarily a person in charge of the whole train. Different duties may be assigned to different persons, each of whom is charged with the conduct of the train, and by his negligence may make the employer liable. An employer may therefore be liable for the negligence of a fireman in charge of cars disconnected from the engine; *McCord v. Cammell* (1896), A.C. 57. A person in charge of the "points" means one who has general charge and not one who has merely charge of them at some particular moment. Therefore a servant whose duties were to clean and oil the locking bars and apparatus is not one in charge of the points; *Gibbs v. Great Western Ry. Co.* (1884), 12 Q.B.D. 208. If the negligence is that of the person injured he cannot recover; *Brinnell v. Canadian Pacific Ry. Co.* (1888), 15 O.R. 375; *Truman v. Rudolph* (1895), 22 A.R. 250.

Negligence of person entrusted with duty. These words include persons who may not be managers or foremen. Where there was evidence that it was the duty of a sawyer to see that a saw was kept guarded, and the guard was off,

but not in the ordinary course of occasional necessity; it was held that there was sufficient evidence to go to the jury, that the sawyer was the person entrusted with the duty of seeing that the machinery was in proper condition; *Tate v. Lathan* (1897), 1 Q.B. 502.

Factories Act. The omission to provide and maintain safety appliances required by the Factories Act may be evidence of negligence so as to entitle a workman to compensation; *Dean v. Ontario Cotton Mills Co.* (1887), 14 O.R. 119; *Thompson v. Wright* (1892), 22 O.R. 127; *Hamilton v. Groesbeck* (1891), 18 A.R. 437; *O'Conner v. Hamilton Bridge Co.* (1894), 25 O.R. 12; 21 A.R. 596; 24 S.C.R. 598; *Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425; *Britton v. Great Western Cotton Co.* (1872), L.R. 7 Ex. 130; *Kelly v. Glebe Sugar Co.* (1893), 20 Rette 833; *Finlay v. Miscampbell* (1890), 20 O.R. 29; *Groves v. Wimborne* (1898), 2 Q.B. 402, and so may a breach of the Act by employing young persons in contravention thereof; *O'Brien v. Sandford* (1892), 22 O.R. 136.

The defence of *volenti non fit injuria* is not applicable where the accident is caused by the breach of a statutory duty; *Hadden v. Earl Granville* (1887), 19 Q.B.D. 423; *Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425, nor is the defence of common employment; *Groves v. Wimborne* (1898), 2 Q.B.D. 402. The Quebec Factories Act imposes no such responsibility; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595.

Liability of person for whom work is done. S. 4 is not in the English Act. Under it an owner may be responsible to a workman of a contractor or sub-contractor. The section is not discussed in the judgments in *Smith v. Onderdonk* (1898), 25 A.R. 171, where a head contractor was held to be not liable at common law for a defective engine supplied to a sub-contractor. The Court, however, said that even if the defendant was negligent the accident was not caused by his neglect. The action was originally brought under the Workmen's Compensation Act, and it was held at the trial that the head contractor was not a person for whom the work was done so as to be an 'employer' within the Act.

Volenti Non Fit Injuria. There can be no actionable negligence without the breach of some duty owing to the plaintiff. If, therefore, the plaintiff with full knowledge and appreciation of the risk from which the injury has arisen, has agreed to accept it, there is no breach of duty, and no liability unless there was some statutory duty to remedy it. The risk may exist at the time of entering into the employment. If the risk was then manifest to the servant it forms one of the terms of the employment whether the servant actually knew it or not; *Yarmouth v. France* (1889) 19 Q. B. D. 647, 653. If the employment becomes dangerous after the servant enters it there then arises the question whether the servant has agreed to accept the risk of the increased danger. The mere fact of his continuing at his work with knowledge and appreciation of the risk will not necessarily imply his acceptance. Whether it will have that effect or not depends to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case; *Smith v. Baker* (1891) A.C., 325, 346. The question whether the servant has accepted the risk or not is one of fact and if there is a contest of fact must be submitted to the jury; *Yarmouth v. France* (1887) 19 Q. B. D. 647; *Thruswell v. Handyside* (1888) 20 Q.B.D. 359; *Smith v. Baker* (1891) A.C. 225, 357, 366; *Osborne v. London and North Western Ry. Co.* (1888) 21 Q.B.D. 220.

But where the plaintiff, a man of full intelligence, had seen the danger, known all about it and elected to continue working, it was held that his knowledge could mean only one thing, and that he was *volens*; *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685, and where a workman was employed in a dark railway tunnel where trains were constantly passing he was considered to have elected to take the risk of danger; *Woodley v. Metropolitan Ry. Co.* (1877) 2 Ex. D. 384 and a workman engaged in shunting trucks was held to have accepted the risk of shunting without assistance, the danger to him being caused by his own act; *Membry v. Great Western Railway Co.* (1889) 14 App. Cas. 179; *Church v. Appleby* (1888) 60 L.T. 542, and a farm servant employed on a machine upon which was a string which applied a brake automatically, takes the risk of the string breaking, and of there not being another person employed to apply the brake, and prevent danger in such event; *Poll v. Hewitt* (1893) 23 O.R. 619. Where the workman knew of the defect in a wagon, but knew how to use, and might have used it, without injury he was not entitled to recover; *Martin v. Connah's Quay Alkali Co.* (1885) 33 W. R.

INDICATE THE POSITION OF THE INJURY

216. Mere knowledge of the risk and continuing in the employment notwithstanding, will not be sufficient to constitute the servant *volens*. The concluding clause of s. 6 only states the common law as it was subsequently laid down in *Smith v. Baker* (1891) A.C. 325. There may have been a perception of the existence of the danger without comprehension of the risk; *Brooke v. Ramsden* (1891) 63 L.T. 287; *Tobin v. New Glasgow Iron Co.* (1894) 29 N. S. R. 70 affirmed by Supreme Court of Canada, and there may have been concurrent facts which justify the inquiry whether the risk though known, was really encountered voluntarily; *Thomas v. Quartermaine* (1887) 18 Q.B.D. 696. The servant may have been induced to continue under a promise that the defect would be remedied; *Clark v. Holmes* (1862) 7 H. & N. 937, 944. There may have been fear of dismissal rather than voluntary action; *Yarmouth v. France* (1887) 19 Q.B.D. 647, 661; *Thrussell v. Handyside* (1888) 29 Q. B. D. 359, 364. Want of appreciation of danger will prevent the application of the maxim; *Anos v. Duffy* (1890) 6 T.L.R. 339, even where the servant knew of the defect when he entered the employment; *Height v. Wortman* (1894) 20 O.R. 618. A risk not incidental to the service as from a savage dog kept by the master is no defence; *Mansfield v. Baddeley* (1876) 34 L.T. 696.

Prima facie the workman accepts only risks ordinarily incident to the operation when performed with reasonable care and skill, therefore a workman who accepted the risks of shunting is entitled to recover for negligent shunting; *Canada Atlantic Ry. Co. v. Hurdman* (1895) 25 S.C.R. 202.

Failure to notify master of defect. The words "without reasonable excuse" are not in the English Act. The Ontario Act contemplates that there may be some other excuse for the omission than the knowledge that the master is already aware of the defect, and this is a question for the jury; *Truman v. Rudolph* (1895), 22 A.R. 250. Where the employer's superintendent is known by the workman to be aware of the defect he is excused from giving information thereof; *Stuart v. Evans* (1883), 49 L.T. 138. The refusal of the master upon complaint to remedy the defect will not free him from liability; *Brooke v. Ramsden* (1891), 63 L.T. 287.

Amount of compensation. Overtime earnings may be taken into account; *Bortick v. Head* (1885), 53 L.T. 909. So may all things capable of being turned into money by accurate estimation, as rent, food and clothes, but not so vague a thing as the tuition an apprentice receives from his master; *Noel v. Redruth Foundry Co.* (1896), 1 Q.B. 453. The rights of representatives of deceased workmen are not more extensive than the rights of representatives of other persons, so that in case of death there must be a reasonable expectation of pecuniary benefit; *Mason v. Bertram* (1889), 18 O.R. 1.

Distribution of compensation. Sec. 8 has no English equivalent beyond Lord Campbell's Act. Where the workman dies the measure of damages to his representatives is different from those recoverable by himself; *Pym v. Great Northern Ry. Co.* (1862), 2 B. & S. 759; 4 B. & S. 396; and it would seem that an independent cause of action vests in the legal representatives so that they could not continue except, perhaps, for damage accruing to the deceased's estate in his lifetime, an action commenced by the deceased himself; see *White v. Parker* (1889), 16 S.C.R. 699; *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (1875), L.R. 10, C.P. 189.

There is no limit to the damages which may be given under Lord Campbell's Act. Where, however, the workman would have had no remedy at common law, and the liability of the employer arises only under the Workmen's Compensation Act, the amount of compensation in case of death is limited by s. 7.

Limitation. The day of the accident must be excluded; *Hanns v. Johnston* (1883), 3 O.R. 100. Where death occurs and actions against the employer are regulated by a special statute of limitations, it would seem to be doubtful whether the action must not be brought within the time limited by the special statute; *Conger v. Grand Trunk Ry. Co.* (1887), 13 O.R. 160; *Zimmer v. Grand Trunk Ry. Co.* (1892), 19 A.R. 663. Where a notice had been given under the Employer's Liability Act but the action was brought on the common law liability, an amendment after the six months could not be granted; *Clark v. Adams* (1885), 12 Rettie 1092.

Contracting out. Sec. 10 is not in the English Act, and the workman, may, in England, by contract, upon any consideration, bar himself and his representatives of any remedy under the Act; *Griffiths v. Earl Dudley* (1882), 9 Q.B.D. 357. The question whether the consideration for the contract is ample

and adequate, and the contract just and reasonable and not improvident is for the Court and not for the jury. An agreement in consideration of advantages under an accident fund would probably be sufficient; *Clements v. London and North Western Ry. Co.* (1894), 2 Q.B. 482; while an agreement in consideration of free transportation to and from work would not; *Flower v. London and North Western Ry. Co.* (1894), 2 Q.B. 65.

Notice of action. Sub-sections 1 to 4 are identical with s. 7 (1-4) of the English Act. Sub-sec. 5 is materially different from the corresponding sub-section in the English Act, and sub-sec. 6 has no English equivalent. The notice must be in writing; *Moyle v. Jenkins* (1881), 8 Q.B.D. 116; but may be collected from a series of letters; *Cox v. Hamilton Sewer Pipe Co.* (1887), 14 O.R. 300. The notice is supposed to be given by a person in a humble sphere of life and not possessed of much knowledge, and is to be written in ordinary language, i.e., his own untutored language. A letter from a solicitor therefore which stated the cause of injury as "an injury to his leg" was held to be defective only, not insufficient. *Stone v. Hyde* (1882), 9 Q.B.D. 76. The notice is not required to state the cause of action, but only the cause of injury, e.g., an unprotected hoist; *Clarkson v. Musgrave* (1882), 9 Q.B.D. 386.

A notice wrongly addressed but received by the right party is good; *Hearn v. Phillips* (1883), 1 T.L.R. 475.

A sufficient notice will include all particulars, and should not incorporate a conversation as "particulars of which have already been communicated to your superintendent;" *Keen v. Millwall Dock Co.* (1882), 8 Q.B.D. 482. The want of notice or the omission of the address of the plaintiff; *Beckett v. Manchester Corporation* (1888), 52 J.P. 346, or the date of the injury; *Carter v. Drysdale* (1884), 12 Q.B.D. 91, or the cause of the injury; *Previsi v. Gatti* (1888), 58 L.T. 762, will not be fatal if the Court (not the jury) is of opinion that there was reasonable excuse therefor, and that the defendant was not thereby prejudiced in his defence. The notice need not be signed; *Mason v. Bertram* (1889), 18 O.R. 1.

If the defendant intends to rely upon the want or insufficiency of the notice, he must give the notice required by s. 14. Merely pleading want of notice is insufficient; *Cavanagh v. Park* (1896), 23 A.R. 715; *Conroy v. Peacock* (1897), 2 Q.B. 6.

Assessors. Assessors are to give their opinion as to the amount of compensation, from ascertained or admitted facts, and are not to decide upon conflicting evidence; *Wright v. Collier* (1892), 19 A.R. 298.

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CHAPTER 166.

An Act respecting Compensation to the Families of Persons killed by Accident, and in Duels.

HER MAJESTY by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Interpretation.

1. Where the words following occur in this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

'Parent.'

1. "Parent" shall include father, mother, grandfather, grandmother, stepfather and stepmother; and

"Child."

2. "Child" shall include son, daughter, grandson, granddaughter, stepson and stepdaughter. R. S. O. 1887, c. 135, s. 1.

Action given to recover damage for the death of any person caused by any wrongful act, neglect, or default.

2. Where the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony. R. S. O. 1887, c. 135, s. 2.

For whose benefit and in whose name such action shall be brought.

3. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the Judge or jury may give such damages as he or they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the Judge or jury find and direct. R. S. O. 1887, c. 135, s. 3.

Damages.

Money paid into court may be paid in one sum without regard to its division into shares.

4. In case the defendant is advised to pay money into Court, it shall be sufficient if he pay it as a compensation in one sum to all persons entitled under this Act for his wrongful act, neglect or default, without specifying the shares into which it is to be divided by the Judge or jury; and

if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the Judge or jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue. R. S. O. 1887, c. 135, s. 8.

5. Where the death of a person has been caused by any wound or injury received in a duel, which wound or injury has been inflicted by the use of any description of fire-arms or other deadly weapon whatsoever, in such case the person inflicting such wound or injury, and all persons present aiding or abetting the parties in such duel as seconds or assistants therein, may be proceeded against under this Act, although no action for damages could have been brought by the person whose death was so caused had death not ensued from the infliction of such wound or injury. R. S. O. 1887, c. 135, s. 4.

Action may be brought against principals, seconds and abettors in duels.

6. Not more than one action shall lie for and in respect of the same subject matter of complaint; and every such action shall be commenced within twelve months after the death of the deceased person. R. S. O. 1887, c. 135, s. 5.

One action only to lie for the same cause.
Limitation.

7. In every such action the plaintiff shall, in his statement of claim, set forth or deliver therewith full particulars of the persons for whom and on whose behalf such action is brought. R. S. O. 1887, c. 135, s. 6.

Plaintiff to deliver particulars.

8. If, and so often as it shall happen at any time or times hereafter in any of the cases intended and provided for by this Act, that there shall be no executor or administrator of the person so deceased, or that there being such executor or administrator, no such action as in this Act mentioned, shall, within six months after the death of such deceased person, have been brought by and in the name of his or her executor or administrator, then and in every such case, such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought, shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator. R. S. O. 1887, c. 135, s. 7.

Where no action brought within six months by executors of person killed, then action may be brought by persons beneficially interested.

9. In all cases where the compensation is not apportioned as hereinbefore provided, it shall be referred to a Judge to apportion the same among the parties entitled and to provide for the costs thereof as he may think meet. R. S. O. 1887, c. 135, s. 9.

Apportionment.

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NOTES.

Death by Wrongful Act. At common law no action for damages caused by the death of a person was maintainable; *Osborn v. Gillett* (1873) L. R. 8 Ex. 88. The statute (R. S. O. c. 160) is based upon Lord Campbell's Act (9 & 10 V. c. 93) amended by 27 & 28 V. c. 95, and the sections of the Ontario Act except sections 5 and 9 have no equivalents in the English enactments. Sections 5 and 9 have no equivalents in the English Acts. The original act has a preamble as follows: "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is often times right and expedient that the wrongdoer in such cases should be answerable in damages for the injury so caused by him.

Persons entitled to Damages. A child *en ventre sa mere* is entitled to be considered in apportioning the damages. *The George and Richard* (1871) L. R. 3 A. & E. 466. But parents of an illegitimate child cannot maintain an action for his death; *Gibson v. Midland Ry. Co.* (1883) 2 O. R. 658, see *Clarke v. Carlin Coal Co.* (1891) A. C. 412, nor can a bastard for the death of a parent; *Dickinson v. North Eastern Ry. Co.* (1863) 2 H. & C. 735. An alien resident abroad is not entitled to the benefit of the Act. *Adam v. British and Foreign Steamship Co.* (1898) 2 Q. B. 430.

Whether a New Cause of Action. The act gives a new cause of action, and does not merely remove the operation of the maxim, *Actio personalis moritur cum persona*; *Blake v. Midland Ry. Co.* (1852) 18 Q. B. 93 110; *Pym v. Great Northern Ry. Co.* (1863) 4 B. & S. 396, 406; *The Vera Cruz* (1885) 10 App. Cas. 59; *White v. Parker* (1889) 16 S. C. R. 609; *Zimmer v. Grand Trunk Ry. Co.* (1892) 19 A. R. 693. The action is new in its species, new in its quality, new in its principle, in every way new and can only be brought if there is any person answering the description of the widow, parent or child who under such circumstances suffer pecuniary loss by death; per Lord Blackburn, 10 App. Cas. 70, 71. But the action is nevertheless a representative one; *Robinson v. Canadian Pacific Ry. Co.* (1892) A. C. 481, 487, and the parties to it claim through the deceased so that his evidence given in an action brought by him in his lifetime, but which abated on his death is admissible; *Walkerton v. Erdman* (1894) 23 S. C. R. 352 see 22 O. R. 693, 20 A. R. 444; See however, *Read v. Great Eastern Ry. Co.* (1868) L. R. 3 Q. B. 555; where Blackburn J. said "This section may provide a new principle as to the assessment of damages, but it does not give any new right of action."

Defences to Action. The death must have been caused by such wrongful act, neglect or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof. The authorities establish that the representative can have no right of action; first where the act or default complained of raised no liability to the deceased at common law, or by reason of his having contracted to bear the risk of it and secondly, where the deceased has been compensated or has settled and discharged his claim; *Robinson v. Canadian Pacific Ry. Co.* (1892) A. C. 481, 486, 487; *Haight v. Royal Mail Steam Packet Co.* (1883) 52 L. J. Q. B. 640. Thus contributory negligence is a defence; *Tucker v. Chaplin* (1848) 2 C. & K. 730; *Senior v. Ward* (1859) 1 E. & E. 385; *Coyle v. Great Northern Ry. Co.* (1887) 20 L. R. Ir. 409; *Wright v. Midland Ry. Co.* 51 L. T. 539, and so is accord and satisfaction; *Read v. Great Eastern Ry. Co.* (1868) L. R. 3 Q. B. 555, and if the accident was caused by the negligence of the deceased himself; *Brunnell v. Canadian Pacific Ry. Co.* (1888) 15 O. R. 375, or by a fellow workman (provided the Workman's Compensation Act does not apply) *Wignmore v. Jay* (1850) 5 Ex. 354, or if the cause is left to conjecture; *Badgerow v. Grand Trunk Ry. Co.* (1890) 19 O. R. 101; *Farmer v. Grand Trunk Ry. Co.* (1891) 21 O. R. 299, the action is not maintainable.

In *Conger v. Grand Trunk Ry. Co.* (1887) 13 O. R. 160, where the action was brought more than six months, but less than twelve months from the death the action was held to be barred by sec. 27 of the Railway Act of 1879 (42 V. c. 9 D.) In the case of *Zimmer v. The Grand Trunk Ry. Co.* (1892) 21 O. R. 628, 19 A. R. 693, the defendants relied upon the provisions of the act

originally incorporating the railway upon which the accident happened, (16 V. c. 99, s. 10) and three Judges of the Court of Appeal expressed the opinion that the twelve months limitation provided by the principal act (s. 6) applies to all cases, and is not to be restricted or limited in its operation by any special protection to railway companies.

What the effect would be if the statute of Limitations had run against the deceased has not been determined, see per Burton, J. A. 19 A. R. 701.

Nominal. Actual damage must have accrued. The mere proof of death and the relationship will give no right of action. A verdict cannot be given for nominal damages; *Boulter v. Webster* (1845) 11 L. T. 598; *Duckworth v. Johnson* (1859) 4 H. & N. 653.

Mental Sufferings. The jury cannot take into consideration mental sufferings or loss of society; *Blake v. Midland Ry. Co.* (1852) 18 Q.B. 93; *Gillard v. Lancashire and Yorkshire Ry. Co.* (1848) 12 L.T. 356.

Funeral Expenses. No allowance can be made for funeral or other expenses incident to the death, such as family mourning, etc.; *Dalton v. South Eastern Ry. Co.* (1858) 4 C.B. N.S. 296.

Loss to Personal Estate. In an action under the act, the loss of the persons in whose behalf the action is brought can only be taken into account in assessing the damages. If the deceased has lived for some time after the inquiry and his estate has been thereby damaged an action may be maintained by his personal representatives for such loss not under this act, but on contract or under R.S.O. c. 129 s. 10 (see *infra*); *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (1875) L.R. 10 C.P. 189; *Leggott v. Great Northern Ry. Co.* (1876) 1 Q.B. D. 599; *Barnett v. Lucas* (1870) Ir. R. 5 C.L. 140; Ir. R. 6 C.L. 247. The case of *Pulling v. Great Eastern Ry. Co.* (1881) 9 Q.B.D. 110, is not an authority in Ontario because of the absence of a provision similar to R.S.O. c. 129 s. 10. A finding in an action under Lord Campbell's Act brought by the executor would be no estoppel in an action brought by him on behalf of the estate; *Leggott v. Great Northern Ry. Co.* (1876) 1 Q.B.D. 599.

Legal Liability of Deceased. The damages are not to be given merely in respect of the loss of a legal right; *Franklin v. Louth Eastern Ry. Co.* (1858) 3 H. & N. 211; *Dalton v. South Eastern Ry. Co.* (1858) 4 C.B. N.S. 296. An action cannot be maintained for the benefit of a creditor; *East Tennessee Ry. Co. v. Lilly* (1891) 90 Tenn. 563.

Nor for a relative within the act, where the only pecuniary benefit to him from the life was derived from a contract which he had entered into with the deceased; *Sykes v. North Eastern Ry. Co.* (1875) 44 L.J. C.P. 191.

Where the widow of deceased had for some time before his death been living apart from him in adultery with another man, she has lost her legal right to support, and can recover nothing for his death; *Stimpeon v. Wood* (1888) 57 L.J.Q.B. 484.

Actual pecuniary loss. The statute is meant to give compensation not for mental injuries but only material ones, loss of money or moneys' worth in a material and not in a sentimental sense; *Lett v. St. Lawrence and Ottawa Ry. Co.* (1884), 11 A.R. 131. The jury may take into consideration the loss of the advantages of superior education, social position and personal comfort of which the father's income, had he lived, would have secured the benefit and enjoyment; *Pym v. Great Northern Ry. Co.* (1882), 2 B. & S. 759. The loss to a husband of a wife's performance of household duties, and to children of a mother's education, is a loss which can be estimated in money and is recoverable under the Act; *Lett v. St. Lawrence and Ottawa Ry. Co.* (1882), 1 O.R. 545; 11 A.R. 1; 11 S.C.R. 422. The proper question for the jury is whether the plaintiff had a reasonable expectation of any and what pecuniary benefit from the continuance of the life; *Franklin v. South Eastern Ry. Co.* (1858), 3 H. & N. 211.

In estimating damages the jury may take into consideration the probable duration of the life of the deceased according to the Carlisle Tables, and any evidence showing that the life in question was better or worse than the average; *Rowley v. London and North Western Ry. Co.* (1873), L.R. 8 Ex. 221.

But they must not give more than a fair compensation for the loss of which a pecuniary estimate can be made; *Armstrong v. The South Eastern Ry. Co.* (1848), 11 Jur. 758; *Gillard v. Lancashire and Yorkshire Ry. Co.* (1848), 12 L.T. 356; *Blake v. Midland Ry. Co.* (1852), 18 Q.B. 83.

affirmed
1909 2 K.B. 648

vide.

INDEX
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Prospective advantages depending upon more than one contingency or a remote contingency cannot be shown; 8 Am. & Eng. Enc. of Law 2nd Ed. 943.

Reasonable expectation. The expectation of pecuniary benefit must be reasonable; *Mason v. Bertram* (1889), 18 O.R. 1.

The following cases illustrate what is reasonable expectation:

(1) **Parents expectation.** A father was assisted by his son in carrying coals around the wards of a hospital where the father was employed at 3s. 6d. a week. He had a reasonable expectation. But £75 was too much; *Franklin v. South Eastern Ry. Co.* (1858), 3 H. & N. 211. A boy of 14 earned 4s. a week. There was no evidence of the cost of his board and clothing. Verdict £50 sustained; *Duckworth v. Johnston* (1859), 4 H. & N. 653.

A boy of 14 had never earned money, but he was capable of earning 6s. a week, and the evidence showed that there was a probability he would have enabled his mother to earn more, or would have devoted his earnings to her support, such probability being based on past filial conduct. This is sufficient evidence of reasonable expectation to submit to the jury; *Condon v. Great Southern and Western Ry. Co.* (1865), 16 Ir. C.L.R. 415.

A father was 59 and nearly blind, his son had assisted him 5 or 6 years before but not since. He had reasonable expectation; *Hetherington v. North Eastern Ry. Co.* (1882), 9 Q.B.D. 160.

A daughter aged 10 assisted in household. In consequence of her death the parent had to employ another servant. He had reasonable expectation; *Wolfe v. Great Northern Ry. Co.* (1891), 26 L.R. Ir. 548.

A daughter 12 years old, who had never earned money, but who might in a year or so have earned money in a factory. Verdict £15; *Brammall v. Lees* (1852), 29 L.T. 111.

Where a mother sued for damages for death of her son, who had covenanted to pay her an annuity during their joint lives, the Court held (1) that the practice and tables of life insurance companies are admissible in evidence to show the average duration of life, (2) that evidence of the present value of an annuity for the joint lives is admissible, (3) that the jury's attention should be called to the difference in value between an annuity on government security and one secured by personal covenant, (4) that the jury should be directed not to give damages to the amount of a perfect compensation, but should take a reasonable view and give what they considered under the circumstances a fair compensation; *Rowley v. London and North Western Ry. Co.* (1873), L.R. 8 Ex. 221.

Where a deceased son earned good wages and visited his parents fortnightly taking presents of sugar, meat, etc., and occasionally made money presents to them, a verdict of £80 for the father and £40 for the mother was sustained; *Dalton v. South Eastern Ry. Co.* (1858), 4 C.B.N.S. 296.

Expectation not Reasonable. A son just of age had assisted on his father's farm for two years before death, and had gone to High School with the intention of being educated for a doctor at the father's expense. Upon the evidence the Court were of opinion that an alleged expectation that he would give the father money when he had acquired his profession, did not rest upon any reasonable foundation, and a verdict of \$200 was set aside; *Mason v. Bertram* (1889) 18 O.R. 1.

Where a son worked for his father and received full wages, the father suffers no pecuniary loss by his death; *Sykes v. North Eastern Ry. Co.* (1875) 44 L.J.C.P. 191.

Where there was no evidence of loss by the death of a child the action was dismissed; *Boulter v. Webster* (1865) 13 W.R. 289.

There are decisions in the Irish Courts that no injury can result from the death of one from whom no benefit has been received during his life; *Bourke v. Cork and Macroom Ry. Co.* (1879) 4 L.R. Ir. 682; *Holleran v. Bagnell* (1880) 6 L.R. Ir. 333; but these are not to be followed here, per *Patterson, J.A.*; *Lett v. St. Lawrence and Ottawa Ry. Co.* (1884) 11 A.R. 29.

Where deceased left a mother and a widow and children and the jury awarded £3,000, the court thought the mother could have no claim; *Secord v. Great Western Ry. Co.* (1855) 15 U.C.R. 631.

(2) **Expectation of Husband.** No averment of pecuniary damage is necessary in the statement of claim; *Chapman v. Rothwell* (1858) 11 Jur. N.S. 180.

A recovery of £25 of which £10 was awarded for the husband and £15 for the children was not attacked. The evidence showed that the wife by her industry had contributed 10 s. a week towards the maintenance of the family; *Cotton v. Wood* (1860) 8 C.B.N.S. 568.

In an action by a gardener there was no specific evidence of loss, but the Court assumed that she was a person of average health, industry and good character, and thus gave a pecuniary assistance to a poor man in housekeeping; Verdict for £200 sustained. *Chant v. South Eastern Ry. Co.* (1866) W. N. 134.

A husband recovered £100 and the verdict was sustained; *Wilkins v. Day* (1884) 12 Q.B.D. 110.

Out of a verdict of \$5800, the husband was awarded \$1500 for loss of assistance in household duties, and the verdict was sustained; *Lett v. St. Lawrence and Ottawa Ry. Co.* (1882) 1 O.R. 545; 11 A.R. 1; 11 S.C.R. 422. Leave to appeal was refused by the Privy Council.

Expectation not Reasonable. Where a husband and wife had quarrelled and had lived apart for some years, the wife was killed at the age of 56 and would have been entitled to £7000 on death of mother, the husband was held to have no reasonable expectation of pecuniary benefit; *Harrison v. London and North Western Ry. Co.* (1885) 1 C. & E. 540.

(3) **Widow's and Children's Expectations.** Where the bulk of the estate of the deceased went to his eldest son, the jury were held to be entitled to have regard to the damage respectively sustained by the widow and younger children, and to award damages in respect of their reasonable expectations although the damage would not have resulted from the accident if the deceased had lived. The wife of a wealthy gentleman was awarded £1000 and each of his younger children £1000. *Pym v. Great Northern Ry. Co.* (1862) 2 B. & S. 729; 4 B. & S. 396.

Expectation not Reasonable. The deceased resided with and was supported by the daughter and assisted her in the laundry business and in cooking and serving meals; but there was no evidence that the value of her services exceeded the cost of her support. She had no reasonable expectation of pecuniary benefit; *Hall v. Great Northern Ry. Co.* (1891) 26 L.R. Ir. 289.

The deceased was the stepmother of plaintiff. The family was in humble circumstances. The plaintiff for six months before had earned 5 s. a week in a factory. The stepmother earned 6 s. a week besides her food. No reasonable expectation; *Johnston v. Great Northern Ry. Co.* (1891) 26 L.R. Ir. 691.

Deduction of Insurance Money. A sum payable to the parties entitled to damages on an accident policy on deceased's life, should be deducted; *Hicks v. Newport, Abergavenny and Hereford Ry. Co.* (1857) 4 B. & S. 403 n.; *Bradburn v. Great Western Ry. Co.* (1874) L. R. 10 Ex. 1; *Beckett v. Grand Trunk Ry. Co.* (1886) 13 A. R. 174 at p. 187.

But the amount payable in respect of a contract of life insurance (other than accident) is not to be deducted, but the jury may be directed to take into account all money provisions made by the deceased for the parties injured by his death including a life policy. The extent to which these ought to be imputed in reduction of damages, depends upon the nature of the provision, and the position and means of the deceased. Where a policy had been paid up by a man out of his earnings, the extent of the benefit is fairly represented by the interest upon the money, during the period between the receipt of the money and the time when it would ordinarily have been received, but for his premature death. *Grand Trunk Ry. Co. v. Jennings* (1888) 13 App. Cas. 800, and if there are premiums to pay, also by the amount thereof. *Hicks v. Newport &c. Ry. Co.* (1857) 4 B. & L. 403 n. see also *Beckett v. Grand Trunk Ry. Co.* (1886) 13 A. R. 174; 16 S.C.R. 713.

Setting aside Verdict. Where the damages awarded by the jury were beyond the pecuniary damages shown, a new trial was directed; *Blake v. Midland Ry. Co.* (1852) 18 Q.B. 83, unless the plaintiff consented to a reduction; *Curran v. Grand Trunk Ry. Co.* (1898) 18 C. L. T. 396.

Where the jury evidently shirked the issue of contributory negligence and awarded 40 s. as a compromise, of which 10 s. was given to each of the children a new trial was ordered; *Springett v. Balls* (1865) 6 B. & S. 477; 4 F. & F. 472.

A verdict of £5000 for the death of a blacksmith, 35 years of age, of good habits is excessive; *Morley v. Great Western Ry. Co.* (1858) 16 U. C. R. 504.

Apportionment of Damage. At a trial the judge or jury apportion the damages among the parties entitled. Where one of the parties to whom damages were awarded died after verdict and before judgment, the court directed a new trial unless the amount awarded to him was reduced to £400—that being the expense to his mother of his illness and maintenance; *Sibbald v. Grand Trunk Ry. Co.* (1890) 19 O. R. 164; 18 A. R. 184; but where the child was sole plaintiff and died, but judgment was entered in proper time by his next friend, the verdict was not disturbed; *Kramer v. Waymark* (1866) L. R. 1 Ex. 241. Where the defendants paid £8500 into court for a widow and four children, the amount was apportioned by analogy to the statute of distributions, one third to the widow and two-thirds to the children; *Sanderson v. Sanderson* (1877) 86 L. T. 847, and in another case the widow was allowed to withdraw the money on her consent to a distribution being made a rule of Court; *Shallow v. Vernon* (1873) Ir. R. 9 C. L. 150. An amount paid in settlement is a trust fund, and may be apportioned in an action to administer the trust fund; *Condlif v. Condlif* (1870) 29 L. T. 831; *Bulmer v. Bulmer* (1884) 25 Ch. D. 409.

Only one Action. The defendant is not to be vexed with more than one action on behalf of the defendants. An action may be brought by any one of the parties entitled to damages within the six months from the death, if there be no executor or administrator; *Lampman v. Gainsborough* (1888) 17 O. R. 191; *Holleran v. Bagnell* (1879) 4 L. R. Ir. 740; *Curran v. Grand Trunk Ry. Co.* (1898) 18 C. L. T. 396. Parties entitled to share will not be allowed to appear by separate counsel and solicitor; *Steele v. Great Northern Ry. Co.* (1891) 26 L. R. Ir. 96, but where an amount is paid into Court before trial and accepted, parties entitled may be heard by counsel as to their shares therein; *Johnson v. Great Northern Ry. Co.* (1887) 20 L. R. Ir. 4.

Within 12 months. The minority of the plaintiffs does not prevent the running of the statute, 8 Am. & Eng. Ency. of Law (2nd Ed.) 875, see *Miller v. Ryerson* (1892) 22 O. R. 369.

Particulars. The statement of claim need not negative the existence of any relatives entitled to compensation other than those on whose behalf the action is brought; *Barnes v. Ward* (1850) 9 C. B. 392.

(For a full collection of authorities see "Death by wrongful act," 8 Am. & Eng. Enc. of Law (2nd Ed.) 851-959).

PART V.

Practice and Procedure.

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4. CONSTITUTION OF THE PROVINCIAL COURTS.

CHAPTER 51.

An Act respecting the Supreme Court of Judicature of Ontario.

SHORT TITLE, s. 1.
INTERPRETATION, s. 2.
CONSTITUTION OF SUPREME COURT,
ss. 3-24.
Supreme Court continued, s. 3.
Judges, ss. 3, 4.
Judgment by Judge who has resigned, s. 5.
Court of Appeal continued, s. 6.
Judges, ss. 6, 7.
Judges or retired Judges may hold Assizes etc., ss. 9, 10.
How to be constituted to hear appeals, s. 11.
How Quorum to be made up, ss. 12-16.
Judge whose decision appealed from not to sit, s. 17.
Judgment in absence of a Judge who heard cause, ss. 18, 19.
Presiding Judge, s. 20.
Sittings, s. 21.
Precedence of Judges, s. 8.
Oath of Judges, ss. 22, 23.
Seals of Court of Appeal and High Court, s. 24.
JURISDICTION OF HIGH COURT, ss. 25-48.
JURISDICTION OF COURT OF APPEAL, ss. 49-56.
RULES OF LAW, ss. 57-59.
NOTICE TO BE GIVEN TO MINISTER OF JUSTICE AND TO ATTORNEY-GENERAL BEFORE ANY ACT DECLARED INVALID, s. 60.

SITTINGS OF COURT AND DISTRIBUTION OF BUSINESS, ss. 61-71.
APPEALS, ss. 72-77.
LIMITATION OF TIME FOR APPEALING, ss. 78-80.
EFFECT OF JUDICIAL DECISIONS, s. 81.
SITTINGS FOR TRIALS, ss. 82-91.
TRIAL OF SUPERIOR COURT CASES IN COUNTY COURTS AND OF COUNTY COURT CASES IN HIGH COURT, ss. 92-96.
CERTIFICATE OF LIS PENDENS, ss. 97-100.
ASSESSORS, s. 101.
TRIAL AND PROCEDURE, ss. 102-112.
INTEREST, ss. 113-116.
ACTIONS ON FOREIGN JUDGMENTS, ss. 117, 118.
COSTS, 119.
WITNESS FEES OF OFFICIALS, s. 120.
REFERENCES TO MASTER IN ORDINARY, s. 121.
RULES OF COURT, ss. 122-129.
OFFICERS AND OFFICES, ss. 130-184.
LOCAL JUDGES OF HIGH COURT, s. 185.
TRANSFER OF CAUSES FROM COUNTY OR DIVISION COURTS TO HIGH COURT, s. 186.
MISCELLANEOUS, ss. 187-191.

HER MAJESTY, by and with the advice and consent, of the Legislative Assembly of the Province of Ontario, enacts as follows:—

TITLE.

1. This Act may be cited as "*The Judicature Act.*" 58 V. Short title.
c. 12, s. 1.

INTERPRETATION.

Interpretation
of terms.

2. Where the words following occur in this Act and in the Rules, made thereunder they shall be construed in the manner hereinafter mentioned unless a contrary intention appears.

1. "Rules of Court" shall include forms.

2. "Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant.

3. "Action" shall include suit and shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court.

4. "Matter" shall include every proceeding in the Court not in a cause.

5. "Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

6. "Petitioner" shall include every person making any application to the Court, either by petition, motion or summons, otherwise than as against any defendant.

7. "Defendant" shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceeding.

8. "Party" shall include every person served with notice of or attending, any proceeding, although not named on the record.

9. "Pleading" shall include any petition or summons, and shall also include the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

10. "Judgment" shall include decree and a decretal order.

11. "Order" shall include rule.

12. "Oath" shall include solemn affirmation and statutory declaration.

13. "Proper officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows :—

(a) Where any duty to be discharged under this Act or under Rules of Court is a duty which has been discharged by any officer, such officer shall continue to be the proper officer to discharge the same, until otherwise provided by Rule. 58 V. c. 12, s. 2, (1—13a.)

- (b) Where any new duty is, under the Rules aforesaid, to be discharged, the proper officer to discharge the same shall be such officer as may be named in the Rules or in case no officer is so named then such officer as may from time to time be directed to discharge the same by the President of the High Court. 59 V. c. 18, Sched. (1); 60 V. c. 3, s. 3.

CONSTITUTION OF THE SUPREME COURT OF JUDICATURE
FOR ONTARIO.

3. (1) The Supreme Court of Judicature for Ontario at present existing is hereby continued, and all commissions, rules, orders and regulations granted or made in, by, or respecting the former Court of Queen's Bench for Ontario, the Court of Chancery for Ontario, and the Court of Common Pleas for Ontario, or the Supreme Court of Judicature, the Court of Appeal, and the High Court of Justice, or the Judges or officers thereof now existing and in force shall remain in force until altered or rescinded or otherwise determined.

Supreme
Court of Judi-
cature con-
tinued.

(2) The Supreme Court shall continue to consist of two permanent divisions, to be called The High Court of Justice for Ontario, and The Court of Appeal for Ontario.

(3) The High Court of Justice for Ontario shall continue to consist of three divisions, to be called The Queen's Bench Division, The Chancery Division, and The Common Pleas Division of the High Court.

(4) The Queen's Bench Division shall during the reign of a King, be called The King's Bench Division, and during the reign of a Queen, The Queen's Bench Division.

(5) The persons hereafter appointed to fill the places of the Chief Justice of the Queen's Bench, the Chancellor of Ontario, and the Chief Justice of the Common Pleas, and their successors respectively, are to be appointed by the authority mentioned in *The British North America Act* and with the same respective titles as heretofore.

Imp. Stat.
30 V. c. 3.

(6) The persons to be appointed Judges of the High Court shall be Barristers-at-Law of at least ten years' standing at the bar of Ontario.

(7) Save as in this Act is otherwise expressly provided, all the Judges hereinbefore mentioned, and their successors, shall have in all respects equal power, authority and jurisdiction.

(8) The Chief Justice of the Queen's Bench shall be the President of the Queen's Bench Division, the Chancellor shall be the President of the Chancery Division, and the Chief Justice of the Common Pleas shall be the President of the Common Pleas Division.

(9) Besides the Chief Justice of the Queen's Bench, two Justices of the High Court shall be attached to the Queen's Bench Division; besides the Chancellor of Ontario, subject to section 4, three Justices of the High Court shall be attached to the Chancery Division; and besides the Chief Justice of the Common Pleas, two Justices of the High Court shall be attached to the Common Pleas Division.

(10) The President of the said High Court shall be that one of the Presidents of the Queen's Bench, Chancery and Common Pleas Divisions, who for the time being, is first in order of seniority.

(11) Upon a vacancy happening among the Judges, the Judge appointed to fill the vacancy is (subject to the provisions of this Act, and to any rules of Court which may be made pursuant thereto) to become and be a member of the same Division to which the Judge whose place has become vacant belonged.

(12) Nothing in this Act shall prevent, or shall be construed as intended to prevent the transfer of any Judge of any of the said Divisions from one to another of the said Divisions. 58 V. c. 12, s. 3.

Detachment
of one Judge
from Chancery
Division.

4.—(1) One of the four Judges of the Chancery Division may, with his consent, be detached from the said Division without being appointed to any other Division of the said Court or ceasing to be a Judge of the High Court.

(2) In case of a vacancy occurring in the said Chancery Division without a Judge thereof having been detached therefrom the Judge to be appointed to the High Court in consequence of the vacancy shall not be attached to any particular division thereof.

(3) In either of such cases each of the Divisions of the High Court shall thenceforward have the same number of Judges.

(4) The Judge so detached or appointed shall continue a Judge of the High Court, and shall from time to time exercise his judicial functions in any of the divisions thereof. 58 V. c. 12, s. 4.

Judgment by
Judge who
resigns after
case heard.

5. Where a Judge resigns his office, and any case which has been fully heard by such Judge, either alone or jointly with other Judges, stands for judgment, he may give judgment therein as if he were still a Judge of the Court; and any such judgment shall be of the same force and validity as if he were still such Judge, provided that such judgment of the Judge be delivered within six weeks after his resignation. 58 V. c. 12, s. 5.

Existing
Court of
Appeal con-
tinued.

6. The Court of Appeal for Ontario, at present existing is continued under that name, and shall consist of a Chief Justice, to be called the Chief Justice of Ontario, and four

other Judges to be called Justices of Appeal and the Judges of the High Court, shall be *ex-officio* Judges of the Court of Appeal, so as to provide for the cases mentioned in sections 12, 13 and 14 of this Act. 58 V. c. 12 s. 6; 60 V. c. 13, s. 1.

7. The Chief Justice of Ontario and the Justices of Appeal may be selected from the Judges for the time being, or the retired Judges of the High Court, or from such barristers as are eligible to be appointed Judges of that Court. 58 V. c. 12, s. 7.

Who may be appointed to the Court of Appeal.

8.—(1) The Chief Justice of Ontario shall have rank and precedence over all other Judges of the Courts in Ontario.

Precedence of Judges.

(2) The Justices of Appeal, the Chief Justice of the Queen's Bench, the Chancellor of Ontario, and the Chief Justices of the Common Pleas shall have rank and precedence among themselves according to their seniority of appointment to any of the said offices.

(3) The other Judges of the High Court shall have rank and precedence among themselves according to seniority of appointment to their respective offices. 58 V. c. 12, s. 8.

9. The Chief Justice of Ontario and the Justices of Appeal may, in addition to their duties as Judges of the Court of Appeal, preside over Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, and hold sittings of the High Court of Justice, for the trial of civil causes, matters and issues, and criminal matters or proceedings; and every such Justice in the exercise of such duties shall have the same rights, powers and privileges as a Judge of the High Court presiding at such Court or Sittings. 58 V. c. 12, s. 9.

The Justices of the Court of Appeal may hold Assizes, etc.

10. Upon the request of the Judge or Judges with or for whom he is requested to sit or act, it shall be lawful for any Judge of the Court of Appeal, or any retired Judge of the said Court, or of the High Court, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting, any such Judge of the Court of Appeal or retired Judge shall have all the power and authority of a Judge of the said High Court. 58 V. c. 12, s. 10.

Provision for absence or vacancy in office of a Judge.

APPEALS.

11.—(1) Subject to sections 18 and 19 of this Act.

Quorum of court of appeal.

(a) Appeals from decisions of Divisional Courts and appeals under *The Controverted Elections Act*, shall be heard and disposed of by the full Court of five Judges. Rev. Stat. c. 11.

(b) All other appeals, including appeals from the judgment of a single judge, may be heard and disposed of by not less than three judges.

Hearing or re-arguing case before five judges.

(2) Where an appeal comes before a court of three Judges the Court instead of hearing such appeal, or giving judgment thereon, may direct the case to be heard or re-argued, as the case may be, before the full Court. 60 V. c. 13, s. 2.

Divisional Courts of Court of Appeal.

12.—(1) In case from pressure of business, or other cause, it shall at any time seem expedient to the Lieutenant-Governor in Council, or to the Judges of the Supreme Court, or a majority of them (of which majority two Judges of the Court of Appeal, including the Chief Justice, unless absent on leave, shall form part), the Court of Appeal may sit in two Divisions either at the same time or at different times; and in such case and to enable two Divisional Courts of the Court of Appeal to be held, the judges of the Supreme Court, or the said majority of them, shall select from the Judges of the High Court a Judge or two of the Judges thereof as may be necessary to form, with the Justices of Appeal, two such Divisional Courts; and every Judge so chosen shall, while sitting in a Divisional Court of the Court of Appeal, have and may exercise all the powers and authority of a Justice of Appeal.

(2) At least two of the Justices of the Court of Appeal shall sit in such Divisional Court. 60 V. c. 13, s. 4.

Quorum may be made up by the Judges of the High Court.

13. In case of there being a vacancy in the Court of Appeal or in case from illness or some other cause, any of the Judges of the said Court are not present at some sitting of the Court, or in case any of the said Judges are under some legal disqualification to hear an appeal, the Judges of the High Court shall choose from amongst their number as many Judges as are necessary, to form a quorum; and the Judges so chosen and acting shall have authority to continue to hear appeals partly heard, and to give judgment in all appeals heard before them, notwithstanding that such vacancy may in the meantime have been filled up, or that the Judge who was absent may have resumed his duties. 58 V. c. 12, s. 13; 60 V. c. 13, s. 5.

Judges of High Court sitting in Court of Appeal.

14. In case of a Judge or Judges not having been chosen by the Judges of the Supreme Court, as mentioned hereinbefore in this Act, or in case of the Judge or Judges chosen not being available, the senior of the Presidents of the Divisions of the High Court shall sit in the Court of Appeal where one Judge only is needed from the High Court, the two senior Presidents where two are needed. Any other Judge of the High Court may sit in the place of one of the Presidents by arrangement between such other Judge and the President whose duty it is to sit as aforesaid. 58 V. c. 12, s. 14; c. 13, s. 4; 59 V. c. 18, Sched.(2); 60 V. c. 13, s. 6.

15. Where a Judge of the High Court is selected or it becomes his duty, under this Act, to sit in the Court of Appeal, the business of the Court of Appeal shall thenceforward have precedence of all other judicial duty of such Judge. 58 V. c. 12, s. 15; c. 13, s. 5.

Duty in Court of Appeal to have precedence over other work of High Court Judge.

16. Judges of the High Court to whom at any time shall fall the duty of sitting in the Court of Appeal, or in a Divisional Court thereof, shall continue to be the Judges to perform such duty until a selection, or new selection (as the case may be), shall be made by a majority of the Judges of the Supreme Court. 58 V. c. 12, s. 16; c. 13, s. 7.

Judges selected to sit in Court of Appeal until other selection made.

17. No Judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in the Court below, shall sit or take part in the hearing of or adjudication upon the proceedings in the Court of Appeal. 59 V. c. 18, Sched. part of (3).

Judge appealed from not to sit.

18. Where a Judge has heard a case in the Court of Appeal and is not present at the time of the judgment of the Court being delivered, his written judgment may be read by one of the other Judges of the Court and shall have the same effect as if he were present. 59 V. c. 18, Sched. part of (3).

Reading judgment of absent Judge.

19. In case, after a cause or matter in the Court of Appeal has been heard and stands for judgment, one of the Judges by whom the appeal was heard is transferred to the Supreme Court of Canada or resigns his office, or is absent from illness or other cause, or dies, the remaining Judges, if unanimous in their decision, may give judgment as if such Judge were still a Judge of the Court of Appeal, and were present and taking part in the said judgment. 59 V. c. 18, Sched. part of (3).

In certain cases judgment may be given notwithstanding a vacancy occurs.

20. In the absence of the Chief Justice of Ontario, the Judge entitled to precedence over the other Judges present shall preside. 58 V. c. 12, s. 17.

Presiding Judge in absence of Chief Justice.

21. The Court of Appeal shall, subject to the provisions of section 62 of this Act, hold its sittings at the City of Toronto at such times and for such periods as the acting Judges thereof for the time being, or a majority of them, may deem necessary or convenient for the speedy despatch of business. 58 V. c. 12, s. 18.

Sittings of the Court of Appeal.

OATH OF JUSTICES.

22. The oath to be taken by the Judges to be hereafter appointed shall be the following:

Oath of office.

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as
58 V. c. 12, s. 19.

; so help me God."

JUDICIAL LIBRARY

Administra-
tion of oath.

23. The oath is to be administered to the Chief Justices and the Chancellor by the Lieutenant-Governor in Council, and to the Justices of the High Court, other than the Chief Justices, in presence of the President of the High Court; and to the Justices of the Court of Appeal in open Court by the Chief Justice of Ontario, unless the Lieutenant-Governor in any of such cases shall otherwise direct. 58 V. c. 12, s. 20.

SEALS OF THE COURT OF APPEAL AND OF THE HIGH-COURT.

Seals of Court
of Appeal and
High Court.

24. The seals heretofore, from time to time, in use in and for the Court of Appeal and the High Court, shall be deemed to have been the proper seals of the said Courts respectively, and shall so continue until another seal is authorized by the Lieutenant-Governor in Council for either of the said Courts; and any seal so authorized may be afterwards changed by the Lieutenant-Governor in Council; and the seal from time to time so authorized shall be the seal of the Court for which it is authorized and by which its proceedings shall be certified and authenticated. 44 V. c. 5, s. 8; 59 V. c. 18, s. 9.

JURISDICTION OF HIGH COURT.

Jurisdiction of
High Court.

25. The High Court shall be a Superior Court of Record of original jurisdiction, and shall, subject as in this Act mentioned, possess all such powers and authorities, as by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions and causes as well criminal as civil, and may and shall proceed in such actions and causes by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of, law and may and shall also hear and (with or without a jury, as provided by law) determine all issues of fact that may be joined in any such action or cause, and judgment thereon give, and execution thereof award in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England. 58 V. c. 12, s. 21.

Equitable
jurisdiction

26. The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say :

1. In all cases of fraud and accident :

2. In all matters relating to trusts, executors and administrators, copartnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates ;

3 To stay waste ;

4. To compel the specific performance of agreements ;

5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same ;

6. To prevent multiplicity of suits ;

7. To decree the issue of Letters Patent from the Crown to rightful claimants ;

8. To repeal and avoid Letters Patent issued erroneously or by mistake, or improvidently, or through fraud. 58 V. c. 12, s. 22.

27. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England, in like cases, on the 4th day of March, 1837. 58 V. c. 12, s. 23.

Rules of decision in such cases.

28. The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at law. 58 V. c. 12, s. 24.

Jurisdiction in cases where formerly no adequate remedy at law.

29. The High Court shall have the like equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th day of March, 1865. 58 V. c. 12, s. 25.

Jurisdiction in matters of revenue.

30. The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit. 58 V. c. 12, s. 26.

Relief against forfeiture for breach of covenant to insure in certain cases. Imp. Act, 22-23 V. c. 35, s. 4.

31. The Court, where relief is granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise. 58 V. c. 12, s. 27.

When relief is granted, the same to be recorded. Imp. Act, 22-23 V. c. 35, s. 5.

32. The preceding two sections shall be applicable in the case of leases for a term of years absolute, or determinable on

To what leases preceding provisions

apply. Imp.
Act 22-23 V.
c. 35, s. 9.

a life or lives or otherwise, and also in the case of a lease for the life of the lessee or the life or lives of any other person or persons. 58 V. c. 12, s. 28.

Jurisdiction
in partition.

33. In any action or proceeding in the High Court for partition or sale of the estate of joint tenants, tenants in common or co-partners, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under *The Partition Act*, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such action or proceeding for the said purposes as might be taken upon a petition under the said Act; and every deed or vesting order made in any such action or proceeding shall have the same effect as a deed or vesting order made in proceedings under the said Act. 58 V. c. 12, s. 29.

Rev. Stat.
c. 123.

Jurisdiction
in alimony.

34. The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court. 58 V. c. 12, s. 30.

Judgment for
alimony may
be registered
and thus bind
lands.

35. An order or judgment for alimony may be registered in any Registry Office in Ontario, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the County or Counties where the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his lands. 58 V. c. 12, s. 31.

Vesting order,
effect of.

36. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a chose in action, as if such chose in action had been actually assigned to such last-mentioned person. 58 V. c. 12, s. 32.

37. The High Court shall have the same jurisdiction as the Court of Chancery in England had on the eighteenth day of March, 1865, in regard to enabling infants, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise, concur therein. 58 V. c. 12, s. 33 (1).

Jurisdiction of High Court in respect to settlement of estates of infants, and special cases.

38. The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. 58 V. c. 12, s. 34

The Court may try the validity of wills.

39.—(1) The High Court may remove an executor or administrator upon the same grounds as such Court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

Powers of High Court as to removal of executor or administrator.

(2) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.

(3) Subject to any rules to be made under this Act the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken in the High Court under this section.

(4) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died.

(5) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors.

Executor of an executor.

(6) A certified copy of the order of removal shall be filed with the Surrogate Clerk and another copy with the Registrar of the Surrogate Court by which probate or administration was granted, and such officers shall, at or upon the entry of the

Order for removal.

grant in the registers in their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed. 59 V. c. 18, s. 4.

Jurisdiction.

40. The High Court shall also have jurisdiction—

In matters
testamentary
Rev. Stat.
c. 59.

1. In matters testamentary as provided in sections 33 to 35 inclusive of *The Surrogate Courts Act*.

Appeals
against judg-
ment of com-
missioners
under Rev.
Stat. c. 33.
Lunatics and
infants.

2. On any appeal from the judgment or decision of the Commissioners under *The Act to Prevent Trespasses to Public Lands*, as provided in the said Act.

Rev. Stats.
cc. 65 and 168.

3. In respect of lunatics and infants and their property and estates, as provided by *The Act respecting Lunatics* and *The Act respecting Infants*.

Testamentary
guardians.
Rev. Stat.
c. 168.

4. In respect of guardians and trustees, as provided by *The Act respecting Infants*.

Partition.
Rev. Stat.
c. 128.

5. In respect of partition and sale of real estate as provided in *The Partition Act*. 58 V. c. 12, s. 35.

Settled
Estates.
Rev. Stat.
c. 71.
General
jurisdiction.

6. In respect of leases and sales of settled estates, as provided in *The Settled Estates Act*. 58 V. c. 20, s. 2 (5).

41. The High Court shall have, generally, all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in, or capable of being exercised by, the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery (whether created by Commission or otherwise) and the High Court shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the said name of "The High Court of Justice for Ontario." 58 V. c. 12, s. 36.

Existing juris-
diction of
Judges con-
tinued.

42. The jurisdiction of the High Court shall include (subject to the exceptions hereinafter contained) the jurisdiction which at the commencement of this Act, was vested in or capable of being exercised by the Judges of the said Courts respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges in pursuance of any statute or law; and all powers given to any such Court, or to any such Judges, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction. 58 V. c. 12, s. 37.

Rights and
privileges of
Judges.

43. Every Judge of the High Court shall have, use and exercise all the rights, incidents and privileges of a Judge of a Court of Record and all other rights, incidents and privileges

as fully to all intents and purposes as the same were, prior to the fifth day of December, 1859, used, exercised or enjoyed by any of the Judges of any of Her Majesty's Superior Courts of Common Law at Westminster. 58 V. c. 12, s. 38.

44. The Judges of the High Court shall, in rotation or otherwise, as they may agree among themselves, sit in Chambers or elsewhere, and there transact any such business as may be transacted by a single Judge out of Court, whether such business be in the Division of the High Court to which such Judge is attached or in another Division, subject to the right of appeal as provided in this Act and the Rules from time to time in force. 58 V. c. 12, s. 39.

A Judge to sit in Chambers.

45. Any person sitting or acting as Judge at any Assizes or sittings of the High Court for the trial of causes, matters, and issues, in the City of Toronto, may, while so sitting or acting as such Judge, or while the Assizes or sittings last, act as a Judge in Chambers in all matters as if he were a Judge of the High Court. 58 V. c. 12, s. 40.

Anyone while acting as Judge of Assizes in Toronto, may act as Judge in Chambers.

46. Any person acting as a Judge at any Assizes or sittings of the High Court for the trial of causes, matters and issues, may, in and for the County in which he is acting, and while the sittings of the said Court last, act as a Judge in Chambers in all matters entered for trial before him, as if he were a Judge of the High Court. 58 V. c. 12, s. 41.

Anyone sitting as Judge of Assize may during sittings act as Judge in Chambers.

47. The several jurisdictions vested in the said High Court, shall not be exercised except in the name of the said High Court as provided by this Act, save as otherwise in this Act provided. 58 V. c. 12, s. 42.

Jurisdiction to be exercised in name of High Court.

48. The jurisdiction of the High Court of Justice and the Court of Appeal, respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by Rules and Orders of Court now in force or to be made pursuant to this Act; and where no special provisions are contained in this Act or in any such Rules or Orders with reference thereto, it shall be exercised as nearly as may be in the same manner as prior to the 22nd day of August, 1881. 58 V. c. 12, s. 43.

Jurisdiction to be exercised according to rules of Court.

JURISDICTION OF THE COURT OF APPEAL.

49. The Court of Appeal shall be a Superior Court of Record and shall have appellate jurisdiction in civil and criminal cases; and in civil cases shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of the High Court, or of any Judges thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and

Jurisdiction of Court of Appeal.

conditions on which appeals shall be allowed, as are now in force or may be made pursuant to this Act. 58 V. c. 12, s. 44.

Additional
jurisdiction.
Rev. Stats.
cc. 7, 9 and 11.

50. The Court of Appeal shall also have jurisdiction as provided by *The Ontario Voters' Lists Act*, *The Ontario Election Act* and *The Ontario Controverted Elections Act*. 58 V. c. 12, s. 45.

May quash
proceedings :
when.

51. The Court of Appeal shall have power to quash proceedings in cases brought before it, in which appeal does not lie, or where such proceedings are taken against good faith. 58 V. c. 12, s. 46.

To make
whatever
order may be
required.

52. The Court of Appeal shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require. 58 V. c. 12, s. 47.

Powers of
Court of
Appeal.

53. The powers of the Court of Appeal may be exercised, notwithstanding that the appeal is brought against part only of the judgment of the Court below ; and may be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from, or complained of the judgment. 58 V. c. 12, s. 48.

Power of a
single Judge
in Court of
Appeal.

54. In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal ; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit ; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof. 58 V. c. 12, s. 49.

On an appeal
Court of Ap-
peal to have
all powers of
High Court.

55. For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court. 58 V. c. 12, s. 50.

Jurisdiction
subject to
rules, etc.

56. The jurisdiction and power of the Court of Appeal, in respect of the said matters and all others, shall be and are subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed as are now in force or as may be made pursuant to this Act. 58 V. c. 12, s. 51.

RULES OF LAW.

57. In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following:

1. If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceedings for the same or the like purposes properly instituted before the passing of *The Ontario Judicature Act, 1881.* Equitable relief.
2. The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for the Dominion, or the Attorney-General of this Province for a declaration as to the validity of any statute, or any provision in any statute of this Legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said court. Jurisdiction as to validity of provincial statute.
3. Subject to appeal as in other cases, the High Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the Court thinks fit. Relief against penalties, etc.
4. No appointment, which after the 25th day of March, 1886, is made in exercise of a power to appoint any property, real or personal, among several objects, shall be adjudged to be invalid on the ground that any object of the power has been altogether excluded, and an appointment shall be valid and effectual notwithstanding that one or more of the objects shall not thereby or in default of appointment take a share or shares of the property which is subject to the power. Appointment under power.

But nothing in this subsection shall prejudice or affect any provision in any deed, will or other instrument creating a power, which shall declare the amount

or the share or shares from which no object of the power shall be excluded, or shall declare some one or more object or objects of the power who shall not be excluded.

Declaratory
judgments
and orders.

5. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

Equitable
defences.

6. If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceedings instituted in that Court for the same or the like purposes before the passing of *The Ontario Judicature Act, 1881*.

44 V. c. 5.

Relief which
may be
granted to
defendants.

7. The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in

respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant.

8. The said Courts respectively, and every Judge thereof shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceedings duly instituted therein before the passing of *The Ontario Judicature Act, 1881*. Courts to take notice of equitable rights and duties.
44 V. c. 5.

9. No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, prior to *The Ontario Judicature Act, 1881*, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Restraint proceedings.

Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, prior to *The Ontario Judicature Act, 1881*, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

10. If any action is brought in the High Court for any cause of action for which any suit or action has been brought and is pending between the same parties or their representatives in any place or country out of Ontario, the Court or any Judge thereof may make an order to stay all proceedings in the High Court until satisfactory proof is offered to the Court or Judge that the suit or action so brought in such other place or country out of Ontario is determined or discontinued. Stay of proceedings if action for same cause is pending out of Ontario.

Giving effect
to legal
claims.

44 V. c. 5.

Multiplicity
of proceedings
to be avoided.
All matters in
controversy to
be determined
in one pro-
ceeding.

Rules of law
upon certain
points.

Statutes of
Limitation
not to apply
to express
trusts.

Rev. Stat.
c. 129.

Equitable
waste.

Merger.

11. Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect to prior to *The Ontario Judicature Act, 1881*, by any of the Courts then existing and whose jurisdiction is now vested in the High Court.

12. The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. 58 V. c. 12, s. 52; 60 V. c. 15, Sched. A (64).

58. The law to be administered in Ontario, as to the matters next hereinafter mentioned, shall be as follows :

1. Subject to the provisions of section 32 of *The Trustee Act*, no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. 58 V. c. 12, s. 53 (1); 59 V. c. 18, Sched. (4).

2. An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

3. There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to *The Ontario Judicature Act, 1881*, have been deemed merged or extinguished in equity.

4. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person. 58 V. c. 12, s. 53 (2-4). Actions for possession of land by mortgagor.
5. Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor. 60 V. c. 15, s. 5. Assignments of debts and choses in action.
6. In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees. Where several claimants under assignments of debts or choses in action.
7. Stipulations in contracts, as to time or otherwise, which would not before the passing of *The Ontario Judicature Act, 1881*, have been deemed to be or to have become of the essence of such contracts in a Court of equity, shall receive in all Courts the same construction and effect as they would, prior to the passing of said Act, have received in equity. Stipulations not of the essence of contracts. 44 V. c. 5.

Satisfaction of
obligation by
performance
in part.

8. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

Injunctions
and receivers.

9. A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

Court may
award dam-
ages, etc.

10. In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the court may direct, or the court may grant such other relief as it may deem just.

Purchaser not
affected by
irregularities
in orders of
Court.

11. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service.

Infants.

12. In questions relating to the custody and education of infants, the rules of equity shall prevail.

Cases of
conflict not
already
mentioned.

13. Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. 58 V. c. 12, s. 53 (5-12).

59. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. 58 V. c. 12, s. 54.

Rules of law to apply to all Courts.

CONSTITUTIONAL QUESTIONS.

60.—(1) When in any action or other proceeding, the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question, the same shall not be adjudged to be invalid until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario, or at their offices respectively.

Notice to be given to Minister of Justice and Attorney-General of Ontario before any Act is declared invalid.

(2) The notice in such case shall be entitled in the cause; shall state what the Act or section of an Act is which is in question, and the day on which the case or the said question is to be argued; and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.

(3) The notice shall be served six days before the day of the argument unless a Judge authorizes a shorter notice.

(4) Upon every such question the said Minister of Justice and the said Attorney-General shall be entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding. 58 V. c. 12, s. 55.

SITTINGS OF COURT AND DISTRIBUTION OF BUSINESS.

61. The legal year shall not be divided into terms so far as relates to the administration of justice; and there shall not be terms applicable to any sitting or business of the High Court, or of any Commissioners to whom any jurisdiction may be assigned under this Act, or of any Commissioners of Assize; but in all cases in which, under the law existing prior to the 22nd day of August, 1881, the terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. 58 V. c. 12, s. 56.

Abolition of terms.

62.—(1) Subject to the Rules of Court, the High Court of Justice, and the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any statute, or otherwise, is required to be discharged.

Sittings of Courts.

Where Divisional Sittings to be held.

(2) Subject to the preceding provision the Divisional Sittings of the High Court shall be held at the City of Toronto. 58 V. c. 12, s. 57.

Vacations.

63. The Lieutenant-Governor in Council may from time to time, upon any report or recommendation of the council of Judges of the Supreme Court hereinafter mentioned, make, revoke or modify, orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. 58 V. c. 12, s. 58.

Commissions of assize and other commissions.

64. Commissions of assize or any other commissions, either general or special, may be issued, by the proper authority, assigning to the persons to be therein named, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter, depending in the said High Court; or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so issued shall be of the same validity as if it were enacted by the body of this Act; and any Commissioner or Commissioners shall, when engaged in the exercise of any jurisdiction so assigned to him or them, be deemed to constitute a Court of the said High Court. 58 V. c. 12, s. 59.

Business to be disposed of by one Judge as far as practicable.

65.—(1) Every action and proceeding in the High Court and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of, before a single Judge.

Judge not to reserve questions.

(2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court.

Judge to constitute a court.

(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court. 58 V. c. 12, s. 60.

Business of Divisional Courts of the High Court.

66. All business which may from time to time be so ordered by Rules of Court shall be transacted and disposed of by Divisional Courts of the High Court, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. 58 V. c. 12, s. 61.

Certain matters to be heard before Divisional Court.

67.—(1) Subject to Rules of Court, the following proceedings and matters shall be heard and determined before a Divisional Court of the High Court:

- (a) Proceedings directed by any statute to be taken before the Court in which the decision of the Court is final. When statute declares decision of Court to be final.
- (b) Cases of *habeas corpus* in which the Judge directs that a motion for the writ, or the writ, be made returnable before a Divisional Court. *Habeas corpus* cases.
- (c) Subject to section 76 any application for a new trial in the High Court when the action has been tried with a jury. Applications for new trials in jury cases.
- (d) Other cases where all parties agree to the same being heard before a Divisional Court. By agreement of parties.

(2) Nothing in this section contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceedings therein heretofore taken before a single Judge to be taken before a Divisional Court. 58 V. c. 12, s. 62; c. 13, s. 12.

68. The Queen's Bench, Chancery, and Common Pleas Divisions of the High Court shall not sit or give judgments as such Divisions; and there shall not be Divisional Courts of any of the said Divisions; but the Divisional Courts shall be Divisional Courts of the High Court, without reference to the said Divisions. 58 V. c. 12, s. 63; c. 13, s. 10; 59 V. c. 18, Sched. (5). Queen's Bench, Chancery and Common Pleas Divisions not to sit as such.

69. The Judges of the High Court or a majority of them, may from time to time pass such rules to regulate the sittings of the Divisional Court as may be found necessary for the due despatch of business; provided always that there shall be at least a monthly sitting of such Court except during vacation. 60 V. c. 15, Sched. A (65). Sittings of Divisional Courts. Provision.

70.—(1) Every Divisional Court of the High Court shall be composed of three Judges, unless from illness or other unavoidable cause a third Judge cannot be obtained, in which case it may be composed of two members, provided that in case of divided opinion upon any matter argued the same shall at the election of either party be re-argued before a Court of three members. 58 V. c. 12, s. 66 (1); c. 13, s. 15, part; 59 V. c. 18, s. 10. Divisional Courts, how composed.

(2) No Judge shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself; but subject to this provision every Judge of the High Court shall be qualified and empowered to sit in any of such Divisional Courts. 58 V. c. 12, s. 66 (2); c. 13, s. 15, part. No Judge to hear appeal from his own judgment.

(3) The Judges of the High Court or a majority of them may arrange in what order the Judges of the High Court shall hold the said sittings. 58 V. c. 12, s. 66 (3); c. 13, s. 16 (3). Judges to arrange sittings.

(4) If no arrangement is made, or subject to any arrangement so made, the presiding Judge shall wherever practicable be a President of one of the Divisions of the High Court; and the Presidents shall preside at the said monthly sittings successively in order of their seniority; and two other Judges of the High Court in rotation and in order of seniority shall be associated with one of the said Presidents in holding every such sittings. 58 V. c. 12, s. 66 (4); c. 13, s. 16 (4).

(5) In the absence of a President of a Division the senior Judge present shall preside. 58 V. c. 12, s. 66 (5).

(6) Nothing in this Act is to be construed as preventing any Judge from sitting in a Divisional Court in the absence of the Judge whose turn it may be to sit; and nothing in this Act is to be construed as making irregular any sitting or any proceeding thereat by reason of the Court not being constituted as hereinbefore mentioned, provided that the sitting is held by the proper number of Judges, not including the Judge from whose judgment or order an appeal is heard.

(7) Where a Judge has heard a case in a Divisional Court and is not present at the time of the judgment being delivered, his written judgment may be read by one of the other Judges of such Divisional Court, and shall have the same effect as if he were present. 58 V. c. 12, s. 66 (6-7); c. 13, s. 16 (6, 7).

Arrangements
for transaction
of business.

71. All such arrangements as may be necessary or proper for the holding of any of the Courts, or the transaction of business, or assignment from time to time of Judges to hold such Courts, or to transact such business, shall be made by the Judges of the High Court or a majority of them. 58 V. c. 12, s. 67.

APPEALS.

Certain
orders not
subject to
appeal.

72. No order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order. 58 V. c. 12, s. 68.

Appeals from
interlocutory
orders.

73. There shall be no appeal to a Divisional Court from any interlocutory order, whether made in Court or Chambers, in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an application to a Superior Court; and there shall be no appeal to the Court of Appeal from any interlocutory order in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an appeal to the Court of Appeal. Any doubt which may arise as to what orders, or judgments, are interlocutory, shall be determined by the Court of Appeal. 58 V. c. 12, s. 69.

74. There shall not be more than one appeal in this Province from any judgment or order made in any action or matter; save only at the instance of the Crown in a case in which the Crown is concerned; and save in certain other cases hereinafter specified. 58 V. c. 12, s. 70; c. 13, s. 2.

Only one appeal to be allowed.

Appeals to Divisional Courts.

75. Subject to sections 72 and 73 of this Act, an appeal shall lie to a Divisional Court of the High Court, in the following cases:—

Appeals to a Divisional Court.

1. From any judgment or order of a Judge of the High Court in Court, whether at the trial or otherwise; Order of single Judge.
2. From the Master in Ordinary except as to decisions or rulings upon questions of practice, or in his jurisdiction in Chambers; Master in Ordinary.
3. From County Courts, as provided in *The County Courts Act*; Under Rev. Stat. c. 55
4. From Surrogate Courts or a Surrogate Judge, as provided in *The Surrogate Courts Act* and *The Act respecting Infants*; Under Rev. Stat. c. 59, 168.
5. From Division Courts as provided in *The Division Courts Act*; Under Rev. Stat. c. 60.
6. From Provisional Judicial District Courts, as provided in *The Unorganized Territories Act*; From District Courts under Rev. Stat. c. 109.
7. From Stipendiary Magistrates, as provided in section 71 of *The Unorganized Territories Act*; Under Rev. c. 109.
8. From a Judge of a County Court upon an appeal from a conviction or order arising out of or under *The Liquor License Act*, as provided in the said Act; Under Rev. Stat. c. 245.
9. From a Judge of a County Court, as provided in *The Act respecting Water Privileges*; Under Rev. Stat. c. 141.
10. From a Judge of a County Court, or Stipendiary Magistrate, as provided in *The Act for protecting the Public Interest in Rivers, Streams, and Creeks*. 58 V. c. 12, s. 71 (3-11); c. 13, s. 11 (3-11); 59 V. c. 18, s. 3, Sched. (6); 60 V. c. 14, s. 88. Under Rev. Stat. c. 142.

Appeals to the Court of Appeal.

76. Subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order or decision of the High Court whether the judgment, order or decision was that of a Divisional Court or of a Judge in Court, and including cases tried with a jury where the appellant complains of the judgment and asks in the alternative for a new trial. 58 V. c. 12, s. 72; 59 V. c. 18, s. 13.

When appeal to lie to Court of Appeal.

Appeals from
Divisional
Court.

Party appeal-
ing to Divi-
sional Court
not to appeal,
but other
parties may.

Appeal on
special leave
to Court of
Appeal.

Powers of
Court or
Judge on
application for
leave to
appeal.

77.—(1) An appeal shall not lie from any judgment or order of a Divisional Court, except as hereinafter provided.

(2) In case a party appeals to a Divisional Court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said Divisional Court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the Divisional Court. 58 V. c. 12, s. 73 (1, 2); c. 13, s. 13 (1, 2).

(3) Except where an appeal lies under the preceding subsection from a Divisional Court to the Court of Appeal, an appeal to the Court of Appeal shall not lie from a judgment or order of a Divisional Court pronounced on an appeal in a cause or matter in the High Court to such Divisional Court except by special leave first obtained upon an application to such Divisional Court, or to the Court of Appeal or a Judge thereof. 58 V. c. 12, s. 73 (3), part; c. 13, s. 13 (3), part; 59 V. c. 18, Sched. (7).

(4) The granting or refusing of such leave shall be in the discretion of the Court or Judge applied to therefor, in view of all the circumstances; and in case of such leave being granted, such terms and conditions may be imposed as the Court or Judge sees fit; but such leave shall not be granted unless, besides being in the opinion of the Court or Judge a proper case for the granting of the leave, the case falls within one or more of the following cases, that is to say:—

- (a) Where the matter in controversy on the proposed appeal exceeds the sum or value of \$1,000 exclusive of costs, or involves indirectly or otherwise that sum or value; or
- (b) Where such matter involves the validity of a patent; or
- (c) Where the judgment or order involves a question of law or practice on which there have been conflicting decisions or opinions by the High Court of Justice, or by Judges thereof; or
- (d) Where a judgment or order is in regard to a matter of practice, but affects the ultimate rights of parties to the action to the extent of the said sum or value; or
- (e) Where there are other sufficient special reasons for treating the case as exceptional and allowing a further appeal. 58 V. c. 12, s. 73 (4); c. 13, s. 13 (4).

Limitation of time for appealing.

Time within
which appeals
from judg-
ments must be
brought to a
hearing.

78. Subject to the provisions of this Act all appeals from a judgment or order of the High Court shall be brought to hearing within one year from the date thereof, or within such

further time as the Court of Appeal or a Judge thereof, may allow. 58 V. c. 12, s. 74.

79. If the appeal is from an interlocutory order, then the appellants shall bring the same to a hearing within six months from the pronouncing of the same, or within such further time as the Court of Appeal or a Judge thereof may allow. 58 V. c. 12, s. 75.

Time within which appeals from interlocutory orders must be brought to a hearing.

80. The time limited for appealing from a judgment or order, which does not become absolute upon the same being pronounced, shall be computed from the time when the same does become absolute. 58 V. c. 12, s. 76, part; 59 V. c. 18, Sched. (8).

Time to be reckoned from the judgment or order becoming absolute.

EFFECT OF JUDICIAL DECISIONS.

81.—(1) The decision of a Divisional Court of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher Court, be binding on the Court of Appeal and all Divisional Courts thereof, as well as on all other Courts and Judges and shall not be departed from in subsequent cases without the concurrence of the Judges who gave the decision, unless and until so overruled or impugned.

Decision of Divisional Court of Court of Appeal to be binding.

(2) It shall not be competent for the High Court or any Judge thereof in any case arising before such Court or Judge to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law or practice without the concurrence of the Judges or Judge who gave the decision; but if a Court or Judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher Court, such Court or Judge may refer the question to such higher Court. 58 V. c. 12, s. 79; c. 13, s. 9.

Decision of Court of co-ordinate authority to be binding.

SITTINGS FOR TRIALS.

82.—(1) Subject to Rules of Court, as often in every year as the due despatch of business and the public convenience may require there shall be sittings of the High Court at every County Town for the trial of causes, matters and issues, whether legal or equitable, in all Divisions of the High Court, which are to be heard and determined by a Judge without a jury, and also for the trial of causes, matters and issues in all Divisions of the High Court which are to be tried with a jury, and for the trial of criminal matters and proceedings; and in case such first mentioned sittings are appointed at any county town for the same time and before the same Judge as jury cases, separate lists shall be made of the jury and non-jury cases, and the jury cases shall be first disposed of, unless the Judge sees fit to direct otherwise. 58 V. c. 12, s. 80 (1).

Sittings for trial of causes.

(2) The Judges of the High Court of Justice, or a majority of them, shall appoint the days upon which such sittings shall be held. 58 V. c. 12, s. 80 (2), part; 59 V. c. 18, Sched. (9).

Sittings in
each County

83.—(1) Subject to Rules of Court, not less than two of such sittings shall be held at the County Town of every County and Union of Counties in each year. 58 V. c. 12, s. 81 (1).

York.

(2) In the County of York, there shall in every year be held at the County Town of such County not less than three of such sittings, and also a fourth such sittings, unless the same is not required for the administration of justice, but if the said Judges, on enquiry, ascertain that such fourth sittings for any year is not required for the administration of justice, it shall not be necessary to hold the same or to appoint a day for holding the same. 58 V. c. 12, s. 81 (3); 59 V. c. 18, Sched. (11).

Carleton,
Wentworth,
Middlesex.

(3) In the Counties of Carleton, Wentworth and Middlesex, there shall, in every year be held at the County Town of each of the said Counties not less than three of such sittings. 58 V. c. 12, s. 81 (4).

Additional
sittings.

(4) In addition to the regular sittings to be held under subsection 1 of this section, a third such sittings may be appointed if the Judges of the High Court, or a majority of them, shall see fit for the trial of civil causes, matters and issues and criminal matters and proceedings, or of civil causes, matters and issues only, to be held at the County Town of any County in the Province. 58 V. c. 12, s. 81 (5); 59 V. c. 18, Sched. (12).

Judges may
appoint sit-
tings in any
county for
issues to be
tried without
a jury.

84. The Judges of the High Court may appoint sittings of the High Court in any County in the Province, as often and at such times as they see fit, for the trial of causes which are to be tried by a Judge without a jury. 58 V. c. 12, s. 82; 59 V. c. 18, Sched. (13).

Separate sit-
tings may be
held for civil
and criminal
matters.

85. The sittings of the High Court for the trial of civil causes, matters and issues in any County may, in the discretion of the Judges appointing the days therefor, or of the Judge who has been appointed to preside or is presiding thereat, be held separate and apart from the sittings for the trial of criminal matters and proceedings, either on the same day or on a different day. 58 V. c. 12, s. 83.

Place in
county towns
where Court
to be held.

86. Such sittings may, at the discretion of the Court or of the Judge who is to hold the same, be held in the court house of the county town in which the same are appointed to be held, or in such other place in the county town as the Judge selects, and the Judge shall in all respects have the same authority as a Judge formerly had when sitting at *nisi prius* in regard to the use of the court house, gaol and other buildings or apartments set apart in the County for the administration of justice. 58 V. c. 12, s. 84.

87.—(1) Such sittings shall be presided over by one of the Judges of the Supreme Court, or in the absence of any such Judge by a retired Judge of the Supreme Court, or by a Judge of any County Court in Ontario, or by one of Her Majesty's Counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or Counsel being requested by a Judge of the Supreme Court to attend for that purpose.

Who may
preside.

(2) Such Judge or Counsel while holding the sittings shall possess, exercise and enjoy all the powers and authorities of a Judge of the High Court, and in civil proceedings may reserve the giving of his decision on questions raised at the trial, and such decision shall have the like force and effect as the decision of a Judge of the High Court. 58 V. c. 12, s. 85.

Powers of pre-
siding Judge.

88. Where the Judge whose duty it is to hold any sittings of the High Court for the trial of civil causes, matters and issues and for the trial of other matters and proceedings within the jurisdiction of the Provincial Legislature, does not arrive in time, or is not able to open such Court on the day appointed for that purpose, the sheriff of the County in which such Court should be held, or, in his absence, his deputy, may, after the hour of six of the clock in the afternoon of such day, adjourn by his proclamation, the Court which should have been opened on that day, to an hour on the following day to be by him named, and so from day to day until the Judge arrives to open such Court, or until such sheriff receives other direction from the Judge in that behalf. 58 V. c. 12, s. 86.

Course to be
pursued by
the sheriff if
the Judge
does not
arrive on
the day
appointed for
opening
Court.

89.—(1) No such sittings of the High Court for the trial of causes, matters and issues shall open earlier than one of the clock in the afternoon on the first day of the sittings, but this shall not prevent a non-jury trial from being begun before one of the clock with the consent of the parties. 58 V. c. 12, s. 87 (1).

Sittings to
commence at
one o'clock in
the afternoon.

(2) No such sittings shall begin before nine o'clock in the forenoon, nor, except for special reasons, extend beyond seven o'clock in the evening, with at least a half-hour's intermission at or near noon. An irregularity under this section shall not render any trial or other proceeding void. 58 V. c. 12, s. 87 (2); c. 13, s. 19.

Hours for
sittings.

90. All non-jury actions in any County may be entered for trial at any sittings of the High Court in such County, except in the County of York. 58 V. c. 12, s. 88; c. 13, s. 17.

Entering non-
jury actions
for trial.

91. At the sittings of the High Court or Assizes in any county town there shall be a general docket in addition to the docket of cases entered for trial, and such general docket may include all motions, petitions, proceedings and other matters which may be heard by a Judge in Court or in chambers in

General
docket after
sittings of
High Court
or Assizes.

any case where the solicitors consent, or where the matter in controversy arose in the County or where the party opposing or showing cause in the matter, or his solicitor, resides in the County. Such general docket shall be disposed of after the trial of causes. 58 V. c. 12, s. 89; c. 13, s. 18.

TRIAL OF HIGH COURT CASES IN COUNTY COURTS, AND
COUNTY COURT CASES BEFORE HIGH COURT.

Certain cases
in High Court
may be tried
in the County
Court of the
county in
which the
action is laid.

92.—(1) All issues of fact and assessments of damages in the High Court relating to debt, covenant and contract, where the amount is liquidated, or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the County where the trial is to take place, if the plaintiff desires it, unless a Judge of the High Court otherwise orders, and upon such terms as the Judge deems meet.

(2) In such case the action shall be entered for trial, notice of trial shall be given, and the trial take place in the same way as in ordinary cases in such County Court.

Certain cases
in the High
Court may be
tried at the
County Court
of the county
in which the
action is to
be tried.

(3) In any action in the High Court, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of the said High Court is satisfied that the case may be properly tried in a County Court, any Judge of the High Court may order that such case shall be tried in the County Court of the County the county town of which is named as the place of trial, and such action shall be tried there accordingly, and the record shall be made up as in other cases, and the order directing the case to be tried in the County Court shall be left with the clerk of the County Court on entering the action for trial, annexed to the record; and the trial shall take place in the same way as in ordinary cases in such County Court. 58 V. c. 12, s. 90.

Proceedings
in such case.

By order
County Court
cases may be
tried at High
Court sittings

93.—(1) By the order of a Judge of the High Court, made upon such terms as the Judge may consider just, the issues of fact and assessment of damages in any action pending in a County Court may be tried and assessed at the sittings of the High Court at any county town.

(2) In such cases the action shall be entered and the case tried as in ordinary cases. 58 V. c. 12, s. 91.

Powers of
County Court
afterwards.

94. Where any such cause is referred by the presiding Judge at such sittings, the County Court in which the action is brought, and the Judge thereof, shall have the same power to enforce any award, report or certificate made on the reference, and to make rules and orders upon appeals therefrom and motions relating thereto, as if the order referring the case had been made by the County Judge. 58 V. c. 12, s. 92.

95. The Clerks of the several County Courts shall provide books in which the Judges presiding at the sittings of the High Court, where cases brought in any County Court are tried or assessed under this Act, may enter their notes of such trials and assessments; and such books, immediately after the trials or assessments, shall be returned to the said Clerks and shall remain in their offices. 58 V. c. 12, s. 93.

Books or
Judge's notes
of trial, etc.

96. The jury fees and the fees and charges payable and pertaining to officers of the County Courts, upon all actions or proceedings brought in the County Courts and tried or assessed in the High Court, shall be chargeable and paid as if the same were being tried or assessed in the County Courts; and no other fees shall be chargeable thereon, and the Clerk of a County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use. 58 V. c. 12, s. 94.

Fees to
officers.

CERTIFICATE OF *LIS PENDENS*.

97. The instituting of an action or the taking of a proceeding, in which action or proceeding any title or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not being a party thereto, until in cases where the land is registered under *The Land Titles Act* a caution is registered under that Act nor in other cases until a certificate, signed by the proper officer of the Court, has been registered in the Registry Office of the Registry Division in which the land is situate, which certificate may be in the following form:—

Action, etc.,
not notice un-
less certificate
registered.

Rev. Stat.
c. 138.

"I certify that in an action or proceeding in the High Court, between A. B., of and C. D., of some title or interest is called in question in the following land (describing it,)"

Form.

Dated at (stating date and place.)

But no certificate shall be required to be registered in any action or proceeding for foreclosure or sale upon a registered mortgage. 56 V. c. 21, s. 53.

Proviso.

98.—(1) Where a certificate of *lis pendens* has been registered, and the plaintiff, or other party at whose instance the certificate was issued, does not in good faith prosecute the litigation, the Court or Judge may at any time during the litigation make an order vacating the certificate of *lis pendens*. 53 V. c. 33, s. 1.

Order vacat-
ing *lis pendens*
upon non-
prosecution of
action.

(2) Where a certificate of *lis pendens* has been registered, and the plaintiff's claim is not solely to recover the land, or the estate or interest therein, but is to recover a sum of money or money's worth which is chargeable on or payable out of the land, or some estate or interest therein, or for which he claims that the land or such estate or interest therein ought to be subjected to payment, or where the plaintiff claims the land or some interest in land, and, in the alternative, damages or compensation in money or money's worth, the Court or a

Order where
claim not lim-
ited to land.

Judge may at any time during the litigation make an order vacating the certificate of *lis pendens*, upon such terms as to giving security or otherwise as may be deemed just. 53 V. c. 33, s. 2.

Upon other grounds.

(3) The Court or Judge may at any time annul the registration upon any other just ground. 53 V. c. 33, s. 3.

Costs.

(4) On application under this section, the Court or Judge may order any of the parties to the application to pay the costs of any of the other parties thereto, or may make any other order with respect to costs, as under all the circumstances may appear to him just. 53 V. c. 33, s. 4.

Appeal from order.

99. The order for vacating or annulling a certificate of *lis pendens* shall be subject to appeal according to the practice of the High Court in like cases, and may be registered in the same manner as judgments and other orders affecting lands are registered, such registration to be on or after the fourteenth day from the date of the order, unless a Judge of the High Court reverses the order meanwhile, or postpones or forbids the registration. 53 V. c. 33, s. 5.

Registration of order.

Effect of vacating *lis pendens*.

100. Where a certificate of *lis pendens* is vacated, any person may deal in respect to the land, as fully as if such *lis pendens* had not been registered, and it shall not be incumbent on any purchaser or mortgagee to enquire as to the facts alleged in the suit, and the rights of such purchaser or mortgagee shall not be affected by his being aware that the allegations made in the suit were in fact made. 53 V. c. 33, s. 6.

ASSESSORS

Assessors.

101.—(1) The High Court, or any Divisional Court or Judge before whom any cause or matter may be pending, or the Court of Appeal, may, in any cause or matter in which it thinks it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors.

Remuneration.

(2) The remuneration, if any, to be paid to such assessors shall be determined by the Court. 58 V. c. 12, s. 105 (2, 3); 60 V. c. 16, Sched. D, part.

TRIAL, PROCEDURE AND PLACE OF TRIAL.

Certain actions for torts to be tried by a jury.

102. In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might prior to *The Administration of Justice Act, 1873*, have been tried by a jury, shall be tried by a jury, unless the parties in person or by their solicitors or counsel, waive such trial. 58 V. c. 12, s. 109.

103. Subject to Rules of Court, all causes, matters and issues, over the subject of which prior to *The Administration of Justice Act of 1873*, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered. 58 V. c. 12, s. 110.

Cases formerly within exclusive jurisdiction of Court of Chancery.

104. All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks, shall be tried by a Judge without a jury, and the trial shall take place in the County in which the road, street or sidewalk is situated. 59 V. c. 18, s. 5.

Certain actions against municipalities to be tried without a jury and venue to be local

105. Subject to Rules of Court, all causes, matters and issues other than as aforesaid, and the assessment or enquiry of damages therein may, and (subject to the provisions of section 110) in the absence of such notice as in the next section mentioned shall be heard, tried and assessed by a Judge without a jury. 58 V. c. 12, s. 111 (1).

Other issues to be tried and damage assessed by judge alone unless jury notice given.

106. If any of the parties desires the issues of fact to be tried or damages to be assessed or enquired of by a jury, he shall at any stage of the proceedings but not later than the fourth day after the close of the pleadings, or in case notice of trial is served before that time, then within two days after service of notice of trial, or within such other time as may be ordered by the Court or a Judge, file and serve on the opposite party a notice in writing requiring that the issues should be tried, or the damages assessed by a jury, and a copy of the notice shall be attached to the record or certified copy of the pleadings prepared for the Judge. 58 V. c. 12, s. 111 (2); 59 V. c. 18, Sched. (17).

Unless jury notice given or Court or Judge otherwise directs.

107.—(1) Where any one of the parties has given such notice requiring a jury, the issues of fact shall (subject to the provisions of section 110) be tried and determined or the damages assessed by the verdict of jurors duly sworn for the trial of such issues or for the assessment of such damages.

Effect of notice requiring a jury.

(2) The parties present at the trial may consent that the said notice requiring a jury shall be waived, and the case tried and damages assessed by the Judge, and may endorse a memorandum of such consent upon the record, and thereupon the judge may try the issues or assess the damages without a jury. 58 V. c. 12, s. 112 (1, 2).

Parties may waive notice.

108.—(1) In all civil cases in the High Court of Justice or in a County Court, or in any matter or cause within the jurisdiction of the Provincial Legislature, where issues are tried or where damages are assessed by a jury, it shall be sufficient if ten of the jurors empanelled for the trial or assess-

Agreement of ten jurors in verdict or answers to be sufficient.

ment shall agree, instead of twelve; and in such case ten jurors may give the verdict, or answer the questions submitted to the jury by the Judge. 58 V. c. 12, s. 112 (3); c. 16, s. 1.

Effect of verdict or answers so given.

(2) A verdict rendered or question answered under the provisions of this section shall have the same effect as the verdict or answer given by twelve jurors. 58 V. c. 12, s. 112 (4); c. 16, s. 3.

Special juries.

(3) This section shall apply to special juries. 58 V. c. 12, s. 112 (5); c. 16, s. 4.

Death or illness of juror or discovery of interest during trial.

109. If at the trial of any action or issue or assessment of damages, a juror should die or become incapacitated by illness or any other cause from continuing to sit or act on the jury, or if it should be discovered that one of the jury sworn has an interest in the result of the suit or is a relative of any of the parties thereto within the degree of first cousin, the presiding Judge may discharge such juror, and may in any such case direct that the trial or assessment shall proceed on such terms as he thinks fit with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the Judge. 58 V. c. 12, s. 113.

Judge may direct trial by jury, or without a jury.

110. Notwithstanding anything in sections 106 and 107 contained, the Judge presiding at the trial may in his discretion direct that the action or issues shall be tried or the damages assessed by a jury; and upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without a jury. 58 V. c. 12, s. 114; 59 V. c. 18, Sched. (18).

Verdict.

Court may direct jury to give a special verdict, except in actions for libel.

111. Upon a trial by a jury, it shall not be lawful for the jury to give a general verdict, where the Court or the presiding Judge otherwise directs, and it shall be the duty of the jury to give a special verdict if the Court or presiding Judge so directs; and the jury may give either a general or a special verdict, unless the Court or the presiding Judge otherwise directs; but this section shall not apply to actions of libel. 58 V. c. 12, s. 116.

In certain cases the jury may be directed to answer questions, and on the answers the Judge shall enter verdict.

112. Upon a trial by jury, in any case except an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any

verdict; and, on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered. 58 V. c. 12, s. 117.

INTEREST.

113. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it 58 V. c. 12, s. 118. Interest may be allowed as hitherto.

114.—(1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable. When allowed on debts certain and overdue.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand. 58 V. c. 12, s. 119.

115. In actions for conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon. 58 V. c. 12, s. 120. When by way of damages in certain actions.

116. Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be notwithstanding that the entry of judgment, shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal. 58 V. c. 12, s. 121. Interest on judgments.

PLEADINGS IN ACTIONS ON FOREIGN JUDGMENTS.

117. In any action brought in Ontario on a judgment obtained in the Province of Quebec in an action in which the service of notice on the defendant or party sued has been personal, no defence that might have been set up to the original action shall be pleaded to that brought on the judgment. 58 V. c. 12, s. 122. Suit upon judgment in Quebec, where service was personal.

118. In any action brought in Ontario on a judgment obtained in the Province of Quebec in an action in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original action may be made to the action on the judgment. 58 V. c. 12, s. 123. Suit upon judgment in Quebec, where the service was not personal.

COSTS.

Cost in discretion of Court.

119. Subject to Rules of Court, and to the express provisions of any statute, the costs of and incident to all proceedings in the Supreme Court of Judicature, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid. 59 V. c. 18, s. 11.

WITNESS FEES.

Fees of certain officers inducing documents.

120. No public official or other witness subpoenaed or called upon to produce before any Court or other tribunal any public or other document shall be entitled to more than ordinary witness fees, unless the Court or other tribunal otherwise orders. 58 V. c. 12, s. 127, part; 59 V. c. 18, Sched. (20).

REFERENCES TO MASTER IN ORDINARY.

When references to be to master in ordinary.

121.—(1) Unless the Master in Ordinary shall certify that by reason of press of business, or for other good reason, he is presently unable to proceed with any reference or trial, or unless the Judge or the Court which directs the reference or the trial is satisfied that the said Master in Ordinary is otherwise unable or ought not by reason of disqualification or for any other good reason, to take or proceed with any reference or trial, the references which shall be made by the Court or a Judge thereof at the trial or hearing of any action, suit or proceeding begun and pending in Ontario, and which might according to the practice of the Court be referred to the Master in Ordinary, shall be to the Master in Ordinary. This section shall apply to references made by order of the Court or a Judge under *The Arbitration Act*.

Rev. Stat. c. 62.

(2) Nothing in this section contained shall affect the powers of reference of the Court or Judge where a reference shall be made to an engineer or other skilled or expert person. 60 V. c. 14, s. 87.

92d VII Cap. 27 Secs 121A 121B 121C.
RULES OF COURT.

Judges of Supreme Court may make rules.

122.—(1) The Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting held for that purpose, alter and annul any Rules of Court for the time being in force, and may make any further or additional Rules of Court for carrying this Act into effect, and in particular for all or any of the following matters that is to say:

(a) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional

or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers ;

- (b) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal ;
- (c) For the hearing of appeals from County Courts, or from a Judge of a County Court, from Provisional Judicial District Courts or from a Judge of any such Court, from Surrogate Courts, Stipendiary Magistrates, or Division Courts, by any two or more of the Judges of the Supreme Court, and for regulating the selection of the Judges of the Supreme Court, who shall hear such appeals, and for regulating all matters relating to the practice of such appeals ;
- (d) For empowering the Master in Chambers, or any referee sitting for him, or the Judges of the County Courts, other than the Judge of the County of York, or the Local Masters in respect of actions brought in their counties, to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any Statute or custom, or by the Rules of the High Court, are now or may be hereafter done, transacted or exercised by a Judge of the High Court sitting at Chambers, and as shall be specified in any such rule, except in respect of matters relating to—
1. The liberty of the subject ;
 2. Appeals and applications in the nature of appeals ;
 3. Proceedings under *The Act respecting Lunatics* ; Rev. Stat., c. 65.
 4. Applications for advice under *The Trustee Act* ; Rev. Stat., c. 129.
 5. Matters affecting the custody of children ; and
 6. Proceedings under section 37 of this Act.
- (e) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the said Supreme Court, or to the costs of proceedings therein ; and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts now or hereafter in force respecting the said Courts.
- (f) Subject to the approval of the Lieutenant-Governor in Council, to make rules from time to time regulating all fees payable in stamps.

To empower Master in Chambers, etc., to make orders.

(2) Where any provisions in respect of the practice or procedure of any courts, the jurisdiction of which is vested by this Act in the High Court, are contained in any statute, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court, unless, in the case of any Act hereafter passed, this power shall be expressly excluded.

(3) Any provisions relating to the payment, transfer or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

(4) All Rules of Court made in pursuance of this section shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section or section 125. 58 V. c. 12, s. 132; c. 13, s. 41.

Judges of
Court of Ap-
peal may
make rules.

123. Subject to any Rules of Court which may be made under the provisions of the preceding section, the Judges of the Court of Appeal, or a majority of them, may from time to time make such general rules and orders for fixing the costs to be allowed in respect of proceedings in the said Court, and for regulating the different proceedings in appeal, and generally for the effectual execution of this Act and the intention and object thereof in regard to the practice in appeals as to them may seem expedient; and may also from time to time alter and amend any of the existing rules or any rules made under the authority of this Act, and make other rules instead thereof; and until such rules are made, the present rules and the existing practice and mode of proceeding in the Court shall continue in force. 58 V. c. 12, s. 133.

Judges of
High Court
may make
rules.

124. The Judges of the High Court or any four of them, of whom two of the Presidents of the Divisions of the High Court shall be two, shall, as regards matters in the High Court, have power to make general rules from time to time for the regulation of the practice of the High Court. 58 V. c. 12, s. 134.

Lieut.-Gov-
ernor in Coun-
cil may
authorize cer-
tain Judges to
make rules.

125. The Lieutenant-Governor in Council may from time to time authorize the following persons, viz.: the Chief Justice of Ontario, the Chancellor, the Chief Justice of the Queen's Bench, the Chief Justice of the Common Pleas, and any one or more of the other Justices of the Supreme Court, to make Rules of Court under this Act; every such appointment to continue for such time as shall be specified by Order-in-Council, and the Judges so appointed, or any three of them, may make such rules, and the same shall have the same effect as if made by all the Judges of the Supreme Court, under section 122. 58 V. c. 12, s. 135.

126. The Judges of the Supreme Court and of the High Court, respectively, shall have the same authority to make Rules of Court with respect to District Courts as they have with respect to the High Court and to County Courts, and the Judges authorized as mentioned in section 125 of this Act shall, with respect to District Courts, have the like authority. 58 V. c. 12. s. 136.

127. A Council of the Judges of the said Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lieutenant-Governor, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court of Justice or the Court of Appeal, or any other Court, or by any other authority; and they shall report annually to the Lieutenant-Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provision (if any) which cannot be carried into effect without legislative authority it would be expedient to make for the better administration of justice; an extraordinary council of the said Judges may also at any time be convened by the Lieutenant-Governor. 58 V. c. 12. s. 137.

128. Save as by this Act or by any Rules of Court otherwise provided, all forms and methods of procedure which, prior to the 22nd day of August, 1881, were in force in any of the Courts whose jurisdiction then became vested in the said High Court, under and by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act or with any Rules of Court, may continue to be used and practised in the said High Court of Justice, in such and the like cases, and for such and the like purposes as nearly as may be, as those to which they would have been applicable prior to the said date in the respective Courts of which the jurisdiction became so vested. 58 V. c. 12. s. 138.

129. The Consolidated Rules of Practice and Procedure of 1897, revised and consolidated under the authority of section 42 of *The Law Courts Act, 1895*, and of section 15 of *The Law Courts Act, 1896*, by the Commissioners appointed under the said section 42 and approved by the Lieutenant-Governor in Council are hereby declared to be as valid as if contained in an Act of the Legislature; and nothing in the said rules shall be open to any question as to the jurisdiction to make, approve and authorize the same under the said section or otherwise,

Authority to make Rules of Court for District Courts.

Council of Judges to consider procedure and administration of justice.

Provision for saving of existing procedure where not inconsistent with this Act or Rules of Court.

Consolidated Rules of Practice prepared under 58 V. c. 13, and 59 V. c. 18, confirmed.

but the same shall be subject to be varied or repealed from time to time by the same authority and in the same manner as other Rules of Court. 59 V. c. 18, s. 15.

OFFICERS AND OFFICES.

Registrar may be appointed for the Court of Appeal.

130.—(1) The Lieutenant-Governor in Council may from time to time appoint a suitable person to be Registrar of the Court of Appeal.

Fees to be paid Registrar in stamps.

(2) The said Registrar shall not take for his own use or benefit, directly or indirectly, any fee or emolument save the salary to which he is entitled by law; and all fees received by him on account of the said office shall form part of the Consolidated Revenue Fund, and shall be payable in stamps, subject to *The Act respecting Law Stamps*. 58 V. c. 12, s. 139.

Rev. Stat. c. 25.

Appointment of Masters, etc.

131.—(1) The Lieutenant-Governor may from time to time appoint a Master in Ordinary, a Master in Chambers, an Accountant of the Supreme Court and two or more Taxing Officers.

(2) Subject to orders of the Lieutenant-Governor in Council, the said officers and the Local Masters shall be officers of the Supreme Court and attached thereto. 58 V. c. 12, s. 140.

Appointment of Clerk of Process, etc.

132. The Lieutenant-Governor may from time to time appoint for the High Court; one Clerk of the Crown and Pleas; two Registrars; one Clerk of the Process; one Clerk of Records and Writs, and also such other clerks and officers as the business of the Court may, from time to time, require; and such officers and clerks shall, in addition to any of the duties usually performed by the like officers and clerks, perform such duties as may by Order in Council or Rules of the Supreme Court or the High Court be provided. 58 V. c. 12, s. 141, part; 59 V. c. 18, Sched. (22).

Duties.

Officers to remain attached to their several Divisions until changed.

133.—(1) Subject to orders of the Lieutenant-Governor in Council, all officers attached to the various Divisions of the High Court shall remain and continue to be attached to the Division to which they are now respectively attached.

(2) Where a doubt exists as to the position under this Act of any existing officer attached to any Court or Judge affected by this Act, such doubt may be determined by Rule of Court.

(3) The Lieutenant-Governor in Council shall have the power and (subject to any Order in Council) the Judges of the said Supreme Court shall have power to change the official names of offices and officers, and to change and regulate the duties of the officers. 58 V. c. 12, s. 142.

134. Subject to any Order in Council in that behalf, the business to be performed in the High Court and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the Chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the said Courts by the preceding section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court; and, subject to such Order in Council and Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, and in the same manner as if this Act had not been passed. 58 V. c. 12, s. 143.

Distribution
of business
among
officers.

135.—(1) Every officer of the Court hereafter appointed shall, before he enters upon his duties, take and subscribe the following oath :—

Oath of
Officers.

“ I, A. B. of ———, do hereby solemnly swear that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of (*as the case may be*) without favour or affection, prejudice or partiality, to any person or persons whomsoever. So help me God.”

Form.

(2) When not convenient to a person appointed to any office to attend at Toronto to take the oath of office, the oath may be taken before the Judge of the County Court of the County in which the officer resides, or before a Commissioner authorized to administer affidavits in such County, and the oath shall be certified by the Judge or Commissioner and filed amongst the records of the Court at Toronto. In all other cases the oath shall be administered to the officer by the Judge in open Court. 58 V. c. 12, s. 145.

Before whom
taken.

136. The Clerk of the Crown and Pleas, the Clerk of the Process, the Registrars and Local Registrars of the High Court, and the Deputy Clerks of the Crown and Pleas, shall within one month next after their appointment, give security to Her Majesty, in such sum and with so many sureties, and in such form as the Lieutenant-Governor in Council directs, conditioned respectively for the due performance of the duties of their respective offices. 58 V. c. 12, s. 146, part; 59 V. c. 18, Sched. (23).

Officers to
give security.

137. The neglect by any such officer to give such security shall render his appointment void; but the forfeiture of office shall not affect any Act done by him during the time he actually continues to hold his appointment. 58 V. c. 12, s. 147, part; 59 V. c. 18, Sched. (24).

Consequences
of neglecting
to do so.

138. The Lieutenant-Governor in his discretion approve of the security and sureties so given by the Clerk of the Process, Clerk of the Crown and Pleas and Registrars; and the Judge of the County Court having first certified his

Who to ap-
prove of the
sureties

To be recorded
and deposited
as provided by
Rev. Stat.
c. 16.

approval in writing, of the security and sureties given by the Local Registrar or Deputy Clerk of the Crown for his County, the Lieutenant-Governor shall in his discretion approve of the security and sureties so given by such Local Registrar or Deputy Clerk; and such securities, when executed and approved, shall be duly recorded in the manner provided by *The Act respecting Public Officers*, and shall then be deposited in the office of the Provincial Treasurer. 58 V. c. 12, s. 148, part; 59 V. c. 18, Sched. (25).

Offices to be
kept at
Osgoode Hall.

139. The Clerk of the Crown and Pleas, the Registrars and the Clerk of the Process respectively shall keep their offices in Osgoode Hall, in the City of Toronto. 58 V. c. 12, s. 149; 59 V. c. 18, Sched. (26).

The Clerk of
Process to
make quar-
terly returns.

140. The Clerk of the Process shall make to the Treasurer of the Province quarterly returns, verified by his affidavit, of all writs and process supplied by him to be issued by the said officers. 58 V. c. 12, s. 151, part; 59 V. c. 18, Sched. (27).

Official
referees.

141.—(1) Subject as aforesaid, the Judges of the County Courts, the Master in Ordinary, the Master in Chambers, the Clerk of the Crown and Pleas, the Registrars of the High Court and the Local Masters shall be official referees for the trial of such questions as shall be directed to be tried by such referees.

Additional
referees may
be appointed.

(2) In case the business is found to require other or additional official referees, and the President of the High Court so certifies, the Lieutenant-Governor from time to time may appoint other and additional official referees accordingly. 58 V. c. 12, s. 152 (1, 2), part; 59 V. c. 18, Sched. (28).

When fees to
be paid in
stamps.

142. In the case of officers who are paid by salary, the fees on any reference or trial shall be paid in stamps other referees shall be paid in money. 58 V. c. 12, s. 152 (3).

Local
Masters.

143.—(1) There shall be a Local Master in every county or union of counties other than the County of York, and every Local Master hereafter appointed shall reside in the county for which he is appointed.

In case of
vacancy.

(2) When a vacancy occurs in the office of Local Master, the Judge of the County Court for the county shall be the Local Master until and unless another person is appointed Local Master. In such case if there are two County Judges, a Senior and Junior Judge, both Judges shall be Local Masters until and unless one of them or some other person is appointed sole Local Master.

(3) Except in the County of York, the several Clerks of the County Courts shall be *ex officio* Deputy Clerks of the Crown and Pleas of the High Court for their respective Counties, unless the offices of Deputy Clerk of the Crown and Deputy Registrar are consolidated under subsection 5.

Deputy Clerks
of the Crown.

(4) Where a County Court Judge is the Local Master, the County Court Clerk shall be the Deputy Registrar.

Ex-Deputy
Registrars.

(5) The offices of Deputy Clerk of the Crown and Deputy Registrar (not Local Master) shall be consolidated as vacancies occur in either; unless where the Presidents of the Divisions of the High Court or a majority recommend otherwise; when the said offices are held by the same person, he shall be styled Local Registrar of the High Court. 58 V. c. 12, s. 153 (1-5).

Local Regis-
trars.

144.—(1) Except as provided in subsection 4 of section 30 of *The Arbitration Act*, where a reference is made to a Deputy Clerk of the Crown, or an examination is taken by him, he shall be entitled to take and receive to his own use the fees on such reference or examination.

Fees of De-
puty Clerks of
the Crown.
Rev. Stat.
c. 62

(2) The Lieutenant-Governor in Council may commute the fees of a Local Master, or of a Local Master and Deputy Registrar, including his fees as an official referee, for a fixed annual sum, such sum not to exceed the average income derived from such fees for the preceding five years.

Commutation
of fees of Local
Masters.

(3) The Lieutenant-Governor in Council may commute the fees payable to a Deputy Clerk of the Crown on references and examinations and other matters for a fixed annual sum, such sum not to exceed the average income derived from such fees during the preceding five years.

Commutation
of fees of
Deputy Clerks
of the Crown.

(4) Any annual sum fixed as provided in the preceding two subsections shall continue until varied by Order in Council, but any order for payment of any such annual sum as aforesaid may be rescinded, and the amount may by Order in Council be increased or diminished, provided that in no case shall any Order in Council name a sum exceeding the average income or fees aforesaid (as the case may be) during the preceding five years. 58 V. c. 12, s. 153 (6-9).

Amount of
commutation
may be
changed.

145. The Local Masters, Local Registrars, and Deputy Clerks of the Crown, Deputy Registrars and other officers mentioned in this Act shall be appointed by the Lieutenant-Governor, and every such officer heretofore or hereafter appointed shall hold office during the pleasure of the Lieutenant-Governor. 58 V. c. 12, s. 153 (10).

Appointment
of officers.

146. Subject to Rules of Court as to office hours during vacations and in Toronto on Saturdays, the offices of the Local Registrars, Deputy Clerks of the Crown, and those of

Office hours of
judicial
officers.

the Supreme Court, Court of Appeal, and the High Court of Justice for Ontario at Osgoode Hall, shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except upon legal holidays or other special days appointed by an Act of the Legislature. 60 V. c. 3, s. 3; c. 14, s. 89.

Officers paid
by salaries not
to take fees
for their own
use.

147.—(1) Where a Local Master, or Deputy Registrar, or Deputy Clerk of the Crown, or other officer, is paid by a salary, he shall not, save as hereinbefore expressly provided, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he is entitled; but the like sums and fees heretofore payable on proceedings in his office shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of this Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 153 (11).

Rev. Stat.
c. 25.

Local officers
may take fees
if not paid by
salary.

(2) The Local Masters and Deputy Registrars not paid by salary and the commissioners for taking affidavits may retain to their own use all the fees of office which they respectively receive not payable to the Crown or belonging to any fee fund, and need not account to the Crown for any portion of such fees. 58 V. c. 12, s. 180 (2).

Local Masters
not to practise
in certain
cases.

148. No Local Master whose gross income from his office of Local Master or of Deputy Registrar and Local Master, is \$2,000 or upwards, shall, during the continuance of his appointment, directly or indirectly, practise in the profession of the law as Counsel, or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any court of this Province, under the penalty of forfeiture of office and the further penalty of \$400, to be recovered by any person who sues for the same by action in the High Court, and one-half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province; and nothing in this section shall prevent the Lieutenant-Governor in Council, or the High Court, from requiring a Local Master whose income does not amount to \$2,000, to abstain from practising under the like penalties. 58 V. c. 12, s. 153 (12).

High Court
may except
officers from
ss. 143 (1)
and 148.

149. The High Court may, with the concurrence of the Lieutenant-Governor, relieve any person now holding the office of Local Master and Deputy Registrar, or any other officer from the operation of subsection 1 of section 143, and section 148, or of either of them. 58 V. c. 12, s. 153 (13).

Salaries of
Deputy Clerks
of the Crown.

150.—(1) The Lieutenant-Governor in Council may direct that sums not in any case exceeding \$600 nor less than \$100 yearly shall be paid out of such moneys as may be

voted by the Legislature for the purpose, as and for the salaries of the Deputy Clerks of the Crown respectively.

(2) The preceding provision fixing the maximum at \$600 shall not apply to any case where the Deputy Clerk does not hold the office of Registrar of the Surrogate Court. 58 V. c. 12, s. 181.

151.—(1) Every officer paid by fees, whether commuted or not, shall on or before the 15th day of January in every year, transmit to the Inspector of Legal Offices appointed under section 165 of this Act, a just, true and faithful account, verified upon oath, of the amount of fees paid or payable to him in cash or in stamps, in respect of his office during the preceding year, and also such particulars with reference to the business of his office as the Inspector of Legal Offices may require. Returns of fees

(2) The Lieutenant-Governor or the member of the Government having charge of the matter may require the return to state any particulars, or to be made in any form that may be thought proper, and such return shall be made accordingly. 58 V. c. 12, s. 153 (14, 15). Form of returns.

152. In the office of every Local Registrar, Deputy Registrar and Deputy Clerk of the Crown such seal shall be used as the Lieutenant-Governor shall from time to time direct, which seal shall be impressed on every writ and other document issued out of or filed in such office; and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such Local Registrar, Deputy Registrar or Deputy Clerk of the Crown, shall in all parts of this Province be received in evidence without further proof thereof. 58 V. c. 12, s. 154. Seals of Deputy Registrars and Deputy Clerks of the Crown.

153. The Lieutenant-Governor in Council may from time to time appoint a suitable person to be the Marshal and Clerk of Assize for the County of York, who shall hold office during pleasure. 58 V. c. 12, s. 155. Marshal and Clerk of Assize for county of York.

154. Every Marshal and Clerk of Assize, being a Deputy Clerk of the Crown, Deputy Registrar, or Local Registrar, or authorized to act as such, shall be entitled to be paid out of the Consolidated Revenue Fund the sum of \$4 for each day's attendance as such Marshal or Clerk of Assize. 58 V. c. 12, s. 156; 59 V. c. 18, Sched. (29). Remuneration of Marshals of Assize.

155. No charge whatever shall be made by any of the said Marshals or Clerks of Assize upon any criminal trial or proceeding in any Court at which they act as Marshals and Clerks of Assize respectively. 58 V. c. 12, s. 157. Not to receive fees in criminal cases.

156.—(1) Each Deputy Clerk of the Crown and Pleas shall, if proper accommodation is afforded him, keep his office in the Where Deputy Clerk's office to be kept.

Court House of his County, and until he can obtain such accommodation he shall keep his office in some convenient place in the County Town.

Proviso.

(2) Provided, however, that the Deputy Clerk of the Crown and Pleas at Sandwich may keep an office in some convenient place in the Town of Windsor, in the County of Essex, subject to such arrangements as the County Council of the County of Essex may assent to, and subject also to the approval thereof by the Lieutenant-Governor in Council. 58 V. c. 12, s. 158.

Official guardian *ad litem*.

157.—(1) There shall be an Official Guardian *ad litem* of infants, who shall be appointed by the Lieutenant-Governor, and shall be a Barrister-at-Law and Solicitor of this Province, of not less than seven years' standing, and shall hold office during pleasure. 58 V. c. 12, s. 159 (1).

Duties of Guardian.

(2) The Official Guardian, besides acting as a Guardian *ad litem* of infants under Rules of Court and other orders, shall perform such other duties as the President of the High Court may from time to time direct. 58 V. c. 12, s. 159 (2); 59 V. c. 18, Sched. (30).

Costs of Guardian.

(3) The same costs as hitherto shall be paid to the Guardian by any party; and the same costs as hitherto shall be payable to the Guardian out of funds in Court; but all costs so paid to the Guardian by any party shall be by such Guardian paid forthwith into Court with the privity of the Accountant of the Supreme Court, and shall be placed to the credit of an account to be entitled "Account of Official Guardian *ad litem*;" and all costs payable to the Guardian out of any funds in Court, shall be transferred to the credit of the same account.

Costs where estate is small.

(4) Where the estate is small, and, in view of the amount at the credit of the said account, the amount or part of the amount payable out of the estate for the Guardian's costs does not appear to be required to pay the salary and disbursements of the Official Guardian, the Court may withhold payment out of such estate of the sum or any part of the sum due for the Guardian's costs in respect of such estate; and may distribute the estate as if such costs were not payable by or out of the same.

Salary of Guardian.

(5) There shall be paid to the said Guardian in respect of all business done a fixed salary of such sum per annum as, in view of the amount of business done or to be done by the Guardian, and the sum at the credit of the account, the said Judges think reasonable and the Lieutenant-Governor in Council approves; which salary shall be over and above all necessary disbursements; and the salary and disbursements shall be paid monthly or otherwise as shall be determined by Rule of Court, out of the fund at the credit of the said account of Official Guardian *ad litem*, and not otherwise.

(6) The surplus appearing from time to time at the credit of the said account beyond what may be required to pay the charges on the said account, shall be transferred to the "Suitors' Fee Fund Account."

Transfer of surplus of Guardian's account.

(7) Where the Official Guardian has occasion to employ a Solicitor in another County for the purpose of any proceeding in an action, such Solicitor shall be entitled to receive from the Official Guardian in respect of the proceeding the same costs as if the Solicitor so employed were Solicitor and Guardian of the infant.

Costs of solicitor employed by Official Guardian.

(8) The Official Guardian *ad litem* shall once every six months file in the Accountant's office an affidavit, showing all costs recovered by him as Official Guardian *ad litem*, during the six months preceding the making of the affidavit, giving therein the several amounts received by him, and the name or names of the actions and matters in which the same were respectively received by him, together with the date of receipt.

Return of costs.

(9) When a new Official Guardian *ad litem* is appointed, he shall *ipso facto* become, and be by virtue of such appointment, Guardian *ad litem* to all infants, in the place and stead of his predecessor, with the same duties and powers; and the latter (his executors and administrators, as the case may be) shall forthwith deliver over to the new Official Guardian all letters, papers, documents and books in his possession or power as official or other Guardian *ad litem* of infants; and the new Guardian shall forthwith communicate his appointment to whomsoever it may concern.

Transfer on appointment of new Guardian.

(10) The Lieutenant-Governor in Council, or the High Court may order that the Official Guardian is not to practise as a Barrister or Solicitor, and in such case he shall not, during the continuance of his appointment and of such order, directly or indirectly, practise the profession of the law as Counsel or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, except in the discharge of his duties as Official Guardian, or of any other duties which may be assigned to him by the said High Court or any Division or Judge thereof as the case may be; and the said Official Guardian in case of his offending in the matter aforesaid shall be subject to a penalty of forfeiture of office, and the further penalty of \$400 to be recovered by any person who sues for the same by action in the High Court; and one-half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province. 58 V. c. 12, s. 159 (3-10).

Guardian not to practise if Lieutenant-Governor in Council or Court so orders.

158. The Accountant shall on or before the 15th day of January in every year, transmit to the Lieutenant-Governor in Council a just, true and faithful statement, showing

Annual statement of Official Guardian's accounts.

ing the state of the "Account of Official Guardian *ad litem*," upon the 31st day of the preceding December. 58 V. c. 12, s. 160.

Accountant
of Supreme
Court.

159.—(1) Subject to any Rules of Court made under the provisions of sections 122 to 129 of this Act, the present Accountant and his successors appointed under section 131 of this Act, shall be the Accountant of the Supreme Court of Judicature for Ontario and shall be so designated.

To be a cor-
poration sole.

58 V. c. 12.

(2) For the purposes of holding the mortgages, stocks, funds, securities, and all estate therein, and any interest in real and personal estate, effects or property, and of all moneys and effects mentioned and described in sections 162 and 163 of *The Judicature Act, 1895*, or in any Rule or Order of Court, the said Accountant shall be a corporation sole by the name of "The Accountant of the Supreme Court of Judicature for Ontario," and the said Accountant as such corporation sole shall have perpetual succession, and may sue and be sued, may plead and be impleaded in any of Her Majesty's Courts in this Province. 58 V. c. 12, s. 161.

When there is
no Accountant
securities to
be vested in
officer ap-
pointed by
Court.

160. In case of there being at any time no Accountant of the Supreme Court, all mortgages, stocks, funds, annuities and securities whatsoever theretofore standing in the name of any Accountant, or in his custody or power in respect of his office, together with all the interest and estate of the said Accountant in the lands and premises embraced in such mortgages or other securities, shall become and be, by force of this Act, vested in such other officer as the Supreme Court, by general rule, may, from time to time, direct, subject to the same trusts as they may then respectively be subject to. 58 V. c. 12, s. 164.

Money under
control of
Court how to
be paid or
invested.

161. All moneys that become subject to the control and distribution of the High Court or Court of Appeal shall be paid in the name of the Accountant of the Supreme Court, (or if there is no Accountant in the name of such other officer as the Court by general rule may have directed) into the hands of such person or body corporate, or shall be invested in the name of the Accountant (or, if there is no Accountant, in the name of such other officer) in the public funds of the Dominion of Canada or of this Province, or in such other securities as the Court may from time to time direct. 58 V. c. 12, s. 165.

Expenses of
Accountant's
office.

162. The expenses of the Accountant's office including all salaries shall be the first charge on the income arising from the funds in Court. 58 V. c. 12, s. 166.

Surplus to
be paid to
suitors's fee
fund.

163. The surplus income arising from the funds in the High Court after payment of the expenses of the Accountant's office, and of such interest on the moneys of suitors as from

time to time by Rules of Court or otherwise is directed to be paid, shall be transferred to the "Suitor's Fee Fund Account." 58 V. c. 12, s. 167.

164. "The Suitor's Fee Fund Account," shall continue to be kept and managed as may from time to time be directed by the Court, and any Divisional Court or any Judge of the Supreme Court of Judicature for Ontario may apply the same as may be necessary for the protection of infants and other persons not *sui juris* or *non compos mentis*, on whose behalf proceedings may be had in the Court, or may, by the Court, be ordered to be had in other Courts, and may also, from time to time, order to be paid, out of the money at the credit of the said account, any sum required to make good a default arising in respect of suitors' money or securities from any mistake, act or omission of any official of the Court. Such payment is to be without prejudice to any personal liability of the official or his sureties in respect of the mistake, act or omission. 58 V. c. 12, s. 168.

Suitor's fee fund.

Certain losses may be charged on suitor's fee fund.

165. The Lieutenant-Governor may from time to time appoint one of the officers of the High Court, or some other competent person, to be called "The Inspector of Legal Offices" to inspect the offices of the Sheriffs, Local Masters, Deputy Registrars, Deputy Clerks of the Crown, Local Registrars of the High Court, Registrars of the Surrogate Courts, Clerks of the Peace and County Crown Attorneys and Clerks of the County Courts, in the respective Counties of the Province, and such other officers connected with the administration of justice as the Lieutenant-Governor in Council may from time to time direct. 58 V. c. 12, s. 169.

Inspector of Legal Offices.

166. The following shall be the duties of the Inspector.

Duties of Inspector.

1. To make a personal inspection of the said offices and of the books and Court papers belonging thereto respectively;

2. To see that proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times and in a proper form and order, and that the Court papers and documents are properly classified and preserved;

3. To ascertain that the duties of the officers are duly and efficiently performed;

4. To see that proper costs and charges only are allowed or exacted;

5. To ascertain that proper security has been given by any officer required by law to give security;

6. To ascertain whether uniformity of practice prevails in the several offices of the High Court and in the County and Surrogate Courts;

7. To report upon all such matters to the Lieutenant-Governor. 58 V. c. 12, s. 170.

Inquiries by
Inspector.

167. When the Inspector has occasion to institute an inquiry into the conduct of any officer in relation to his official duties or acts, it shall be lawful for the said Inspector to require such officer, or any other person or persons, to give evidence on oath; and for this purpose the Inspector shall have the same power to summon such officers and other persons to attend as witnesses, to enforce their attendance and to compel them to produce books and documents and to give evidence, as any Court has in civil cases. 58 V. c. 12, s. 171.

Books, etc.,
be produced
for inspection

168. The said several officers shall, as often as required by the Inspector, produce for examination and inspection all books and documents which are required to be kept by them, or which may hereafter be required to be kept by them; and shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector shall require. 58 V. c. 12, s. 172.

[As to authority of Inspector to direct law stamps to be affixed to proceedings not properly stamped, see Chap. 25, sec. 14.]

Stenographic
writers.

169. The stenographic writers heretofore appointed, or who shall hereafter be appointed by the Lieutenant-Governor to report trials at sittings of the High Court or of a County Court, shall be officers of the Court to which they are appointed, and shall hold office during the pleasure of the Lieutenant-Governor, and shall perform such other duties as may be assigned to them by Rule of Court, or order of the Lieutenant-Governor in Council.

Reporter's
oath.

170. Every such reporter shall take the following oath before one of the Judges of the Court to which he is appointed, and the same shall be filed:

I, (A. B.) do solemnly and sincerely promise and swear that I will faithfully report the evidence and proceedings at the trial in each case in which it may be my duty to act as shorthand reporter. So help me God.

58 V. c. 12, s. 174.

171.—(1) To provide a fund to enable a reduction to be made to litigants for copies of evidence taken in shorthand at trials or references, a fee of \$1 shall be paid in every civil case in the High Court of Justice entered for trial to the officer of the Court who enters the same, who shall keep a list of such causes duly entered in a book to be kept by him for the purpose, and who shall within forty-eight hours after the closing of the sittings of the Court make a return to the officer to be appointed for that purpose by the Lieutenant-Governor in Council of the actions so entered for trial, and of the money so paid thereon, and shall certify that the sum therewith returned is the full amount so paid to him on account of the cases entered at such sittings.

Fee payable on entering actions for trial.

(2) The officer appointed shall keep an account of the said moneys, under the head of Shorthand Reporter's Fund, in a book to be kept for the purpose, and the said moneys shall be paid out and applied in connection with such reporting in such manner as the Lieutenant-Governor in Council may from time to time by order provide. 58 V. c. 12, s. 131 (1); c. 13, s. 40 (1); 59 V. c. 18, Sched. (21).

Shorthand reporter's fund.

172.—(1) The Supreme Court may, from time to time, under the seal of the Court, appoint, and at discretion remove, special examiners for the purpose of taking evidence of parties and witnesses, and the examiners so appointed shall have all the powers formerly possessed by Masters Extraordinary and Examiners. 58 V. c. 12, s. 175.

Appointment of special examiners.

(2) There shall be but four special examiners at or in the City of Toronto, besides the officer or clerk at Osgoode Hall mentioned in subsection 4. 60 V. c. 14, s. 56 (1).

Number limited.

(3) The Lieutenant-Governor in Council may make regulations fixing the fees and charges of and payments to stenographers and others entitled to take examinations for taking examinations for discovery or cross-examinations in the High Court and County Court, and for copies of such examinations or cross-examinations. 58 V. c. 12, s. 131 (2); c. 13, s. 40 (2).

Fees for examinations.

(4) No officer or clerk at Osgoode Hall who is in receipt of a salary as such officer or clerk from the Province shall act as a special examiner for fee or reward; but the fees payable in respect of such examination or for copies or certificates thereof or connected therewith shall be payable in stamps subject to the provisions of *The Act respecting Law Stamps*, and not otherwise, and no such officer or clerk whose salary is paid as aforesaid shall hereafter be eligible for appointment as a special examiner. In the event of a vacancy occurring in the

Salaried officer at Osgoode Hall not to take fees as examiner for his own use.
Rev. Stat. c. 25.

said office of examiner there shall thereafter be but three special examiners in the said city besides such officer or clerk. 60 V. c. 14, s. 56 (2).

Examination
to be taken in
presence of
examiners.

173. When an examination is taken by a stenographer or other person who is not an examiner, it shall be taken in all cases in the presence of the examiner. 60 V. c. 14, s. 60.

Examinations
not to be
solicited.

174. No special examiner shall solicit or make request from any suitor, solicitor, or other person, or offer inducements to have special examinations taken before him, nor shall any one do so on his behalf with his knowledge or assent, on pain of forfeiture of office. 60 V. c. 14, s. 57.

Fees of
examiners.

175. The Lieutenant-Governor in Council shall fix a schedule of fees to be charged and taken by special examiners, and may make rules and regulations in respect thereof; and no other fees or charges than those fixed by the said schedule shall be charged or taken. 60 V. c. 14, s. 58.

Appointment
of special
examiners,
pro tem.

176. Where it appears to the Lieutenant-Governor in Council that the Local Registrar or Deputy Clerk of the Crown or Clerk of the County Court elsewhere than in Toronto, is infirm or ill, or is absent on leave, or is otherwise unable or unfit to act personally as special examiner, the Lieutenant-Governor in Council may appoint the shorthand writer for the County Court, or some other efficient person temporarily or otherwise to act as such special examiner, instead of the said Local Registrar, Deputy Clerk of the Crown, or Clerk of the County Court. 60 V. c. 14, s. 59.

Administra-
tion of oaths.

177. Any officer of the Supreme Court, the Court of Appeal or the High Court shall, for the purposes of any proceedings directed by the Court to be taken before him, have full power to administer oaths, to take affidavits, to receive affirmations and to examine parties and witnesses as the Court may direct. 58 V. c. 12, s. 176. 60 V. c. 15, Sched. A (67).

Sheriffs, Gaol-
ers, etc., to be
officers of the
Court.

178. Sheriffs, Deputy Sheriffs, Gaolers, Constables and other peace officers, shall aid, assist and obey the Court and the Judges thereof respectively in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by any general or other order of the Court or by order of a Judge thereof, required so to do. 58 V. c. 12, s. 177.

Gaols to be
prisons of the
Court.

179. All gaols in Ontario shall be prisons of the High Court. 58 V. c. 12, s. 178.

Salaries, etc

180.—(1) There shall be paid out of the Consolidated Revenue Fund of this Province as and for the salaries of officers of the said Courts, who are not paid by fees or otherwise, such sums as the Legislature may from time to time appropriate for such purpose.

(2) The salaries of all officers of the Court which are payable out of the Consolidated Revenue Fund shall be paid monthly, but the payment to be made in each case on the first day of payment which happens after the right thereto accrues, shall be a ratable proportion of a month's salary, according to the time then elapsed since the accrual of the right; and in case of a vacancy, the person who vacates the office, his executors or administrators shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last payment. 58 V. c. 12, s. 179.

181. Unless specially authorized, neither the Master in Ordinary, the Clerk of the Crown and Pleas, the Master in Chambers, the Registrars, nor any of their deputies, nor the Process Clerk, nor the Clerk in Chambers, nor the Accountant, nor any of their clerks, shall take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; but the like sums and fees heretofore payable on proceedings in the offices of the said officers shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of the Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 180 (1); 59 V. c. 18, Sched. (31).

Certain officers not to take fees for their own use.

Rev. Stat. c. 25.

182. The fees payable on all writs and process issued out of the Central Office at Toronto shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 181, part; 59 V. c. 18, Sched. (32).

Fees on writs and process.

Rev. Stat. c. 25.

183. In addition to all fees, otherwise authorized to be levied on proceedings in the High Court, the following fees shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*.

Fees on certain proceedings in High Court.
Rev. Stat. c. 25.

On every writ of summons, capias or subpoena, and on every other writ or other document of what nature and description soever, having the seal of the Court affixed thereto.....	0 50
On every judgment entered.....	0 60
On every certificate of action instituted, judgment or decretal order made.....	0 50
On the setting down on the paper for argument of every special case, points reserved, special verdict or appeal case.....	0 30
On entering every action for trial or assessment.....	2 00
On every rule or order of Court issued.....	0 20
On taxation of every bill of costs.....	0 20

58 V. c. 12, s. 183.

184. In addition to all fees otherwise authorized to be levied on proceedings in cases brought to the Court of Appeal from the High Court, the following fees shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*.

Fees on certain proceedings in Court of Appeal.
Rev. Stat. c. 25.

On every appeal entered \$4 00
 On every judgment, decree or order of the Court passed and
 entered 2 00
 58 V. c. 12, s. 184.

LOCAL JUDGES OF THE HIGH COURT.

County Court
 Judges to be
 local Judges
 of High Court.

185. Except in the County of York, the Judges of the several County Courts shall be Judges of the High Court for the purposes of their jurisdiction in actions in the High Court; and in the exercise of such jurisdiction may be styled "Local Judges of the High Court," and shall, in all causes and actions in the High Court, have, subject to the Rules of Court, power and authority to do and perform all such acts, and transact all such business in respect to matters and causes in and before the High Court as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform. 58 V. c. 12, s. 185 (1).

TRANSFERRING CAUSES FROM COUNTY OR DIVISION COURTS
TO HIGH COURT.

Transfer to
 High Court
 from County
 and Division
 Courts.

186. In any case in a County or Division Court where the defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, the High Court or any Judge thereof, may on the application of any party to the proceeding, order that the whole case be transferred from such Court to the High Court, and thereupon all the proceedings in such case shall be transmitted by the clerk or other proper officer, of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the High Court as if it had been originally commenced therein. 58 V. c. 12, s. 186.

MISCELLANEOUS.

Order in
 Council as to
 allowances
 and salaries
 subject to
 ratification by
 Legislative
 Assembly.

187.—(1) Every Order in Council determining the commutation allowance or the salary of any Judge, Official Guardian or other officer under the authority of this Act, shall be laid before the House of Assembly forthwith, if the Legislature is in session at the date of the order, and if the Legislature is not then in session, the order shall be laid before the said House within the first seven days of the session next after the Order in Council is made.

Disapproval
 of order by
 Assembly.

(2) In case the Assembly at the said session, or if the session does not continue for three weeks after the said order is laid before the House, then at the ensuing session of the Legislature, disapproves by resolution of such Order in Council, either wholly, or so far as relates to any of the persons therein named, the Order in Council, so far as so disapproved of, shall have no effect from the time of such resolution being passed. 58 V. c. 12, s. 187.

Saving as to
 Commissions
 of Assize, etc.

188. This Act shall not affect the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or

other Commission for the discharge of civil or criminal business on circuit or otherwise; or the authority of a Judge or a retired Judge of any of the Superior Courts, or a Judge of a County Court, or one of Her Majesty's Counsel learned in the law, to preside without any Commission at any Court of Assize, Oyer and Terminer, and General Gaol Delivery, or at a Court held under this Act in the exercise of the jurisdiction now belonging to the Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or the authority of any Judge or retired Judge of a Superior or County Court, or Counsel learned in the law, to hold any sitting for the hearing of causes; and any such Judge or Counsel shall after the commencement of this Act have the same authority to preside as aforesaid, or to hold any sitting of the High Court for the hearing of causes in the High Court, which such Judge or Counsel has to preside at Courts of Assize, Oyer and Terminer, and General Gaol Delivery, and any such Judge or Counsel when presiding as aforesaid with or without a Commission, or when holding any sitting as aforesaid, shall be deemed to constitute a Court. 58 V. c. 12, s. 188.

189. Every person shall have access to and be entitled to inspect the several books of the High Court and of the County Courts, containing records or entries of the writs issued, judgments entered, and chattel mortgages and bills of sale filed; and no person desiring such access or inspection shall be required, as a condition to his right thereto, to furnish the names of the parties or the style of the causes or matters in respect of which such access or inspection is sought; and the Clerk of the Crown and Pleas, Registrars, Deputy Clerks of the Crown, Deputy and Local Registrars of the High Court and all Clerks of the County Courts of the Province respectively, shall, upon demand or request, produce for inspection any writ of summons or copy thereof, and any judgment roll, or chattel mortgage, or bill of sale so issued, entered or filed in their respective offices, or of which records or entries are, by law, required to be kept in such several books of the High Court and County Courts respectively. 58 V. c. 12, s. 189; 59 V. c. 18, Sched. (33).

All books in which writs, judgment, etc., are entered to be open to inspection.

190. The fees payable in respect of such inspection of books shall be twenty-five cents as for a general search, and ten cents for each writ of summons, judgment roll, chattel mortgage or bill of sale so inspected, and ten cents per folio shall also be payable for all extracts, whether made by the person who makes the search or by the officer. 58 V. c. 12, s. 190.

Fees on inspection.

191. Nothing in this Act shall affect the practice or procedure in criminal matters, or matters connected with Dominion controverted elections. 58 V. c. 12, s. 191; 59 V. c. 18, Sched. (35).

This Act not to apply to criminal matters or Dominion elections

NOTES.

In 1831 the Court of Queen's Bench, the Court of Common Pleas and the Court of Chancery were consolidated into one Court, called the High Court of Justice, and the several jurisdictions which had theretofore been vested in the several courts were conferred upon the consolidated Court. The High Court of Justice and the Court of Appeal constitute the Supreme Court of Judicature for Ontario. The Court might more properly be called the Supreme Council of Judicature *R. v. Bunting* (1884) 7 O. R. 118.

The main object of the Act was to assimilate the transaction of Equity business, and Common Law business by different Courts of Judicature. It has sometimes been inaccurately called "the fusion of Law and Equity"; but it was not any fusion or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute, which should come before that tribunal. Then as to that very small number of cases in which there was an actual conflict it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail. That was the mode of administering the combined jurisdiction, and that was the meaning of the act. To carry that out, the Legislature did not create a new jurisdiction, but simply transferred the old jurisdictions of the Courts of Law and Equity to the new tribunal and then gave directions to the new tribunal as to the mode in which it should administer the combined jurisdictions; *Salt v. Cooper* (1880) 16 Ch. D. 44.

To discuss the several sections of the act would occupy more space than can be devoted in the present work. The reader is referred to the exhaustive annotation of Holmsted & Langton, and to Snow's Annual Practice, 1899, and Wilson's Judicature Acts.

CHAPTER 55.

An Act respecting the County Courts.

SHORT TITLE, s. 1.	COSTS IN ACTIONS REMOVED, s. 35.
STYLE OF THE COURTS, s. 2.	VENUE FOR CERTAIN ACTIONS, s. 36.
JUDGES, ss. 3, 4.	PLEADING AND PRACTICE, ss. 37-41.
CLERKS, ss. 5-12.	COSTS WHERE NO JURISDICTION s. 42.
SPECIAL EXAMINERS OF HIGH COURT TO BE OFFICERS OF COUNTY COURTS, s. 13.	EXECUTION, ss. 43, 44.
SITTINGS, ss. 14-21.	POWER TO ENFORCE RULES, s. 45.
JURISDICTION, ss. 22-29.	ACCOUNTS AND INQUIRIES, ss. 46-49.
REMOVAL OF ACTIONS INTO HIGH COURT, ss. 30-34.	APPEALS, ss. 50-57.
	RULES OF LAW, s. 58.
	RULES OF COURT, s. 59.
	TARIFF OF COSTS, s. 60.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The County Courts Act.*" R. S. O. Short title. 1887, c. 47, s. 1.

2. There shall be in every county or union of counties a Existing Court of Record, to be styled the County Court of the County Courts con- of (or United Counties of as the case tinued. may be); and the County Courts already established under such names respectively, and all existing commissions, Judges and officers of such County Courts shall continue, subject to the provisions of this Act. R. S. O. 1887, c. 47, s. 2.

JUDGES.

3. The County Court in every county shall be presided over Judges. by the Judge or Junior or acting Judge or Deputy Judge as provided by *The Local Courts Act.* R. S. O. 1887, c. 47, s. 3 Rev. Stat. c. 54.

[As to Judges being Local Judges of the High Court. See *Cup. 51, sec. 185*; and as to Judges exercising authority of Master in Chambers and local Masters see *Consolidated Rules of Supreme Court of Judicature.*

4. In case of the illness or absence of the Judge of a County illness or absence of County, such County Court may be presided over by a Judge of County any other County Court in the Province, or by one of Her Judge.

Majesty's Counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or Counsel being requested so to act by the first mentioned Judge. 57 V. c. 20, s. 9.

CLERKS.

The Lieutenant-Governor to appoint clerks.

5. The Lieutenant-Governor shall from time to time appoint, under the great seal, a Clerk to every County Court, to hold office during pleasure. R. S. O. 1887, c. 47, s. 4.

Clerks to give security.

6. Every Clerk of a County Court shall give security for the due performance of the duties of his office, in such sum and with so many sureties, and in such manner and form as the Lieutenant-Governor directs. R. S. O. 1887, c. 47, s. 5.

Place of office.

7. The Clerk of every County Court shall keep his office in the Court House, or if there be no room therein, then in such place within the county town, as the Judge directs; Provided, however, that the Clerk of the County Court of the County of Essex, may keep an office in some convenient place in the City of Windsor, in the County of Essex, subject to such arrangements as the County Council of the County of Essex may assent to, and subject also to the approval thereof by the Lieutenant-Governor in Council. R. S. O. 1887, c. 47, s. 6.

Proviso.

Office hours.

8. Subject to Rules of Court as to office hours during vacations and in Toronto on Saturdays, the office of the Clerk of the County Court, shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except upon legal holidays or other special days appointed by an Act of the Legislature. 60 V. c. 3, s. 3; c. 14, s. 89.

Clerk to render accounts to County Crown Attorney.

9. The Clerk of every County Court shall, from time to time as often as required so to do by the County Crown Attorney of his county, and at least once in every three months, deliver to him, verified by the affidavit of such Clerk, sworn before the Judge or a Justice of the Peace of the county, a full account in writing of all fines levied by the Court. R. S. O. 1887, c. 47, s. 7.

[As to return of fees by County Court Clerks see Chap. 16, sec. 29, and as to payment of proportion to Provincial Treasurer see Chap. 18.]

Clerk to tax costs.

10. The Clerk of every County Court shall tax costs, subject, in the event of a dispute arising at taxation, to an appeal to the Judge of the Court. R. S. O. 1887, c. 47, s. 8.

11. No clerk of a County Court shall, for fee or reward draw or advise upon a chattel mortgage or other paper or document connected with the duties of his office and for which a fee is not expressly allowed by the tariff in that behalf. R. S. O. 1887, c. 47, s. 9.

Clerk not to draw or advise on documents.

12.—(1) In the event of the death, resignation or removal of the Clerk of a County Court the Clerk of the Peace for the County shall, *ex-officio*, be Clerk of the County Court until another person is appointed and assumes the duties of the office, and every Clerk of the Peace while Clerk of the County Court as aforesaid shall, except in the County of York, be also *ex-officio* Deputy Clerk of the Crown and Registrar of the Surrogate Court, or in case the said Clerk of the County Court was Local Registrar, the said Clerk of the Peace shall, while he holds the said office, be *ex-officio* Local Registrar; Provided, however, that this enactment as to the Clerk of the Peace being *ex-officio* Registrar of the Surrogate Court, shall not apply to any case where at the time of the death, resignation or removal of the Clerk of the County Court, he did not hold the office of Registrar of the Surrogate Court. R. S. O. 1887, c. 47, s. 10 (1); 60 V. c. 15, Sched. A (12).

Clerk of the Peace to act *pro tem* in case of the death, etc., of the County Court Clerk.

Proviso.

(2) The Clerk of the Peace shall add the words *pro tem* when affixing his official designation as Clerk of the County Court, Deputy Clerk of the Crown, Local Registrar or Registrar of the Surrogate Court to his signature in any writs, rules, grants or orders, signed by him under the provisions of this section. R. S. O. 1887, c. 47, s. 10 (2).

SPECIAL EXAMINERS.

13. All special examiners of the High Court heretofore or hereafter appointed, shall be officers of the several County Courts of the Province and shall possess like powers in County Court cases, as those now possessed and exercised by them in cases in the High Court. R. S. O. 1887, c. 47, s. 11.

Special examiners of High Court to be officers of County Court.

SITTINGS.

14.—(1) In lieu of terms, the several County Courts shall in each year hold four quarterly sittings, which (except in the County of York), shall commence respectively on the second Monday in the month of January and the first Monday in the months of April, July and October in each year, and end on the Saturday of the same week, unless extended by order of the Judge.

Sittings in lieu of terms.

(2) The said quarterly sittings of the County Court of the County of York shall commence on the second Monday in January, June and October, and the first Monday in April in each year; and shall end on the Saturday of the same week unless extended by order of the Judge.

(3) It shall not be necessary for the Sheriff or his officers to attend the said quarterly sittings of the County Court. R. S. O. 1887, c. 47, s. 12.

Trial sittings
of County
Courts.
Rev. Stat.
c. 54.

15. Except in the County of York, and subject to the provisions of section 21 of the *Local Courts Act*, sittings of the said County Courts, for the trial of issues of fact and assessment of damages, shall be held semi-annually, to commence on the second Tuesday in the months of June and December in each year. R. S. O. 1887, c. 47, s. 13 (1).

In County of
York.

16. The County Court of the County of York shall hold four such sittings in each year, to commence respectively on the first Tuesday in the months of December and March, and on the second Tuesday in the months of May and September in each year. R. S. O. 1887, c. 47, s. 13 (2).

County Court
sittings with-
out a jury in
April and
October.

17. Except in the County of York, there shall be sittings of the several County Courts of this Province on the first Tuesday in the months of April and October in each year, whereat all issues of fact in any civil action brought or pending in the Court wherein the sittings may be, and every assessment and inquiry of damages in such action may be heard, tried and assessed by the Judge of such Court without the intervention of a jury, in those cases where no jury is required. R. S. O. 1887, c. 47, s. 14.

Sittings on
first day to
commence at
one o'clock in
the afternoon.

18. The sittings of the County Courts for the trial of jury and non-jury cases shall not open earlier than one of the clock in the afternoon on the first day of the sittings, but this shall not prevent a non-jury trial being begun before one of the clock with the consent of the parties. 57 V. c. 20, s. 12.

Power to hold
additional
sittings.

19. In addition to the regular sittings of the several County Courts, the Judge of every County Court may, at such times as he appoints for the purpose, hold additional sittings of such Court for the trial of issues of fact to be tried in such Court by a Judge without a jury; and he shall hold such sittings as often as may be requisite for the due despatch of business. R. S. O. 1887, c. 47, s. 15.

Concurrent
sittings for
trial of jury
and non-jury
cases.

20. While sittings of the County Court of any County which has a Senior and Junior Judge, are being held for the trial of issues of fact and assessment of damages, the Judges of the said Court, or any two persons authorized to hold the sittings of such Court, may, in case the General Sessions of the Peace have been adjourned or have terminated, sit separately, one for the trial of causes where a jury is required, and the other for the trial of causes to be tried without a jury. R. S. O. 1887, c. 47, s. 16

21.—(1) Where, from illness or from other casualty, the Judge who is to hold the Sittings of the County Court is unable to hold the same at the time appointed therefor, the Sheriff of the County, or in his absence his Deputy, may adjourn by his proclamation the said Court to any hour on the following day, to be by him named, and so from day to day until the Judge is able to hold such Court, or until he receives other directions from the Judge or Provincial Secretary.

Adjourning
County Courts
owing to
illness of
Judge, etc.

(2) The Sheriff shall forthwith notify any adjournment to the Provincial Secretary, for the information of the Lieutenant-Governor. R. S. O. 1887, c. 47, s. 17.

Provincial
Secretary to
be notified.

JURISDICTION.

22. Except in the cases of actions in which, by section 27 of this Act, or by any other Act jurisdiction is conferred upon County Courts or a Judge thereof, the said Courts shall not have cognizance of any action:—

Matters not
to be within
jurisdiction of
County
Courts.

1. In which the title to land of a greater value than ⁵⁰⁰\$200 is brought in question; or

2. In which the validity of any devise, bequest or limitation exceeding \$200 under any will or settlement is disputed, nor where the assets of the estate or fund out of which the amount in question is payable exceeds ²⁰⁰\$1,000; or

3. For libel and slander; or

4. For criminal conversation or seduction; or

5. Against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto. 59 V. c. 19, s. 1.

23. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction;

Jurisdiction
allowed.

1. In all personal actions where the debt or damages claimed do not exceed the sum of \$200;

2. In all causes and actions relating to debt, covenant and contract, to \$600, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant;

3. To any amount on bail-bonds given to a Sheriff in any case in a County Court, whatever may be the penalty;

4. On recognizances of bail taken in a County Court, whatever may be the amount recovered or for which the bail therein may be liable;

5. In actions of replevin where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, as provided in *The Replevin Act*.

Rev. Stat.
c. 86.

6. In interpleader matters, as provided by the rules respecting interpleader; R. S. O. 1887, c. 47, s. 19; 59 V. c. 19, s. 2.

Where parties
consent in
actions for
liquidated
damages.

7. In any cause or action relating to debt, covenant and contract where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant, when the plaintiff and defendant, before the issue of the writ, agree by memorandum in writing signed by them and filed upon the application for the writ, that the Court shall have power to try the action;

Recovery of
land.

8. In actions for the recovery of or for trespass or injury to land where the value of the land does not exceed \$200;

Partnership
accounts.

9. In actions by persons entitled to and seeking an account of the dealings and transactions of a partnership, the joint stock or capital not having been over \$1,000, whether such account is sought by claim or counter claim;

Legacies.

10. In actions by a legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy not exceeding \$200 in amount or value out of such deceased person's estate not exceeding \$1,000;

Actions on
mortgages.

11. In actions by a legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed \$200;

Actions for
redemption.

12. In actions by a person entitled to redeem any legal or equitable mortgage or any charge or lien, and seeking to redeem the same, where the sum actually remaining due does not exceed \$200;

Equitable
relief.

13. In actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject matter involved does not exceed \$200;

Right of
creditor to
rank on estate.

14. In any action or contestation to establish the right of a creditor to rank upon an insolvent estate where the amount of such claim does not exceed \$400. 59 V. c. 19, s. 3.

Transfer of
certain
actions found
not to be
within the
jurisdiction.

24. If during the progress of any action or matter under clauses 9 and 10 of the last preceding section, it is made to appear to the Judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any proceedings already had or order already made, but unless an order is made under the next section it shall be the duty of the Judge by his order to transfer the action or matter to the High Court; and the procedure in the said action or matter after being so transferred shall be regulated by the rules of the Supreme Court of Judicature for Ontario. 59 V. c. 19, s. 4, part.

When action
may be con-
tinued in
County Court

25.—(1) Any party or person interested may upon notice to the other parties apply to a Judge of the High Court for

an order authorizing and directing the action or matter to be carried on, continued and completed in the County Court, if such action or matter is beyond the jurisdiction of the County Court by reason only that the amount of the "joint stock or capital," or "deceased person's estate," mentioned and limited in clauses 9 and 10 of section 23 exceeds the sum of \$1,000 by an amount not exceeding \$500.

notwithstanding excess of jurisdiction.

(2) If after hearing the parties or such of them as appear, the Judge is of the opinion that such excess will not prejudicially interfere with a proper trial or completion of the said action or matter in the said County Court he may order that all subsequent proceedings in such action or matter shall be had and taken to completion (including the issue of execution and all proceedings thereon or thereafter) in the County Court as fully as though such Court had had jurisdiction *ab initio*, or that only certain of such proceedings to be mentioned in the order shall be so had in the County Court, and that thereafter the other proceedings shall be had in the High Court as to said Judge appears meet and proper, and he may make such order as to the costs of the proceedings had before him as he deems just. 59 V. c. 19, s. 4, part.

Order transferring in discretion of Judge.

26. Where it appears at any time before or during the trial that the claim of the plaintiff is in excess of the jurisdiction of the Court, the plaintiff in his discretion may before or during the trial by writing signed by him and filed, upon such terms as the Judge deems proper as to costs and otherwise, abandon so much of his claim as is in excess of the jurisdiction of the Court. In such case the plaintiff shall forfeit such excess, and shall not be entitled to recover the same in any other action. 59 V. c. 19, s. 5.

Abandonment of so much of claim as is in excess of jurisdiction.

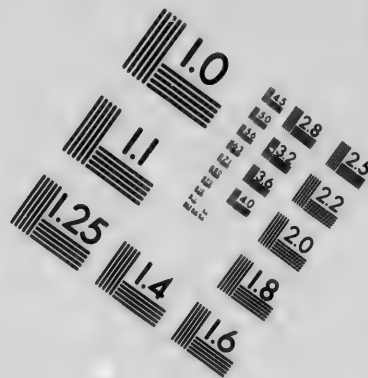
27.—(1) The several County Courts shall have jurisdiction in actions for the recovery of corporeal hereditaments (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed \$200) in the following cases, namely;

Jurisdiction in actions for recovery of land.

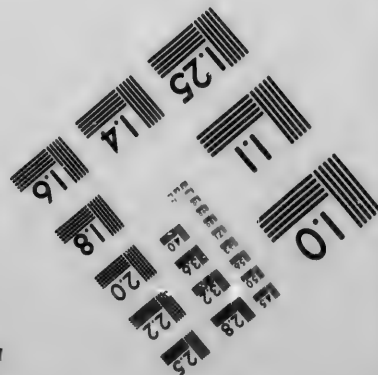
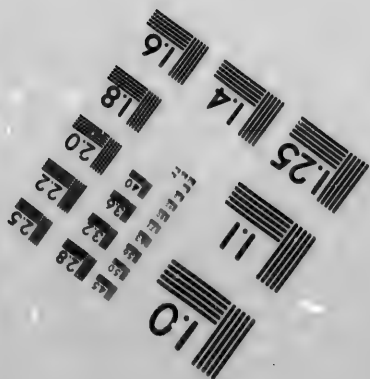
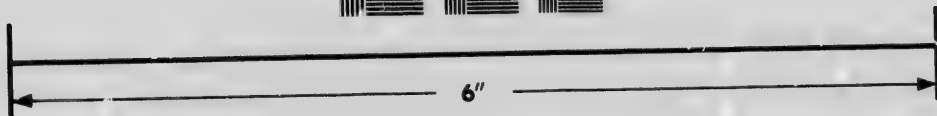
- (a) Where the term and interest of the tenant of such corporeal hereditament has expired, or has been determined by the landlord or the tenant, by a legal notice;
- (b) Where the rent of such corporeal hereditament is sixty days in arrear, and the landlord has the right by law to re-enter for non-payment thereof;

and in respect to such actions the said Courts shall have and exercise the same powers as belong to and may be exercised by the High Court, in and in respect to actions for the recovery of land.

Power in such cases.



A resolution test chart featuring various patterns of vertical lines of increasing frequency. Each pattern is accompanied by a numerical value representing its resolution. The values include 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, and 4.0. The patterns consist of groups of three, four, or five lines, with the number of lines increasing as the resolution value increases.



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1.8 2.0 2.2 2.5 2.8 3.2 3.6 4.0 4.5 5.0 5.6 6.3 7.1 8.0 9.0 10.0 11.2 12.5 14.0 16.0 18.0 20.0 22.4 25.0 28.0 31.5 36.0 40.0 45.0 50.0 56.0 63.0 71.0 80.0 90.0 100.0

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Landlord
defined.

(2) The term "Landlord," as used in this section shall be understood to mean the person entitled to the immediate reversion of the land; or if the property be holden in joint tenancy, coparcenary or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion. R. S. O. 1887, c. 47, s. 20 (1 3).

Relief which
may be
granted by
County
Courts.

28. Every County Court shall have legal and equitable jurisdiction and shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant, in any action or proceeding in such Court such relief, redress or remedy, or combination of remedies, either absolute or conditional, including the power to grant, vesting orders and to relieve against penalties and forfeitures and shall in every such action or proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained) by and upon the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case by the High Court. 59 V. c. 19, s. 6; 60 V. c. 15, Sched. A (72).

Duty of Courts
where defence
or counter-
claim involves
matters be-
yond jurisdic-
tion.

29. Where in a proceeding before a County Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon such counter-claim. R. S. O. 1887, c. 47, s. 22.

REMOVAL OF ACTIONS INTO HIGH COURT.

When title to
land beyond
the value of
\$200 is called
in question.

30.—(1) Where it appears in an action otherwise of the proper competence of the County Court that such Court has not cognizance thereof from the title to land beyond the value of \$200 being brought in question, or from the validity of a devise, bequest or limitation under a will or settlement being disputed, and the devise, bequest or limitation exceeding in value \$200, or from the assets of the estate or fund out of which the amount in question is payable exceeding \$1,000, a Judge of the High Court or a Judge of the County Court before whom the cause is pending, may (subject to section 25 of this Act) direct the removal of the cause into the High Court; and the cause when removed into the High Court shall be proceeded with in the said Court in the manner provided by section 31 of this Act. 59 V. c. 19, s. 9.

Imposition of
terms on
granting order
for removal.

(2) The Judge making the order may in his discretion make and impose terms on the party applying for the order as to payment of costs, giving security for debt or costs, or such other terms as he thinks fit.

(3) Where the order is made by a Judge of a County Court, a Judge of the High Court sitting in Chambers at Toronto, may rescind the order, or vary the terms thereof or imposed thereby. R. S. O. 1887, c. 47, s. 23 (2, 3).

Judge of
High Court
may review
order for re-
moval of Co.
Court Judge.

31.—(1) If it appears to a County Court or a Judge thereof that an equitable question raised in an action or other proceeding in such County Court, cannot be dealt with by the County Court so as to do complete justice between the parties, or may for any other reason be more conveniently dealt with in the High Court, the Court or Judge may order the action or proceeding to be transferred to the High Court; and the order of transference may be made by the Court or Judge *sua sponte*, or upon the application of either party or notice to the other parties interested, and may be made at any stage of the action or other proceeding.

Certain
cases may be
transferred to
the High
Court.

(2) Where an order is made under the preceding subsection, the proper officer of the County Court shall annex together all pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such officer of the High Court as the order directs.

Proceedings
on transfer to
High Court.

(3) Where a transfer has been made under this section the action or other proceeding shall thereafter proceed in the High Court; and the Judges of the High Court and the officers thereof shall have the same powers and perform the same duties in relation thereto, and the Rules and practice of the Supreme Court shall in all respects (or as nearly as may be) apply as if the suit had been originally instituted as an action, or proceeding in the High Court; but no further or other pleadings shall be necessary than the original pleadings in the Court from which the action or proceeding was transferred, unless specially ordered by the Court or a Judge. R. S. O. 1887, c. 47, s. 38.

On a transfer
made to High
Court prac-
tice, powers,
etc.

32. Where it appears in an action brought in a County Court that such Court has not cognizance thereof from any cause other than those mentioned in section 30, a Judge of the High Court, or the Judge of the County Court before whom the action is pending, may order the action to be transferred to the High Court, and the proceedings thenceforward shall be as provided by sections 31 and 34 of this Act for like cases. 54 V. c. 14, s. 1.

Transfer of
actions
improperly
brought in the
County Court.

33. Except in cases within the meaning of sections 24, 30, 31 and 32, or in cases where the defence or counterclaim involves matter beyond the jurisdiction of the County Court as provided in section 186 of *The Judicature Act*, no cause or action instituted in a County Court shall be removed or removable from such County Court, by order of *certiorari*, or otherwise, into the High Court unless the debt or damages claimed amount to upwards of \$100, and then

In what cases
and on what
conditions
causes shall
be removable.
Rev. Stat. c.
51.

only on affidavit and by leave of a Judge of the High Court, in cases which appear to the Judge fit to be tried in the High Court, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he thinks fit. R. S. O. 1887, c. 47, s. 24.

On removal
case to
proceed on
the record as
it stands.

34. In a case removed from a County Court to the High Court it shall not be necessary to deliver a new statement of claim, but the case shall proceed on the record as it stands when removed into the High Court, and all subsequent proceedings may be had and taken in the cause in the same way as if it had been originally commenced and prosecuted in the High Court. R. S. O. 1887, c. 47, s. 25.

COSTS IN CASES TRANSFERRED.

Costs on
transfer.

35. Subject to rules, where an action is transferred under section 31, the fees and disbursements shall be paid and the solicitors' costs taxed according to the lower scale tariff of the High Court. R. S. O. 1887, c. 47, s. 39.

PLACE OF TRIAL IN CERTAIN CASES.

Venue for
certain
actions.

36.—(1) Actions under clause 8 of section 23 of this Act shall be brought and tried in the county where the land is, and actions under clause 9 of the said section shall be brought and tried in the county where the partnership had or has its principal place of business, and actions under clause 10 of the said section shall be brought and tried in the county where letters probate or of administration have issued, or where the deceased resided at the time of his death, unless by consent of the parties, or unless the place of trial is changed. 59 V. c. 19, s. 10.

(2) Actions under section 27 of this Act shall be brought in the County Court of the county in which the premises sought to be recovered lie. R. S. O. 1887, c. 47, s. 20 (2).

PLEADING AND PRACTICE.

Where action
against Judge
of County
Courts may be
brought.

37. An action by or against a Judge or Junior Judge of a County Court which is within the competence of a County Court, may be brought in the County Court of any County adjoining that in which such Judge or Junior Judge resides. R. S. O. 1887, c. 47, s. 26.

Pleading want
of jurisdic-
tion

38. When it is intended by a pleading to bring into question the title to land, or to any annual or other rent, duty, or other custom or thing, relating to or issuing out of lands or tenements of greater value than \$200, or to dispute

the validity of any devise, bequest or limitation exceeding \$200 under any will or settlement or when it is intended by any pleading to exclude the jurisdiction of the Court upon the foregoing or upon any other ground it shall be so expressly stated in the pleading, and the matter relied on for that purpose shall also be set out in the pleading. 59 V. c. 19, s. 11.

39. Issue may be taken on any such pleading or reply may be made or a summary application may be made to the Judge to determine whether the jurisdiction of the Court is by such pleading *bona fide* brought in question. If the Judge is of opinion that the jurisdiction of the Court is not so brought in question he may direct the pleading to be amended or to be struck out. Where the Judge is of opinion that the jurisdiction of the Court is properly and *bona fide* brought in question by any pleading he may order that the cause be transferred to the High Court. 59 V. c. 19, s. 12.

Taking issue on pleading want of jurisdiction.

40. Subject to the provisions of *The Judicature Act* and to Rules of Court, the pleadings, practice and procedure for the time being of the High Court shall apply and extend to the County Courts, wherever the pleadings, practice and procedure of the County Courts corresponded with those of the Superior Courts of Law, prior to the passing of *The Ontario Judicature Act, 1881*, and the rules, orders and forms applicable to similar cases and under similar conditions in the High Court shall apply to all actions, suits or proceedings, had, instituted or pending under the additional jurisdiction given by *The County Courts Act, 1896*, to County Courts unless and until additional or other rules applicable to such cases are made. R. S. O. 1887, c. 47, s. 28; 59 V. c. 19, s. 13.

Procedure in County Courts. Rev. Stat. c. 51.

Rules, orders and forms. 44 V.

59 V. c. 19.

41. The several County Courts may set aside verdicts or non-suits, and grant new trials, and such Courts and the Judges thereof may set aside judgments by default, and proceedings for irregularity, grant time for any pleading, and order stay of proceedings till security is given for costs, and may issue summonses and make orders in all matters of practice in like manner and on the like principles and grounds, and to the same extent as the High Court, or the Judges thereof in the said Court, and may cause rules on sheriffs, or any other rules, orders or proceedings thereupon to be served in any county. R. S. O. 1887, c. 47, s. 29.

Powers as to new trials, etc.

COSTS WHERE NO JURISDICTION.

42. In all actions or other proceedings brought in a County Court in which the plaintiff fails to recover judgment by reason of such Court having no jurisdiction over the subject matter thereof, the County Court shall have jurisdiction over the costs of the action, or other proceeding, and may order by and to whom the same shall be paid, and the recovery

Costs where action fails for want of jurisdiction.

of the costs so ordered to be paid may be enforced by the same remedies as the costs in actions or proceedings within the proper competence of the said Court are recoverable. R. S. O. 1887, c. 47, s. 30.

EXECUTION.

Writs of execution.

43. The County Courts may issue writs of execution against goods and lands, and writs of *capias ad satisfaciendum* against the person, in like cases, upon the same terms, and in the same order, as similar writs may be issued in the High Court. R. S. O. 1887, c. 47, s. 31.

Writs of execution, etc., may run into other counties

44. The County Courts may issue writs of execution against the person, lands or goods, writs of subpoena, rules on the sheriff and all other rules, orders and proceedings into any other county, to be served or executed therein; and Judge's summonses and orders may be issued in like manner; and all such writs, rules, summonses, orders and proceedings shall be of equal force and effect, and as binding as if the same had been issued from the Court or by the Judge of the County to or into which they are so issued, and all subsequent proceedings thereupon shall be carried on in the Court in which the action has been brought or the judgment entered. R. S. O. 1887, c. 47, s. 32.

POWER TO ENFORCE RULES.

Power to enforce rules, etc.

45. The several County Courts shall have and exercise the same powers to enforce their rules, regulations and directions as the High Court possesses, and may punish by fine or imprisonment, or by both, for any wilful contempt or resistance to their regular process, rules or orders; but the fine shall in no case exceed \$100, nor shall the imprisonment exceed six months. R. S. O. 1887, c. 47, s. 33.

ACCOUNTS AND INQUIRIES.

References.

46. Where it is proper to direct a reference, the Court or Judge may make such reference to the Master in Ordinary of the Supreme Court or to any of the Local Masters or to the Clerk of the Court, and where the Judge of the Court is Local Master the reference may be made by him to himself as such Master, but no reference to take accounts or make enquiries shall be directed at the sittings of the Court where such accounts or inquiries can be conveniently taken or made at such sittings; and no reference shall be directed at any time, unless where a reference is necessary, if such reference will increase the cost of the proceedings. 60 V. c. 15, s. 2.

Power on such order.

47.—(1) Where an order is made under the preceding section, the Master or Clerk to whom the reference is directed shall proceed therein, and all rules as to the powers of the

Master, and as to the proceedings in the Master's office, shall apply thereto. R. S. O. 1887, c. 47, s. 35; 59 V. c. 19, s. 7.

(2) Upon every reference under the preceding section the fees to be paid and the costs to be allowed, whether as between party and party, or solicitor and client, shall be in accordance with the lower scale tariff of the High Court. 59 V. c. 19, s. 8.

Costs of reference.

48. Where the Master or Clerk has made his report pursuant to the order, the same shall be filed with the officer of the Court with whom the pleadings are filed; and the report shall, without an order confirming the same, become absolute at the expiration of fourteen days after the filing thereof, unless previously appealed from, but the Court or a Judge may, under special circumstances, allow an appeal after the fourteen days. R. S. O. 1887, c. 47, s. 36; 59 V. c. 19, s. 7.

Report to be filed.

When it shall become absolute.

49. The appeal from a report referred to in the preceding section shall be to a Judge in Chambers or to the Court; but when the appeal is taken to the Court, the notice of appeal shall be returnable not later than the fourth day of the County Court Sittings next after the filing of the report. R. S. O. 1887, c. 47, s. 37.

Appeal from report.

APPEALS FROM COUNTY COURTS.

50. The terms "party to a cause or matter," and "appellant," hereinafter used, shall include persons suing or being sued in the name of others, though not mentioned in the record, and persons on whose behalf or for whose benefit any action is prosecuted or defended, as well as parties named in the record. R. S. O. 1887, c. 47, s. 40.

Meaning of "party to a cause or matter" and "appellant."

51.—(1) Any party to a cause or matter in a County Court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the County Court to be entered at or after the trial in any case tried without a jury, and also in any case tried with a jury, to which subsection 4 does not apply.

Appeals to Divisional Courts.

(2) Instead of appealing to a Divisional Court of the High Court of Justice any party may move before the County Court within the first two days of its next quarterly sittings to set aside the judgment and enter any other judgment upon any ground.

Motion to County Court for new trial or other judgment.

(3) A motion for a new trial on the ground of discovery of new evidence or the like shall be made before the County Court.

Moving for new trial on discovery of new evidence.

(4) Where there has been a trial with a jury any motion for a new trial, whether made for that relief alone or combined with, or as an alternative for any other relief, shall be made to the County Court.

Where has been a trial with a jury.

Party moving
County Court
not to appeal
to High Court.

(5) If a party moves before a County Court under subsection 2 in a case in which he might have appealed to the High Court he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court. 58 V. c. 13, s. 44 (1); 60 V. c. 15, Sched. A (69).

Appeals from
decision of
Judge.

52.—(1) An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory. R. S. O. 1887, c. 47, s. 42; 58 V. c. 13, s. 44 (2); 59 V. c. 18, Sched. (48); c. 19, s. 14.

(2) This section shall not apply where jurisdiction is given to the Judge of the County Court as *persona designata*. 56 V. c. 13, s. 6.

[As to appeals where Judge is *persona designata*. See Cap. 76, Sec. 6.]

Appeal after
judgment
signed.

53. An appeal may be had from any appealable decision of a County Court Judge, notwithstanding judgment has been signed thereon. R. S. O. 1887, c. 47, s. 43, part; 58 V. c. 13, s. 44 (3).

Order of
Divisional
Court on
appeal.

54. On an appeal the Divisional Court may set aside any judgment which may have been directed to be entered or may have been signed, and direct any other judgment to be entered or direct a new trial to be had and make any other order as to such Court may appear requisite and just. 58 V. c. 13, s. 44 (4).

Pleadings,
etc., to be cer-
tified.

55. The Judge shall at the request of the appellant, certify under his hand to the proper officer of the High Court the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, together with the Judge's charge and the judgment or decision on the same, and, where a trial has been had, the evidence and all objections and exceptions thereto, and all other papers in the cause affecting the questions raised by the appeal. R. S. O. 1887, c. 47, s. 51, part; 58 V. c. 13, s. 44 (5).

Certifying pro-
ceedings
under s. 52.

56. In appeals under section 52, the Judge shall only be required under the next preceding section to certify the motions,

rules, orders, affidavits, evidence and other materials, necessary for the full understanding of the matter in appeal, together with his judgment or decision on the same. R. S. O. 1887, c. 47, s. 45.

57. The appeal shall be set down for argument at the first ^{Setting down} sittings of a Divisional Court of the High Court of Justice ^{appeals.} which commences after the expiration of one month from the judgment, order or decision complained of and the Divisional Court shall give such order or direction to the Court below, touching the judgment to be given in the matter, as the law requires; and shall also award costs to either party in its ^{Costs.} discretion, which costs shall be certified to and form part of the judgment of the Court below; and upon receipt of the order, direction and certificate, the Court below shall proceed in accordance therewith. R. S. O. 1887, c. 47, s. 52, part; 58 V. c. 13, s. 44 (6).

RULES OF LAW.

58. The several rules of law enacted and declared by *The* ^{Rules of Law} *Judicature Act* shall be in force and receive effect in all County ^{to apply to} Courts in Ontario, so far as the matters to which such rules ^{County} ^{Courts.} relate shall be respectively cognizable by such Courts. R. S. O. 1887, c. 47, s. 53. ^{Rev. Stat.} ^{c. 51.}

RULES OF COURT.

59. The Judges of the Supreme Court and of the High ^{Judges of} Court respectively, shall have the same authority to make ^{Supreme} Rules of Court with respect to the County Courts as by sec- ^{Court and of} tion 122 and 124 of *The Judicature Act* they have with respect ^{High Court} to the High Court; and the Judges authorized, as mentioned ^{may make} in section 125 of that Act, shall, with respect to the County ^{rules.} Courts, have the like authority. R. S. O. 1887, c. 47, s. 54. ^{Rev. Stat.} ^{c. 51.}

TARIFF OF COSTS.

60.—(1) The Board of County Judges appointed under section 305 or 306 of *The Division Courts Act*, or the majority of them, may frame a tariff of costs to be allowed to solicitors and counsel in respect of actions in the County Courts, and may, ^{Tariff of costs} ^{for counsel} ^{and solicitors.} from time to time, alter and amend the same. ^{Rev. Stat.} ^{c. 60.}

(2) The Board, or any three of them, shall certify to the Judges authorized to make Rules under section 122, 124 or 125 of *The Judicature Act*, any tariff so framed, or any alter- ^{Rev. Stat.} ^{c. 51.} ation thereof; and the Judges may approve, disallow or amend such tariff or alterations; and such tariff or alterations approved by the Judges shall have the same force and effect as if made under the said Act by the Judges so approving of the same. R. S. O. 1887, c. 47, s. 55.

NOTES.

Jurisdiction limited to a particular county. Actions and proceedings in the County Court may, subject to the right to obtain a change of venue, be brought in any county except in the following cases :

- (1) Actions of replevin must be brought in the county in which the goods have been wrongfully distrained, taken or detained, R.S.O. c. 66, s. 7; *Hoover v. Craig* (1885), 12 A.R. 72.
- (2) Applications by way of interpleader by a party who has not been sued must be made to the Court of the County in which the applicant resides, or in which the money, goods or chattels are situate; C.R. 1123 (b).
- (3) Actions for recovery of or for trespass or injury to land not exceeding in value \$200, must be brought where the land is, except by consent. See section 36.
- (4) Actions for a partnership account must be brought where the partnership had its principal place of business, except by consent. See section 36.
- (5) Actions for a legacy must be brought in the County where probate or letters of administration issued, or where deceased resided at the time of his death, except by consent. See section 36.
- (6) Actions by a landlord for recovery of demised premises where the yearly value or rent does not exceed \$200, must be brought in the County where the premises lie. See sections 27 and 36.
- (7) Actions against a justice of the peace or other officer fulfilling a public duty for an act done in the performance thereof must be brought in the County where the cause of action arose. R.S.O. c. 88, ss. 1 (2), 19, compare R.S.O. c. 99, s. 44.
- (8) Actions for infringement of patent must be brought in the court which holds its sittings nearest to the place of residence or business of the defendant. R.S.C. c. 61, s. 30.
- (9) Proceedings under The Creditors' Relief Act are to be filed with the Clerk of the County Court of the County, the Sheriff of which has the execution. R.S.O. c. 77, s. 7 (4).
- (10) Actions for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law shall, unless otherwise provided, be laid and tried in the County where the act was committed, and not elsewhere. Criminal Code, 1892, s. 975.

Jurisdiction limited by amount or value. The jurisdiction in actions to recover land, otherwise than by a landlord, or for trespass or injury to land, or in which title is in question, is limited to cases where the value of the land does not exceed \$200. This means the actual marketable value of the land; *Elston v. Rose* (1869), L.R. 4 Q.B. 4; *Stolworthy v. Powell* (1890), 54 L.T. 795; and where the Judge has found the value on conflicting evidence and has not proceeded on a wrong principle, his decision will not be reviewed on a motion for prohibition; *Brown v. Cocking* (1868), L.R. 3 Q.B. 672; but where prohibition is moved for before the trial on the ground of excess in value and the value is determined to be within the jurisdiction, no evidence can be afterwards received in the County Court on the question of value; *Symons v. Rees* (1876), 1 Ex. D. 416. Where the action is by a landlord to recover from his tenant the demised premises, the rental value is that payable as between the litigant parties; *Brown v. Cocking* (1868), L.R. 3 Q.B. 672.

Except actions on bail bonds and recognizances of bail, the County Courts are limited in point of amount beyond which there is no jurisdiction, except in collateral proceedings. Except in actions for liquidated damages and partnership accounts the limit is \$200 and as a general proposition it may be said the County Courts have jurisdiction in all matters to \$200, except in the five cases enumerated in s. 22. The amount is determined by the sum claimed by the plaintiff. Several causes of action may be joined together, the different items of which would exceed \$200, but if the sum claimed is only \$200, the jurisdiction is not ousted, *McMurtry v. Munro* (1877) 14 U.C.R. 166; re *Stogdale v. Wilson* (1879) 8 P. R. 5; *McLaughlin v. Schaefer* (1886) 13 A. R. 253; and

interest before verdict cannot be allowed except in so far as the amount of the verdict does not exceed \$200; *Malcolm v. Lays* (1892) 15 P.R. 75; *Young v. Morden* (1884) 10 P.R. 276, but interest after verdict and before entry of judgment is unobjectionable, *Sproule v. Wilson* (1893) 15 P.R. 349.

Liquidated Claims. In actions relating to debt, covenant and contract where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant, the limit of jurisdiction is \$600. Whenever a sum up to \$600 is agreed on by the parties as the remuneration for a service to be rendered or for the price of a horse or goods sold, or for any article, the subject of sale or purchase, if the service be performed or the article or goods delivered in pursuance of that bargain, the amount is liquidated by the act of the parties. *Ostrom v. Benjamin* (No. 2) (1894) 21 A.R. 467. Thus an agreement to pay the invoice price of goods and freight and duties is liquidated at the amount of the invoice price and the amount paid for freight and duties; *Wallbridge v. Brown* (1879) 18 U.C.R. 138. On a sale of a number of hogsheads at \$10 each, or of a quantity of butter at 22 cts. a pound, the amount is liquidated. *Watson v. Severn* (1881) 6 A.R. 559; *Durnin v. McLean* (1884) 10 P.R. 295. On an agreement to pay an agent one-half of the amount received for a pension and the agent succeeding in establishing a claim for \$500, the action may be brought in the County Court; *Ostrom v. Benjamin* (No. 2) (1894) 21 A.R. 467. But where the amount is not agreed on or acknowledged by the defendant to the plaintiff with his assent, it is not liquidated. *Robb v. Murray* (1889) 16 A.R. 503, but this case must be confined to its actual facts, and the cases of *Brown v. Hose* (1890) 14 P.R. 3 and *re McKay v. Martin* (1890) 21 O.R. 104, in so far as they are authorities for the proposition that the amounts there in question were not liquidated appear to be inconsistent with *Ostrom v. Benjamin*, supra. The denial by the defendant of the agreement or a conflict of evidence as to its terms or the quantity of goods received, will not oust the jurisdiction. The question must be submitted to the jury, *Watson v. Severn* (1881) 6 A.R. 559. The ascertainment may be either at the time of the contract, or afterwards, or any time before action brought; *White Sewing Machine Co. v. Belfry* (1883) 10 P.R. 64; *Ostrom v. Benjamin* (No. 2) (1894) 21 A.R. 467. The reduction of the amount by payment or by abandonment of the excess, *McMurty v. Munro* (1877) 14 U.C.R. 166; *Brown v. McAdam* (1867) 4 P.R. 54, or by a set-off admitted by both parties or agreed on as payment, *Fleming v. Livingstone* (1873) 6 P.R. 63; *re Dixon v. Snarr* (1876) 6 P.R. 336, may be but an unadmitted set off cannot be allowed to reduce the amount of the plaintiff's claim so as to bring the case within the jurisdiction. *re Furnival v. Saunders* (1866) 26 U.C.R. 119; *Hubbard v. Goodley* (1890) 25 Q.B.D. 156. The decision of the judge that the parties have agreed to the set-off will not be reviewed on a motion for prohibition. *re Jenkins v. Miller* (1883) 10 P.R. 95. In an action on a guarantee a liquidation or ascertainment by the debtor is not binding on the guarantor, and the Court consequently will in such case have no jurisdiction beyond \$200. *Thompson v. Eede* (1895) 22 A.R. 105.

Combining Liquidated and Unliquidated Claims. An unliquidated claim under \$200 may be joined with a liquidated claim under \$600, and jurisdiction exists up to \$600. *Vogt v. Boyle* (1880) 8 P.R. 249; *McLaughlin v. Schaefer* (1886) 13 A.R. 253.

TITLE TO LAND.

When jurisdiction ousted. The title of a corporeal hereditament is in question whether its existence or the right of the claimant to it is denied; *Adey v. Deputy-Master of Trinity House* (1852), 22 L.J.Q.B. 3; S.C. 1 E. & B. 273, sub. nom. *R. v. Everett*. There must be some show of reason for the claim; *Cornwell v. Sandars* (1862), 3 B. & S. 206. The claim must be a bona fide one, and the right one that can exist in point of law; *Hudson v. McRae* (1863) 4 B. & S. 585; *Lloyd v. Jones* (1848), 6 C.B. 81. It must be of such a nature as if substantiated, would form a defence to the action; *Leatt v. Vine* (1861), 30 L.J.M.C. 207. If the defendant actually bring the title in question, then, although his claim may be fraudulent or founded on the most utter bad faith, the Court will have no jurisdiction; *Marsh v. Dewes* (1853), 17 Jur. 558. Where in an action of tort for personal chattels, the title to land comes incidentally in question, the jurisdiction is ousted; *Trainor v. Holcombe* (1850), 7 U.C.R. 548. Where the question was whether certain goods were part of the freehold or not the jurisdiction was held to be ousted; *Portman v. Patterson* (1871), 21 U.C.R. 237; but in a later case it was held to be a ques-

tion of fact, and if the inferior Court Judge decided that the chattel was not part of the freehold, the jurisdiction was not ousted; *Re Bushell v. Moss* (1886), 11 P.R. 251; see *McNeil v. Haines* (1889), 13 P.R. 115; *Macara v. Dines* (1891), 2 West. L.T. 99. The earlier case of *Portman v. Patterson* was not cited. Where the defendant claimed the right to obstruct a street it was held that title was brought in question; *R. v. Taylor* (1851), 8 U.C.R. 257; so also where a right of way was claimed across a railway; *Cole v. Miles, W.N.* (1888), 150. Where, if the parties had been landlord and tenant, the Court would have had jurisdiction, but defendant claimed to be a freeholder, the jurisdiction was ousted; *Pearson v. Glazebrook* (1868), L.R. 3 Ex. 27; but where, in an action for double rent the tenant was estopped from denying his landlord's title, his claim of title was of no avail; *Wickham v. Lee* (1848), 12 Q.B. 521; *Bank of Montreal v. Gilchrist* (1881), 6 A.R. 659; but it would have been otherwise if the defendant had shown that his lessor's title expired during the tenancy; *Moun'noy v. Collier* (1853), 1 E. & B. 630. Where a demise is admitted, but the subject matter thereof, e.g., whether certain rooms in a cottage are included, is in dispute, the jurisdiction is ousted; *Chew v. Holroyd* (1852), 8 Ex. 249. Where, in an action for rent, the defendant set up that the rent belonged to a third party to whom it had been paid, the jurisdiction was ousted; *Fair v. McCrow* (1871), 31 U.C.R. 599; see, however, *Whitling v. Sharples* (1889), 9 C.L.T. 141. If a person is charged with liability by reason of ownership of certain land, and he denies that ownership, title is in question; *R. v. Harden* (1854), 2 E. & B. 187. Though the fact that title came in question does not appear on the face of the proceedings, prohibition may be granted; *Marsden v. Wardle* (1854), 3 E. & B. 695. Application may, however, be made before trial in the inferior Court, and prohibition will be awarded if it appear that title must come in question; *Macara v. Moorish* (1861), 11 C.P. 75; *Sewell v. Jones* (1850), 15 Jur. 153; 1 L.M. & P. 525; see other cases where jurisdiction ousted; *R. v. Davidson* (1880), 45 U.C.R. 91; *R. v. McDonald* (1886) 12 O.R. 381. In these cases a mere bona fide claim of right was sufficient, but in Division Courts title must be in question. Where it is necessary to prove that a married woman has separate estate, and no evidence can be given of the possession of any personal estate in respect of which she may be deemed to have contracted, and a bona fide question arises whether she has title to certain lands, it seems that the jurisdiction is ousted; *Re Widmeyer v. McMahon* (1881), 32 C.P. 191, 194, in which, however, the title of the married woman was not disputed or brought in question. Where a question of title to an incorporated hereditament arises, the jurisdiction does not appear to be ousted. Compare *R.S.O. c. 60, s. 71* (4).

When not ousted. In an action of trespass the plaintiff need not prove his title but merely show possession. *Hawkins v. Rutter* (1892) 1 Q. B. 668.

The mere assertion by a solicitor of a claim of right is insufficient. Title must be *in question*; *re Emery v. Barnett*, (1858) 4 C.B.N.S. 423; *Lilley v. Harvey*, (1848) 5 D. & L. 648, 12 Jur. 1026; *R. v. Sandford*, (1874) 30 L.T.N. S. 601; *Ball v. G. T. R.* (1866) 16 U. C. C. P. 252. If there are disputed facts, or a question as to the proper inference from undisputed facts, there is no jurisdiction. If the facts can lead to only one conclusion, and that against the defendant, then there is no such bona fide dispute as will oust the jurisdiction. *Re Moberly v. Collingwood*, (1894) 25 O. R. 625. Where a lessor has certain rights under a lease, and sells, the mere proof by the vendee in an action against the lessee of his paper title, does not oust the jurisdiction; *See Neads v. McMillan*, (1869) 29 U. C. R. 415; *R. v. Priest W. N.* (1887) 65. Where the question was whether certain rails forming a line fence put by mistake on another's land were the property of the party putting them there, title to land was not in question: *Re Bradshaw v. Duffy*, (1868) 4 P. R. 50. The term of a tenancy do not form matter of title: *re English v. Mulholland*, (1882) 9 P. R. 145; *re Knight*, (1848) 1 Ex. 802. The question whether a right to impound is implied from a right to pasture, is not a question of title: *Graham v. Spettigue*, (1885) 12 A. R. 261. Nor is the question whether a municipality is bound to repair a road: *Knight v. Medora (Township)*, (1886) 11 O. R. 138; 14 A. R. 112; nor whether the stream is navigable; *Reece v. Miller*, (1882) 8 Q. B. D. 626. In an action of false imprisonment, no question of title can arise; *Eversfield v. Newman*, (1858) 4 C. B. N. S. 418.

Certiorari. A case transferred to the High Court is transferred on the pleadings delivered in the County Court: see *Hankey v. Grand Trunk R'y Co.* (1859) 17 U. C. R. 472, and must be tried in the High Court: *Sherk v. Evans*,

(1895) 22 A. R. 242; and the jurisdiction of the County Court ceases upon transmission of the papers: *D'Errico v. Samuel* (1896) 1 Q. B. 163; *Mahon v. Nicholls* (1880) 31 C. P. 52; and the parties are then in the same position as if the action had been originally commenced in the High Court. *Struthers v. Green* (1892) 14 P. R. 486.

For further authorities relating to County Courts see Robertson's Local and County Courts Acts.

CHAPTER 65.

An Act respecting Lunatics.

INTERPRETATION, s. 1.

JURISDICTION, s. 2.

INQUISITION BY COMMISSION, ss. 3, 4.

INQUIRY WITHOUT COMMISSION, ss.
5-8.

SCOPE OF INQUIRY, s. 9.

PROTECTION OF PROPERTY, ss. 10-16.

APPEAL, s. 17.

COSTS, s. 18.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Interpretation
"lunatic."

1. The word "lunatic" in this Act shall include an idiot or other person of unsound mind. R. S. O. 1887, c. 54, s. 1.

Jurisdiction
over lunatics
and their
estates.

2. In the case of lunatics and their property and estates the jurisdiction of the High Court shall include that which in England is conferred upon the Lord Chancellor by a Commission from the Crown, under the Sign Manual. R. S. O. 1887, c. 54, s. 2.

INQUISITION BY COMMISSION.

Traverse of in-
quisition of
lunacy.

3.—(1) Where a Commission has been issued and an inquisition thereupon returned into Court, by which a person is found lunatic, in case any one entitled to traverse the inquisition desires to do so, he may, within three months from the day of the return and filing of the inquisition, present a petition for that purpose to the Court, and the Court shall hear and determine the petition subject to the following provisions:

Time to be
limited.

(2) In every order giving effect to the petition, the Court shall limit a time not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, shall proceed to the trial of the traverse; but the Court may under the special circumstances of any case, verified by affidavit, and upon a petition being presented for that purpose, allow the traverse to be had or tried after the time limited; and in such special case the Court may make such orders as seem just.

May be tried
in any Court of
Record.

(3) The trial may be ordered to take place in any Court of Record in Ontario, with the aid of a jury, according to the circumstances of the case and the situation of the parties.

(4) The Court may order that the person to traverse, if he is not the party who has been found lunatic, shall, within one month after the date of the order, file, with such officer as the Court may appoint, a bond, with one or more sureties, in favour of the Accountant, or other officer appointed by the Court, and conditioned for all proper parties proceeding to the trial of the traverse within the time limited. The bond before the filing thereof shall be approved of and certified to be sufficient by the Judge of the County Court of the County in which the parties reside, or by one of the Masters of the Supreme Court of Judicature.

What security the traverser shall give.

(5) Every person who does not present his petition, or who neglects to give the security, or who does not proceed to the trial of the traverse within the times respectively limited therefor, and the heirs, executors and administrators of every such person, and all others claiming through him, shall be absolutely barred of the right of traverse. R. S. O. 1887, c. 54, s. 3.

When the traverser barred.

4. The Court if dissatisfied with the verdict returned upon a traverse, may order a new trial, or new trials, as in other cases. R. S. O. 1887, c. 54, s. 4.

New trials may be granted.

INQUIRY WITHOUT COMMISSION.

5. Instead of issuing a Commission of Lunacy the High Court may, with or without the aid of a jury (which the Court or a Judge thereof may cause to be empanelled as in other cases) hear evidence and inquire into and determine upon the alleged lunacy, or may send the inquiry to any Court of Record; but the alleged lunatic shall have a right in such cases to demand that the inquiry be submitted to a jury. R. S. O. 1887, c. 54, s. 5.

Inquiry as to lunacy.

Alleged lunatic may require a jury.

6. Where such inquiry is had, no traverse shall be allowed, but the Court, if dissatisfied with the finding of a jury, may, at the instance of any party who would be entitled to traverse an inquisition under commission of lunacy, direct a new trial or new trials from time to time upon application therefor made to the Court within three months from the time the verdict is rendered, or such further time as the Court, under special circumstances, permits, and subject to such directions and upon such conditions as to the Court seem proper, and the Court may order such new trial to be had before the same Court in which the verdict was rendered or before any other Court. R. S. O. 1887, c. 54, s. 6.

No traverse allowed but new trial may be granted by Court.

7. On every such inquiry the alleged lunatic, if he is within the jurisdiction of the Court, shall be produced, and shall be examined at such times and in such manner either in open Court or privately before the jury retire to consult about their verdict as the presiding Judge may direct, unless the Court

Alleged lunatic may be examined openly or privately as Judge directs.

ordering the inquiry has, beforehand, by order, dispensed with the examination. R. S. O. 1887, c. 54, s. 7.

Declaration of lunacy without commission.

Proceedings in lieu of traverse when no commission issued.

8. The High Court or a Judge thereof may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a commission to inquire into the alleged lunacy, except in cases of reasonable doubt; and any person who might traverse an inquisition to the same effect may move against the order containing the declaration, or may appeal therefrom, as the case requires; and the right so to move or appeal shall, as to time, be subject to the same rules as the right to traverse. R. S. O. 1887, c. 54, s. 8.

SCOPE OF INQUIRY.

Question to be tried.

9. Every inquiry, under a Commission of Lunacy, or before any Court of Record, shall be confined to the question, whether or not the person who is the subject of inquiry is, at the time of the inquiry, of unsound mind and incapable of managing himself or his affairs, and the verdict rendered by a jury shall, in every case, be returned to the Court, certified by the Judge before whom the inquiry has been had, and shall be final as to the question on the inquiry, unless the same is set aside. R. S. O. 1887, c. 54, s. 9.

PROTECTION OF PROPERTY.

Property of Lunatics.

10. In order to afford due protection to the property of lunatics, the following provisions shall in every case be observed:

The committee to file an inventory of present property.

1. The committee of the estate shall, within six months after being appointed, file in the office of the Master to whom the matter is referred, or of such officer as may be appointed for that purpose, a true inventory of the whole real and personal estate of the lunatic, stating the income and profits thereof, and setting forth the debts, credits and effects of the lunatic, so far as the same have come to the knowledge of the committee;

Also, of after discovered property.

2. If any property belonging to the estate is discovered after the filing of an inventory, the committee shall file a true account of the same from time to time, as the same is discovered;

To be verified on oath.

3. Every inventory shall be verified by the oath of the committee; and

Security to be given by the committee.

4. The committee of the estate shall give two or more responsible persons as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, for duly accounting for the same once in every year, or

oftener if required by the Court, and for filing the inventory aforesaid; and the security shall be taken by bond in the name of the Accountant or other officer appointed by the Court for that purpose, and the same shall be filed in the office of the Accountant or other officer so appointed. R. S. O. 1887, c. 54, s. 10.

11. Where the personal estate of a lunatic is not sufficient for the discharge of his debts, the following steps may be taken: When estate not sufficient to pay debts.

1. The committee of his estate may petition for authority Committee to apply for leave to mortgage or sell. to mortgage, lease or sell so much of the real estate as may be necessary for the payment of the debts;
2. The petition shall set forth the particulars and amount of the estate, real and personal, of the lunatic, the application made of any personal estate, and an account of the debts and demands against the estate; What the petition is to contain.
3. The Court shall, by one of the Masters of the Supreme Court of Judicature, or otherwise, inquire into the truth of the representations made in the petition, and hear all parties interested in the real estate; Truth of petition to be inquired into.
4. If it appears to the Court that the personal estate is not sufficient for the payment of debts, and that the same has been applied to that purpose as far as the circumstances of the case render proper, the Court may order the real estate or a sufficient portion of it to be mortgaged, leased or sold either by the committee or otherwise; If personal estate insufficient, real estate may be disposed of.
5. The Court shall direct the committee to discharge the debts out of the money so raised, and the Court may order the committee to execute conveyances of the estate, and to give security for the due application of the money, and to do such other acts as may be necessary in such manner as the Court may direct; and Debts to be paid out of the proceeds.
6. In the application of moneys so raised, the debts shall be paid in equal proportion without giving preference to those secured by sealed instruments. Ratably and without preference.

R. S. O. 1887, c. 54 s. 11.

12. Where the personal estate, and the rents, profits and income of the real estate of the lunatic are insufficient for his maintenance or that of his family, or for the education of his children, an application may be made by the committee, or by a member of the family of the lunatic, that the committee be authorized or directed to mortgage or sell the whole or part of the real estate as may be necessary; upon which the like If effects not sufficient to maintain the lunatic, his real estate may be applied.

reference and proceedings shall be had, and a like order made, as for the payment of debts. R. S. O. 1887, c. 54, s. 12.

Surplus sums
how to be ap-
plied or dis-
posed of.

13. In case of a mortgage, lease or sale being made, the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns shall have the like interest in the surplus which remains of the money raised as he or they would have in the estate, if no mortgage, lease or sale had been made; and the money shall be of the same nature and character as the estate mortgaged, leased or sold; and the Court may make such orders as are necessary for the due application of the surplus. R. S. O. 1887, c. 54, s. 13.

Where a
lunatic is
trustee or
mortgagee his
committee
may act, and
how far.

14. Where a lunatic is seised or possessed of real estate, by way of mortgage, or as a trustee for others in any manner, the committee may apply to the Court for authority to convey such real estate to the person entitled thereto, in such manner as the Court may direct; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate; and the Court, upon hearing all the parties interested, may order a conveyance to be made; and on the application of any person entitled to a conveyance, the committee may be compelled by the Court, after hearing all parties interested, to execute the conveyance. R. S. O. 1887, c. 54, s. 14.

Instruments
executed by
the committee
to be valid.

15. Every conveyance, mortgage, lease and assurance made by the committee under direction of the Court, pursuant to any of the provisions of this Act, shall be as valid as if executed by the lunatic when of sound mind. R. S. O. 1887, c. 54, s. 15.

Specific per-
formance of
contracts
made by
lunatic when
sane.

16. The Court may compel the specific performance of any contract made by a lunatic while capable of contracting, and may direct the committee to execute all necessary conveyances for the purpose; and the purchase money, or so much thereof as remains unpaid, shall be paid to the committee or otherwise as the Court directs. R. S. O. 1887, c. 54, s. 16.

APPEAL.

Appeal.

17. An order made by a Judge in a matter of lunacy shall be subject to appeal to a Divisional Court and to the Court of Appeal within the same times and under the same conditions as in other cases in the High Court. R. S. O. 1887, c. 54, s. 17.

COSTS.

By whom the
Court may
order costs
to be paid.

18. The Court may order the costs, charges and expenses of and incidental to a petition for a commission of lunacy or to any inquiry, inquisition, issue, traverse, order, direction, conveyance or other proceeding in lunacy, to be paid by the party or parties presenting the petition or prosecuting the same or such inquiry or other proceeding in lunacy, or by the party or parties opposing the same, or out of the estate of the lunatic, or alleged lunatic, or partly in one way and partly in another. R. S. O. 1887, c. 54, s. 18.

NOTES.

Scope of the Act. The Act deals with the practice by which a person of unsound mind is judicially declared to be a lunatic, and with the care and management of the property of the person so declared. The civil rights and duties of a lunatic are governed by the common law. The committee of a lunatic to a Public Lunatic Asylum, and the management of his property while detained there are regulated by R.S.O., c. 317. Private Lunatic Asylums are subject to R.S.O., c. 318.

Jurisdiction in Lunacy. By the Judicature Act (R.S.O., c. 51, s. 40) the High Court has jurisdiction in respect of lunatics and their property and estates. By the common law the King *As Pater patrie* has the care of the persons and the personal estates of those who from their want of understanding are incapable of taking care of themselves, and for this reason the King's committee shall by the common law have the custody of the persons and personal estates of all idiots and lunatics to the end that provision may be made against their wasting their properties or their injuring their own persons or those of their fellow-subjects. The Statute *De Prerogativa Regis* provided that the King (a) should have the custody of the lands of *idiots*, taking the profits of them without waste or destruction, subject to the conditions that he should supply the idiot with necessaries and restore the lands to his heirs after his death and (b) should see that the lands of *lunatics* were safely kept without waste and destruction; that they and their household were competently maintained out of the "issues of the same" and that the residue was to be kept for their use on recovery; Lord Ely's case (1764), Ridgway's Parliamentary Cases 518.

An idiot is one who never had reason, while a lunatic as distinguished from an idiot is a person who was of good and sound memory, and by the visitation of God, sickness, grief or accident, has lost it. *Beverley's case* (1603) 2 Co. Rep. 568. The distinction between an idiot and a lunatic is now of no consequence, the word "lunatic" comprising idiots and persons of unsound mind, and the Crown having long ago ceased to take any beneficial interest from an idiot's property.

In England the jurisdiction in lunacy was exercised by the Lord Chancellor, not as the head of the Court of Chancery, but as the representative and delegate of the Crown. The theory was that the Sovereign alone had jurisdiction and to save repeated applications to him, the power was delegated to the Lord Chancellor by sign manual on his coming into office. In Ontario all the power of the Crown is vested in the High Court.

English Lunacy. It may be observed that the Lunacy Act, 1890, (53 V. c. 5 Imp.) s. 110, provides that the powers and authorities given by that Act to the Judge in Lunacy shall extend to property within any British possession. Lands in Ontario may, therefore, be affected by proceedings under that Act.

Petition for Inquisition. The proceeding by inquisition is now seldom resorted to, but some account of it may be necessary. A petition for an inquisition may be presented by the nearest relative. *Ex parte Persee* (1828), Moll. 219; by a tenant, *Ex parte Ogle* (1808) 15 Ves. 112; by a creditor, *Re Bell* (1809) 2 Coop. 163, *Re Pearce* (1844) 8 Jur. 89; by a stranger, *Re*— (1854) 23 L. T. 123; *Re Smith* (1826), Russ. 348.

All the facts and evidence should be laid before the Judge and a case should be made amounting, at least, to a probability of insanity. *Ex parte Persee* (1828), Moll. 219. The granting of an inquisition is the subject of discretion regulated solely by the benefit of the lunatic with reference to the care of his person and property, and is not, of course, upon the mere fact of lunacy; *Re Clark* (1892) 14 P.R. 370. *Ex parte Tomlinson* (1812), V. & B. 57; 12 R.R. 191; *Re Holbyn* (1857) 29 L.T. 305; *Re Clare* (1846) 3 Jo. & Lat. 571. The petition should be supported by affidavits of medical men and others. The certificate of a physician who keeps a private lunatic asylum will not be received. *Anon* (1804) 6 Ir. Eq. R. 389.

The Petition should be presented in Chambers; *Re Stuart* (1853) 4 Gr. 44. If granted a commission *de lunatico inquirendo* will be issued. Notice of the order for the issue of this commission must be served on the alleged lunatic

unless service upon him would be dangerous to him; see *Re Talbot* (1882) 20 Ch. D. 269; *Re Patton* (1868) 1 Ch. Chamb. 192; *Re Newman* (1869) 2 Ch. Chamb. 390; *Re Mein* (1869) 2 Ch. Chamb. 429. If the lunatic should be resident out of the jurisdiction, a direction may be made for service upon him, and upon the person with whom he is living by registered letter; *Re Lanwarne* (1882) 46 L.T.N.S. 668. Where a lunatic had been taken out of the jurisdiction before the commission issued, an order was made that she should be brought back. *Re Wykeham* (1823) Turn. & R. 537.

The carriage of the commission will be committed to the person most likely to bring out the whole truth; *Re Nesbitt* (1847) 2 Ph. 245; *Re Webb* (1846) 2 Ph. 10; *Re Scarlett* (1873) L.R. 8 Ch. 739. Subject to this rule the preference will be given to the wife or children or other nearest of kin; *Re Wood* (1859) 1 L.T.N.S. 119; *Ex parte Tomlinson* (1812) 1 V. & B. 57; 12 R.R. 191. But where a wife had an interest in preventing the proof of lunacy being carried back beyond a certain time, a brother was preferred; *Re Whittaker* (1839) 4 Myl. & Cr. 441, and a secretary of a Friend Society has been preferred to the next of kin; *Re Anstie* (1849) 1 Mac. & G. 200, and a maternal aunt was preferred to a half-brother who was an alien notwithstanding she was interested in the lunacy not having commenced before a will under which she benefited was made, but the half-brother was given leave to attend the proceedings and cross-examine witnesses; *Re Bariatinski* (1843) 13 L. J. Ch. 49.

In the absence of other controlling facts the person who first presents a petition is entitled to the carriage of it; *Re Wood* (1869) 1 De G. J. 142.

Protection of Property Pending Commission. The lunatic may, pending the inquiry, be restrained from leaving the jurisdiction, and from disposing or mis-using his property; *Re Lawler* (1874) Ir. R. 8 Eq. 506; and may appoint a receiver; *Re Pountain* (1888) 37 Ch. D. 609, but ample means for resisting the commission will be furnished out of the estate to those who act on the inquiry on his behalf; *Re Holmes* (1827) 4 Russ. 186; 28 R.R. 42, and for household expenses; *Re Bullock* (1886) 35 W.R. 109.

Protection of Person. The person of the supposed lunatic will also be protected pending inquiry; *Re Naylor* (1862) 1 N.R. 173;

Execution of Commission. The commission should be executed without delay. *Anon* (1742) 2 Atk. 52; or the order will be discharged; *Re Naylor* (1862) 1 N.R. 173.

The inquiry should be held at a place near the residence of the alleged lunatic; *Re Jephson* (1838) 2 Jur. 200; but the rule is not inflexible; *Re* (1881) 18 Ch. D. 26; *Re Waters* (1836) 2 Myl. & Cr. 38.

The lunatic has the right to have the inquiry before a jury; *Re Talbot* (1882) 20 Ch. D. 269.

Persons Allowed to Attend. The following persons have been given leave to attend on an inquisition—the alleged lunatic himself; *Ex parte Ogle* (1808) 15 Ves. 112; persons claiming under a settlement by the lunatic made 10 years before, where the lunacy was alleged to have existed for thirty-five years; *Re Richards* (1852) 1 De G. M. & G. 715; the wife of the alleged lunatic *Re Parkinson* (1841) 5 Jur. 547, but a mortgagee who refused to be bound by the proceedings was refused leave; *Re Watts* (1844) 1 Ph. 512; *Ex parte Snook* (1844) 1 Ph. 512.

Quashing Inquisition. An inquisition may be quashed for irregularity or misconduct of the jury or the commissioners; *Ex parte Robert* (1743) 3 Atk. 6; *Re Milne* (1865) 11 Gr. 153; *Rochfort v. Ely* (1767) 1 Ridgway P.C. 541 or for an uncertain verdict; *Re Holmes* (1827) 4 Russ. 182; 28 R.R. 42; *Re Bruges* (1836) 1 Myl. & Cr. 278; *Re Atkinson* (1821) Jacob 333. On the inquisition being quashed a new commission may issue without a second petition; *Re Bennett* (1837) 1 Jur. 469.

Traverse. After the return to the inquisition if the party has been found lunatic a petition may be presented within three months from the return and filing of the inquisition for leave to traverse the finding. The following persons have the right to traverse: (1) the lunatic himself; *Re Cumming* (1852) 1 De G. M. & G. 548; (2) the husband or wife of the lunatic; *Re Nugent* (1817) 2 Mol. 517; (3) an alienee, *Sherwood v. Sanderson* (1815) 19 Vos. 287; 13 R.

R. 193, (4) Any person having a legal or equitable title to or interest in his estate, Vin. Abr. tit. Lunatic. (5) A person who had contracted with the lunatic; Ex parte Hall (1802) 7 Ves. 261. The traverse of an inquisition is a matter of right; Ex parte Ferne (1801) 5 Ves. 833; Ex parte Wragg (1800) 5 Ves. 450; Re Bridge (1841) Cr. & Ph. 338; but if the application be by the lunatic himself care must be taken that it is really his wish and that he is competent to form and express the wish; Re Cumming (1852) 1 DeG. M. & G. 548. Where the validity of his marriage was doubtful an application by the husband was refused; Re Fust (1788) 1 Cox. 418.

Provisions substantially similar to ss. 3 and 4 will be found in the English Lunacy Act 1890 ss. 101-103.

Inquiry without Commission. An issue may be directed without the issue of any writ of summons; Re Scott (1884) 27 Ch. D. 116. Somewhat similar provisions to those of ss. 5, 6 and 7 are to be found in the English Lunacy Act 1890 ss. 94 and 104.

Production of Lunatic. A wife may be committed for not producing her husband who is alleged to be a lunatic; Lord Wenman's case (1721) 1 P. Wms. 701.

Summary Declaration of Lunacy. In practice declarations of lunacy are made upon a summary application by petition in chambers. The petition must be supported by the evidence of at least two medical men; Re Patton (1868) 1 Ch. Chamb. 162; Re Fleming (1877) 13 U.C.L.J.N.S. 197. Notice of the application must be served upon the alleged lunatic and any person he may desire to see must be allowed access to him; Re Miller (1868) 1 Ch. Chamb. 215. Notice to the lunatic will only be dispensed with when it would be dangerous to the lunatic to serve him; Re Newman (1869) 2 Ch. Chamb. 390; Re Mein (1869) 2 Ch. Chamb. 429.

Although lunacy may be shewn, the Court has a discretion to refuse the declaration where it would not be for the lunatic's benefit; Re Clark (1892) 14 P.R. 370.

Scope of Inquiry. The question is whether the alleged lunatic is at the time of the inquiry of unsound mind and incapable of managing himself or his affairs; see also Lunacy Act 1890 (53 V. c. 5, Imp.) s. 98. The incapacity may be from a cause distinct from lunacy, as old age; Ex parte Ogle (1808) 15 Ves. 112; Gibson v. Jeyes (1801) 6 Ves. 273; 5 R.R. 295; Re Kelly (1875) 6 P.R. 220, or imbecility of mind caused by disease, age or habitual intoxication; Re Monaghan (1846) 3 Jo. & Lat. 258; Ridgeway v. Darwin (1802) 6 Ves. 65; 6 R.R. 227.

Non-residents who have property here may be declared lunatics. Ex parte Southcote (1751) 2 Ves. 401; Re Scott (1874) 22 W.R. 748, and so may aliens; Re Bariatinski (1843) 1 Ph. 374.

Residents within the jurisdiction, but possessing property only in another jurisdiction may be declared lunatics; Re Houston (1826) 1 Russ. 312; Ex parte Southcote (1751) 2 Ves. 401; Re Stevens (1819) 2 Coop. 150; Re Tottenham (1837) 2 Myl. & Cr. 39.

Control of Property. The Court will not allow the lunatic's property to be applied otherwise than for his benefit, and will not pay his creditors out of it without first providing for the maintenance of himself and his family; Re Raiton (1837) 1 Jur. 574; Re Adey (1846) 1 Coop. 225; re Pink (1883) 23 Ch. D. 577, and it will not allow property in its control to be seized under an execution. Re Winkle (1894) 2 Ch. 519; but it has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic, which at the time of seizure was not in the custody of the Court; Re Clarke (1898) 1 Ch. 336; Re Farnham (1896) 1 Ch. 836. Accordingly maintenance is a first charge on the property under the control of the committee; Re Plenderleith (1893) 3 Ch. 332; Re Farnham (1895) 2 Ch. 799; but where the creditor has seized or realized on the property under a *fi. fa.* the court cannot take the property or its proceeds from him; Re Clarke (1898) 1 Ch. 336.

Committee. In the appointment of committee of a lunatic, relations are, unless there is some specific objections, preferred to strangers; Ex parte Leup (1811) 18 Ves. 222; Re Watkins (1846) 1 Coop. 225. The Court will attend as far as possible to the wishes and inclinations of the lunatic; Re Leacocke (1838) L.L. & G. 498, even if unreasonable; Re Dyce Sombre (1844) 8

Jur. 817. The next of kin may be appointed; *Ex parte Cockayne* (1802) 7 Ves. 591; *Neale's case* (1731) 2 P. Wms. 544. Persons out of the jurisdiction may under special circumstances be appointed; *Re Bruere* (1881) 17 Ch. D. 775; *Re Hopper* (1897) 66 L. J. Ch. 569, and so may a partner; *Re Millington* (1854) 2 Eq. R. 158. The mother of an infant tenant in tail in remainder was preferred to the nominee of a party interested in his personal estate (1846) *Re Webb* 2 Ph. 532. The natural daughter of a bastard lunatic with whom he had lived was given leave to carry in proposals for a committee; *Re Webb* (1847) 2 Ph. 116. Where the lunatic has two estates situate at a distance from each other a separate committee may be appointed for each; *Re Robins* (1831) 2 Russ. & M. 449. A husband has no indefeasible right to be appointed committee, but will probably be appointed in 999 cases out of 1000, but if it is not for the lunatic's benefit that he should be appointed, the Court will exercise its discretion and appoint some other person, *Re Davy* (1892) 3 Ch. 38. The fitness of the proposed committee must be shewn by affidavit; *Re Patton* (1868) 1 Ch. Chamb. 192. Separate committees may be appointed of the person and the estate, see *Re Talbot* (1882) 20 Ch. D. 269.

The committee of the person may settle and change the residence of the lunatic. He must keep within the allowance for maintenance. The lunatic must not be removed out of the jurisdiction without the leave of the Court. Upon such removal security may be required; *Re Stair* (1846) 1 Coop. 227, see also *Re Jones* (1844) 1 Ph. 461; *Re Halkett* (1854) 3 Ir. Ch. 375.

The committee of the estate is a mere bailiff; *Re Fitzgerald* (1807) 2 Sch. & Lef. 432; *Isaacs v. Chinery* (1896) 12 T. L. R. 302. His rights and duties are defined by the act. He is invariably required to give security; but the Court may authorize him to act before giving security. The provisions of the Statute as to security are merely directory. *Shaw v. Crawford* (1879) 4 A. R. 371.

Mortgage, Lease, or Sale of Real Estate. Much wider powers are given to the Court in Lunacy under the Lunacy Act 1890 (53 V. c. 5. Imp.) ss. 117-122 than those conferred upon the Court here. The lands may be sold, leased or mortgaged either to pay debts or to provide maintenance for the lunatic or his family, or education for his children. The provisions as to security do not apply to documents directed to be executed under the authority of the Court; *Shaw v. Crawford* (1879) 4 A. R. 371. A sale in consideration of a perpetual rent charge may be allowed; *Re Ware* (1892) 1 Ch. 344. No lease can be made without the consent of the Court; *Foster v. Marchant* (1684) 1 Vern. 262; *Re Wilkins* (1842) 6 Jur. 308.

Payment of Debts. In paying debts, those resting upon a moral obligation only may be paid. *Re Hewson* (1852); *Re Whitaker* (1889) 42 Ch. D. 119, but this would not include gambling debts *ib.*

Right of Succession not to be changed. By s. 13 effect is given to the general rule of the Court never to change the right of succession to the property of a lunatic. This rule is derived from the Statute of 17 Edw. II. *Ex parte Annandale* (1749) Amb. 81; *Weld v. Tew* (1828) 1 Beat. 268. Ordinary repairs will be paid for out of the personal estate, but any extraordinary outlay of the personal estate on the land should retain its character of personality; *Re Badcock* (1840) 2 Myl. & Cr. 440, or the amount thereof raised out of the land; *Re Gist* (1877) 5 Ch. D. 881. There is no jurisdiction to charge one estate with the expenses incurred on another estate, where the succession would be different; *Re Vavasour* (1885) 29 Ch. D. 306. If a charge or mortgage is paid off on real estate out of the personality and the persons entitled to the real and personal estate respectively are different; the persons entitled to the personality will have a lien on the real estate; *Weld v. Tew* (1828), 1 Beat. 268, and if the charge has been paid off out of savings of real estate, the heir will be entitled to take the land free from the charge, even though it has been kept alive. *Leitrim v. Enery* (1804) 6 Ir. Eq. R. 357.

Costs. Though an alleged lunatic may be found to be of sound mind, the costs may be ordered to be paid out of his estate, if the application was prompted by a desire to protect the person and property of the alleged lunatic, and was made upon reasonable grounds and in a reasonable manner; *Re Cathcart* (1893) 1 Ch. 466.

The costs of successfully opposing a petition in lunacy cannot be allowed priority, on the footing of maintenance, over the claims of other creditors where the estate is being administered under an assignment for the benefit of creditors; *re Dumbrell* (1884) 10 P. R. 216.

CHAPTER 66.

An Act respecting Actions of Replevin.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Replevin Act.*" R. S. O. Short title. 1887, c. 55, s. 1.

WHEN GOODS REPLEVIABLE.

2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. R. S. O. 1887, c. 55, s. 2.

When goods may be replevied.

3. No party to an action or proceeding, in any Court, shall replevy or take out of the custody of the Sheriff, Bailiff, or other officer, any personal property seized by him under process against such party. R. S. O. 1887, c. 55, s. 3.

Goods seized not to be replevied by parties.

4. Where a Sheriff has in his hands an order of replevin, and in case the property to be replevied or any part thereof is reasonably supposed to be secured or concealed in any dwelling house of the defendant, or of any other person holding the same for him, and in case the Sheriff publicly demands at the door of such dwelling house delivery of the property to be replevied, and in case the same is not delivered to him within six hours after such demand, he may, and shall, if necessary (but during daylight only), break open such dwelling house for the purpose of replevying such property or any part thereof, if found therein, and shall make replevin according to the order. 56 V. c. 5, s. 15 (1).

Power of sheriff to make search under order of replevin in dwelling house of defendant or others holding for him.

When concealed in other enclosure.

5. When the property to be replevied, or any part thereof, is reasonably supposed to be secured or concealed in any enclosure other than a dwelling house of the defendant, or of any other person holding the same for him, and in case the Sheriff publicly demands at the enclosure, delivery of the property to be replevied, and in case the same is not forthwith delivered to him, he may, and shall, if necessary, at once break open such enclosure for the purpose of replevying such property, if found therein, and shall make replevin according to the order. 56 V. c. 5, s. 15 (2).

When concealed on person, etc.

6. If the property to be replevied, or any part thereof, is reasonably supposed to be concealed either about the person or on the premises of the defendant, or of any other person holding the same for him, and in case the sheriff demands from the defendant, or such other person, delivery thereof, and delivery is neglected or refused, he may, and if necessary, shall, search and examine the person, and (subject to the preceding clauses) the premises of the defendant or other person, for the purpose of replevying the property, or any part thereof, and shall make replevin according to the order. 59 V. c. 18, Sched. (44).

REPLEVIN IN COUNTY COURTS.

In cases under \$200 action may be brought in County Court.

7. In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, and in case the title to land is not brought in question, the action may be brought in the County Court of any County wherein the goods or other property or effects have been distrained, taken or detained. R. S. O. 1887, c. 55, s. 4.

REPLEVIN IN DIVISION COURTS.

In cases under \$60, action may be brought in Division Court.

8.—(1) In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, and in case the title to land is not brought in question, the action may be brought in the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained.

Procedure in Division Court.

(2) The matter shall then be disposed of without formal pleadings, and the powers of the Court and officers, and the proceedings generally shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts. R. S. O. 1887, c. 55, s. 5.

NOTES.

Under the Replevin Act specific goods claimed by one party and unlawfully distrained or otherwise wrongfully taken or detained, are restored to the true owner. Formerly the action was commenced by a writ of replevin. This writ has been abolished, and the action is now commenced in the ordinary way by writ of summons. An order directing replevin may be obtained upon motion under clause 1 of C.R. 1068, or on praecipe under clauses 2 and 3 thereof. The plaintiff is required to give security for the return of the goods and payment of damages by bond, the amount of the penalty of the bond to be fixed by the Court. See C.R. 1069.

Personal Action. The action of replevin is a personal action.

Notice of Action. No notice of action is necessary. *Lewis v. Teale* (1871) 32 U. C. R. 103; *Folger v. Minton* (1853) 10 U.C.R. 423; See *Ibbtson v. Henry* (1885) 8 O.R. 625.

What goods are repleviable. All kinds of personal property and effects may be replevied; title deeds may be replevied, *Burr v. Munroe* (1840) 6 O.S. 57; *Anderson v. Hamilton* (1848) 4 U.C.R. 372; *Dowling v. Miller*, (1852) 9 U.C.R. 227. A swarm of bees may be replevied; R.S.O. chap 117; Money in a box; leather made into shoes, if sufficiently identified. *Van Every v. Grent*, (1862) 21 U.C.R. 542.

When the action will lie. Replevin may be maintained in cases where trespass is maintainable. *Cook v. Fowler* (1855) 12 U.C.R. 568; *Brown v. Zimmerman* (1858) 15 U.C.R. 563. Where there has been no wrongful taking but a mere detention. *Deal v. Potter*, (1867) 26 U.C.R. 578.

Upon a distress for school rates. *Applegath v. Graham* (1858) 7 C.P. 171; *Spry v. McKenzie* (1858) 18 U.C.R. 161. By a purchaser in whom property has vested by reason of his purchase, *O'Rourke v. Lee* (1859) 18 U.C.R. 609. By the claimant of goods seized under execution. *Reid v. Macdonell*, (1876) 26 C. P. 147.

By the hirer of goods in possession of a person under the terms of a hire receipt on default in payment of instalments. *Mason v. Johnson*, (1876) 27 C. P. 208; *Nordheimer v. Robinson*, (1878) 2 A. R. 305; *Walker v. Hyman*, (1877) 1 A. R. 345; *McDonald v. Forrester* (1881) 29 Gr. 300; (1882) 9 S.C.R. 12.

By the claimant of goods seized under an attachment, the attachment not being against him. *Arnold v. Higgins*, (1854) 11 U.C.R. 191.

By the legal representatives of a deceased owner of goods wrongfully sold. *Duffill v. Erwin*, (1859) 18 U.C.R. 431.

By an employer against his workman. *Bush v. Pimlott*, (1859) 9 C.P. 54.

By the true owner of goods stolen or found, or bought from a person having no authority to sell. *Cundy v. Lindsay*, (1877) 2 Q.B.D. 96; 3 App. Cas. 459. *Roland v. Gundy*, 5 Ohio, 202.

Goods obtained by fraud or by purchase on a preconceived design not to pay for them. *Higsons v. Burton*, (1857) 26 L.J. Ex. 342; *Clough v. L. & N. W. Ry. Co.* (1872) L.R. 7 Ex. 26. *Cundy v. Lindsay*, (1878) 3 App. Cas. 459; 22 Central O.L.J. 537; except against an innocent purchaser from a fraudulent vendee. *White v. Garden* (1851) 10 C.B. 919; *Steser v. Springer*, (1882) 7 A.R. 497, even if the party has been convicted of false pretences. Criminal Code Sec. 838. *Bentley v. Vilmont*, (1887) 12 App. Cas. 471, is not now law in Ontario.

Goods distrained by a landlord off the demised premises. *Huskinson v. Lawrence*, (1867) 26 U.R.C. 51.

By the purchaser of growing timber sold and cut into logs, as against the owner of the land, *McGregor v. McNeil*, (1882) 32 C.P. 538.

Against a wrong doer by one who has bare possession. *Gilmour v. Buck* (1874) 24 C.P. 187; *Meyerstein v. Barber* (1867) L.R. 2 C.P. 261; L.R. 4 H. L. 317.

For growing crops. *Glover v. Coles*, (1822) 7 Moore, 231.

For goods seized under a warrant of conviction and removed from the county in which seizure made and there detained. *Hoover v. Craig* (1885) 12 A.R. 72.

By a person from whose possession goods have been taken by force or fraud or without right. *Hammond v. McLay* (1864) 10 U.C.L.J. 269.

By a person having a mere equitable title. *Carter v. Long* (1896) 26 S.C.R. 430.

By a person entitled to possession as agent of a foreign corporation, the owner of the goods. *Coquillard v. Hunter* (1875) 36 U.C.R. 316.

Demand. Where the defendant lawfully acquired possession of the goods, demand must be made upon him before replevin can be maintained. *Tufts v. Mottashed* (1879) 29 C.P. 539.

Lien. Where the defendant has a lien upon the goods, replevin cannot be maintained. *Lake v. Biggar* (1861) 11 C.P. 170. *Byers v. McMillan* (1887) 15 S.C.R. 194, but delivery of the same may be ordered by the Court under C.R. 1099.

Where goods subject to a lien have been relieved and the plaintiff on account of the lien has failed in the action, and the goods are thereupon returned to the defendant, his lien revives; *Kennin v. Macdonald* (1892) 22 O.R. 484.

When replevin will not lie. Replevin will not lie in the following cases :—

Where neither trespass nor trover would have been maintainable; *Caron v. Graham* (1860) 18 U.C.R. 215; *Schaffer v. Dumble* (1884) 5 O.R. 716; for goods seized for breach of revenue laws; *Scott v. McRae* (1861) 3 P.R. 16; for goods in the hands of an official assignee in insolvency; *Barelay v. Sutton* (1876) 7 P.R. 14; by a mere servant of the owner, nor by one who has never had possession; *Cool v. Mulligan* (1856) 13 U.C.R. 613; against a pound keeper, *Ibbotson v. Henry* (1885) 8 O.R. 625; for goods seized under a distress warrant issued on a conviction unless the magistrate acted without jurisdiction; *Hannigan v. Burgess* (1888) 8 C.L.T. 192; The plaintiff will fail in the action if the title to the goods has not passed to him. *Henry v. Cook* (1858) 8 C.P. 29.

Estoppel. The plaintiff may be estopped by acquiescence from disturbing goods in the defendant's possession; *O'Shaughnessy v. Ball* (1892) 21 S.C.R. 415.

Breaking open doors. S. 4 is an invasion of the maxim "Every man's house is his castle." If the goods were in the dwelling house of the defendant, the outer doors formerly could not be broken open. If they had been taken to the house of a stranger to prevent the replevying thereof, the sheriff could only justify the breaking, upon it appearing that the goods were actually there. *Senayne's case* (1605) 5 Coke 91; 1 Sm. L.C. 228. Now reasonable supposition that the goods are in the dwelling house will justify the breaking.

Searching Defendant. Formerly goods upon the person could not be replevied because such would provoke a breach of the peace, see *Sunbolf v. Alford* (1837) 3 M & W. 248.

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CHAPTER 67.

An Act respecting Actions of Dower.

SHORT TITLE, s. 1.

ASSIGNMENT OF DOWER WITHOUT ACTION, s. 2.

TENANT SERVED WITH WRIT TO NOTIFY LANDLORD, s. 3.

MODE OF ESTIMATING DAMAGES, s. 4.

ASSIGNMENT OF DOWER AFTER JUDGMENT, ss. 5-17.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Dower Procedure Act.*" Short title. R. S. O. 1887, c. 56, s. 1.

2. The dowress and the tenant of the freehold may, by any instrument under their hands and seals, executed in the presence of two witnesses, agree upon the assignment of dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of the instrument, proved by the oath of one of the subscribing witnesses, shall be registered in the proper registry office, and shall entitle the dowress to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by the tenant of the freehold; and the instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any action or proceeding by the dowress for dower in the lands mentioned therein. R. S. O. 1887, c. 56, s. 4.

Dowress and tenant may agree upon assignment, etc.

3. Every tenant in possession, who is not also tenant of the freehold, and who is served with a writ of summons in an action for the recovery of dower shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years' improved rent of the premises in the possession of the tenant, to the person under whom he entered into possession, to be recovered by action in the High Court. R. S. O. 1887, c. 56, s. 5. 59 V. c. 18, Sched. (37).

Tenant in possession, not also tenant of freehold to notify landlord.

Penalty.

Mode of estimating damages for detention of dower, etc.

4. In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the lands by the husband, or after the death of the husband, shall not be taken into account; but the damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of the land in the particular locality. R. S. O. 1887, c. 56, s. 6.

ASSIGNMENT OF DOWER AFTER JUDGMENT.

Sheriff to appoint Commissioners to admeasure the dower, etc.

5. The Sheriff, on receipt of the writ, shall by writing under his seal of office, appoint two resident freeholders of his County who are rated upon the assessment roll for real estate of a value not less than \$2,000 each, and a duly authorized Ontario Land Surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said writ, to be Commissioners to admeasure the dower, and the Sheriff shall, in such writing, set out a copy of the writ of assignment, and shall name therein a day on or before which the Commissioners shall make and return to him a report of their proceedings and determination in the execution of the duty assigned to them. R. S. O. 1887, c. 56, s. 8.

Provision in case of death, etc., of Commissioners.

6. In case of the death of, or refusal by, any or all of the Commissioners so appointed, the Sheriff shall, from time to time, in like manner, appoint another or others to perform the duty of any who may die or refuse. R. S. O. 1887, c. 56, s. 9.

Oath of Commissioners.

7. Every Commissioner so appointed shall, before entering upon the execution of his duty, take and subscribe an affidavit in the form or to the effect following; and the said Commissioners shall annex to their report the affidavits sworn by them, and return them to the Sheriff:

Form of oath.

"I, _____, do swear that I am not of kin to the plaintiff (*naming her*) or to the defendant (*naming him*), or in any way interested in the lands out of which the assignment of dower is to be made by me, and that I will honestly, impartially, and to the best of my skill and ability, execute and perform the duties imposed upon me by the appointment of _____, Esquire, Sheriff of the County of _____, as a Commissioner for the admeasurement of dower between the said plaintiff and the said defendant according to law."

R. S. O. 1887, c. 56, s. 10.

Commissioners when sworn to be officers of the Court.

8. After taking and subscribing such affidavit, the Commissioners and each of them shall, for all purposes in the fulfilment of the duties by law required of them, be considered as officers of the Court, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceedings as a Sheriff, in the discharge of his duty. R. S. O. 1887, c. 56, s. 11.

9. It shall be the duty of the Commissioners :

Their duties.

1. To admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the lands and premises mentioned in the writ of assignment, according to the nature of the land, whether meadow, arable, pasture or woodland, being a part of the lot or parcel of land and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises ;

To admeasure dower by bounds, etc. ;

2. To ascertain and determine what permanent improvements have been made upon the lands and premises since the death of the plaintiff's husband, or since the time her husband alienated the same to a purchaser for value, and if it can be done they shall award the dower out of such part of the lands as does not embrace or contain such permanent improvements ; but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the plaintiff in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements ;

ascertain improvements, etc. ;

3. If from peculiar circumstances, such as there being a mill or mills or manufactory upon the land, the Commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, and in assessing such yearly sum they shall make allowances and deductions for permanent improvements, as above provided for, and in their report to the Sheriff they shall state the amount of such yearly sum and set forth all the evidence taken by them in relation to the same, such evidence to be reduced to writing and taken upon oath (which oath any one of the Commissioners is hereby authorized to administer) and to be subscribed by the witness examined ;

and, where they cannot assign bounds, etc., to assess a yearly sum.

Evidence on oath.

4. Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the Commissioners specially direct otherwise, and make the same issuable and payable out of some specific portion of the lands, and the same shall be recoverable by distress as for rent or by action against the tenant of the freehold for the time being ;

Such sum to be a lien on lands, unless otherwise directed.

5. The report of the Commissioners shall be in writing, subscribed by them and directed to the Sheriff, and shall contain a full statement of their proceedings, and where the dower is assigned by metes and bounds, shall distinctly point out and describe the same, and the posts, stones or other monuments designating the boundaries, and for the purpose of planting and marking the posts, stones or monuments, the Commissioners may, if necessary, employ chain-bearers and labourers.

Report of Commissioners.

Sheriff may
enlarge time
for report.

10. The Sheriff may, in his discretion, upon the request of the Commissioners, enlarge the time for making their report, for not more than ten days, and he shall, within twenty-four hours after the receipt thereof, endorse thereon the day and hour of the receipt, and he shall then forthwith return the writ of admeasurement of dower, together with the report and all papers annexed thereto, to the office wherein the action was commenced and carried on. R. S. O. 1887, c. 56, s. 13.

Either party
may appeal
from report.

11. Either party may, within a month from the filing of the Sheriff's return to the writ of assignment, or within such further time as a Court or Judge may under special circumstances allow, appeal from the report of the Commissioners to a Judge in Court, upon grounds apparent on the report and papers filed therewith, or may apply to set aside the same, upon such other grounds verified by affidavit as the Judge may see fit, every such ground being set forth in the notice served, and the Judge may vary or amend the report in any way and to any extent that he may deem proper, or refer the same back to the Commissioners for amendment in whole or in part, with such directions as to law or fact as he may deem proper, or he may confirm the same, or may annul and set aside the report and may appoint three new Commissioners or direct that the Sheriff shall do so, and the new Commissioners shall have the same powers and execute the same duties, and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of the new Commissioners shall be treated as if no other report had been previously made, and shall be dealt with and proceeded upon accordingly. R. S. O. 1887, c. 56, s. 14.

Order of Court
thereon.

Effect of re-
port being
appealed from
for miscon-
duct, etc.

12. If the report is moved against upon the ground of misconduct or fraud on the part of the Commissioners, the Court may, in its discretion, make them parties to the proceeding and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the commissioners be adjudged to pay to the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the proceeding to set aside the report; and the payment may be enforced by the like process and proceedings as are from time to time in use to compel a Sheriff to pay costs of any summary proceeding against him. R. S. O. 1887, c. 56, s. 15.

Costs of
appeal.

13. The appeal or application may be dismissed with or without costs, and the Court may order the party at whose instance, or on whose complaint or representation, the Commissioners may have been made parties to the proceeding to pay the Commissioners their costs; and if the appeal or application is dismissed, or if the report is not appealed from or moved against within the proper time, the report shall thenceforth be final and conclusive on all parties to the action of dower, and

a copy of the report, certified by the Registrar under the seal of the Court, shall be registered in the proper Registry Office for which service the Registrar of deeds shall be entitled to receive \$1. R. S. O. 1887, c. 56, s. 16.

Copy of report when final to be registered.

14. After such registration the plaintiff shall be entitled to sue out a writ directed to the proper Sheriff, commanding him to put her into possession of the lands and premises assigned and admeasured to her for her dower, and to levy all such costs as by the judgment and any order of Court, or either of them, have been awarded to her against the defendant. R. S. O. 1887, c. 56, s. 17.

Plaintiff may after registration sue out writ of possession.

15.—(1) In case it is desired by either party to produce any witness before the Commissioners, such party may, on application to the Court or to a Judge, on affidavit that the evidence of such witness is necessary, obtain an order commanding the attendance of the witness before the Commissioners, and if in addition to the service of the order, an appointment of time and place of attendance in obedience thereto, signed by one of the Commissioners, be served on the person whose evidence is required, either with or after the service of the order, non-attendance shall be deemed a contempt of Court, and shall be punishable accordingly.

Mode of procuring attendance of witnesses before Commissioners.

(2) The person so required to attend shall be entitled to be paid the same fees, allowance and conduct money as if he had been subpoenaed as a witness in an ordinary action, but no witness shall be obliged to attend more than two consecutive days. R. S. O. 1887, c. 56, s. 18.

Payment of witnesses.

16. The Commissioners shall be entitled to receive from the plaintiff the sum of \$4 for each day's attendance, not, however, to exceed two, and may also charge at the rate of twenty cents for every hundred words for drawing up their report, and ten cents for every hundred words of each copy furnished by them to either party. R. S. O. 1887, c. 56, s. 19.

Commissioners' fees.

17. The plaintiff shall pay the costs of suing out, and the costs of the Commissioners in executing the writ of assignment of dower, and making the report thereof, but each party shall pay his own costs of witnesses, or of counsel or solicitor attending before the Commissioners. R. S. O. 1887, c. 56, s. 20.

By whom costs to be paid.

NOTES.

Agreement on Assignment. At common law it is quite competent for the heir and dowress to agree to assign dower or an equivalent for it by parol; *Park on Dower*, p. 269; *Leach v. Shaw* (1860) 8 Gr. 494, Sec. 1 of this Act does not abrogate the common law; *Fraser v. Gunn* (1879) 27 Gr. 63.

Assignment by Commissioners. Where two-thirds of a dwelling house stood upon the land out of which dower was claimed and the remaining third upon the adjoining land which was not dowerable, it was held that the commissioners had not under sec. 9 (3) power to assess a yearly sum. They were not however, bound to assign a portion of the building but might give an equivalent; *McIntyre v. Crocker* (1893) 23 O.R. 369. Where the subject of the assignment is a house, the whole of particular rooms may be set off as dower, *Doe d. Riddell v. Gwinnell* (1841) 1 Q.B. 682; *Cameron on Dower* 318.

The dower must be assigned by metes and bounds; but if the assignment is irregular in this respect, the tenant of the freehold may by his acts confirm it; *Fisher v. Grace* (1869) 28 U.C.R. 312.

The Report of the commissioners need not set out their reasons nor will it be disturbed unless upon the clearest evidence of injustice; *Robinet v. Pickering* (1879) 44 U.C.R. 337.

Permanent Improvements. The clearing of land is a permanent improvement; *Robinet v. Pickering* (1879) 44 U.C.R. 337. Though at the time of the alienation by the husband, the land may have had no rentable value, yet if it afterwards became rentable by improvements a portion of the rent must be attributed to the land; *Wallace v. Moore* (1871) 18 Gr. 560.

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CHAPTER 79.

An Act respecting Absconding Debtors.

ABSCONDING DEBTOR DEFINED, s. 1.	SALE OF CHATTELS, s. 10.
PROCEDURE TO OBTAIN ATTACHMENT, ss. 2, 3.	ATTACHMENT OF DEBTS DUE TO THE ABSCONDING DEBTOR, ss. 11, 12.
WHAT PROPERTY MAY BE ATTACHED, s. 4.	ACTIONS BY SHERIFF FOR OUTSTANDING DEBTS, ss. 13-17.
PERISHABLE PROPERTY, ss. 5, 6.	DISTRIBUTION OF PROCEEDS, ss. 18, 19.
DIVISION COURT ATTACHMENT SUPERSEDED, s. 7.	SURPLUS TO BE RESTORED TO DEBTOR, s. 20.
SHERIFF'S COSTS, ss. 8, 9.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. If a person resident in Ontario indebted to any other person, departs from Ontario with intent to defraud his creditors, and at the time of his so departing is possessed to his own use and benefit of any real or personal property, credits or effects therein not exempt by law from seizure, he shall be deemed an absconding debtor, and his property, credits or effects aforesaid, may be seized and taken for the satisfying of his debts by an order of attachment. R. S. O. 1887, c. 66, s. 1. Con. Rules 1897, No 1,058.

Who to be regarded as an absconding debtor.

PROCEDURE TO OBTAIN ATTACHMENT.

In the High Court.

2. Upon affidavit made by a plaintiff, his servant or agent that a person so departing is indebted to the plaintiff in a sum exceeding \$100, and stating the cause of action, and that the deponent has good reason to believe and does verily believe that the person has departed from Ontario and has gone to (stating some place to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he has fled to), with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process, and was, at the time of his so departing, possessed of real or personal property, credits or effects, not exempt by law from seizure, to his own use and benefit in Ontario, and upon the further affidavit of

Proceedings upon affidavits that the defendant has absconded, etc.

R.

Order of
attachment to
issue.

two other persons, that they are well acquainted with the debtor mentioned in the first named affidavit, and have good reason to believe and do believe that the debtor has departed from Ontario with intent to defraud the plaintiff, or to avoid being arrested or served with process, the High Court, or a Judge thereof, or the Judge of a County Court, may make an order in the High Court for the attachment of the property, credits and effects of the debtor, and may in the order appoint the time for the defendant's putting in special bail, which time shall be regulated by the distance from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of and necessary time for postal or other communication. R. S. O. 1887, c. 66, s. 2.

In County Courts.

Proceedings in
cases within
County Court
jurisdiction.

3. In case the sum claimed is within the jurisdiction of the County Courts, any such Court or the Judge thereof, may in like manner make an order of attachment in that Court, and the proceedings thereon shall be the same as in this Act provided. R. S. O. 1887, c. 66, s. 3.

WHAT PROPERTY MAY BE ATTACHED.—INVENTORY, ETC.

Sheriff to
attach all the
property and
credits of
defendant.

4.—(1) All the property, credits and effects of an absconding debtor, including all rights and shares in any association or corporation, may be attached in the same manner as they might be seized in execution; and the sheriff to whom an order of attachment is directed shall forthwith take into his charge all such property and effects according to the exigency of the order, and shall be allowed all necessary disbursements for keeping the same, and he shall immediately call to his assistance two substantial freeholders of his county, and with their aid he shall make a just and true inventory of all the personal property, credits and effects, evidences of title or debt, books of account, vouchers and papers that he has attached, and shall return such inventory signed by himself and the said freeholders, together with the order of attachment. R. S. O. 1887, c. 66, s. 13.

Inventory to
be made.

(2) Goods exempt from seizure under execution shall not be liable to seizure under the order of attachment. R. S. O. 1887, c. 64, s. 4, part.

Exemptions.

For property exempt from execution and attachment see Chaps. 77 and 156.]

PERISHABLE PROPERTY.

Sale of perish-
able goods on
plaintiff giving
security.

5. In case horses, cattle, sheep, pigs, or perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of,

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are taken under an order of attachment, the sheriff who attaches the same shall have them appraised and valued, on oath, by two competent persons; and in case the plaintiff desires it and deposits with the sheriff a bond to the defendant executed by two freeholders (whose sufficiency shall be approved of by the sheriff), in double the amount of the appraised value of the articles, conditioned for the payment of the appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the sheriff shall proceed to sell all or any of such enumerated articles at auction, to the highest bidder, giving not less than six days' notice of the sale, unless any of the articles are of such a nature as not to allow of that delay, in which case the sheriff may sell such articles last mentioned forthwith; and the sheriff shall hold the proceeds of the sale for the same purposes as he would hold property seized under the attachment. R. S. O. 1887, c. 66, s. 14.

Sheriff to hold proceeds.

6. If the plaintiff, after notice to himself or his solicitor of the seizure of any articles enumerated in the last preceding section, neglects or refuses to deposit the bond, or only offers a bond with sureties insufficient in the judgment of the sheriff, then, after the lapse of four days next after the notice, the sheriff shall be relieved from all liability to the plaintiff in respect to the articles so seized, and the sheriff shall forthwith restore the same to the person from whose possession he took such articles. R. S. O. 1887, c. 66, s. 15.

The goods to be restored if plaintiff fails to give sufficient security.

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

7. If the sheriff to whom an order of attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable, belonging to the absconding debtor named in the order of attachment, in the custody of a constable or of a bailiff or clerk of a Division Court by virtue of a warrant of attachment issued or money paid into Court under a garnishee summons under *The Division Courts Act*, the sheriff shall demand and take from the constable, bailiff or clerk, the property or effects, or the proceeds of any part thereof and the constable, bailiff or clerk, on demand by the sheriff and notice of the order of attachment, shall forthwith deliver all the property, effects and proceeds aforesaid to the sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by the sheriff, with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property and effects of the absconding debtor; but the creditor who has duly sued out the warrant of attachment may proceed to judgment against the absconding debtor in the Division Court, and on obtaining judgment, and serving a judgment.

Proceeding if Sheriff finds property in the hands of a Bailiff or Clerk of a Division Court.

Rev. Stat. c. 60.

Creditor in Division Court may proceed to judgment.

memorandum of the amount thereof, and of the costs to be certified under the hand of the clerk of the Division Court, such creditor shall be entitled to satisfaction in like manner as, and in ratable proportion with, the other creditors of the absconding debtor who obtain judgment as hereinafter mentioned. R. S. O. 1887, c. 66, s. 16.

SHERIFF'S COSTS.

Sheriff's costs
and how paid.

8. The costs of the sheriff for seizing and taking charge of property, credits and effects under an order of attachment, including the sums paid to persons for assisting in taking an inventory, and for appraising (which shall be paid for at the rate of \$1 for each day actually required for and occupied in making the inventory or appraisement) shall be paid in the first instance by the plaintiff, and may, after having been taxed, be recovered by the sheriff by action in any Court having jurisdiction, and such costs shall be taxed to the party who pays the same as part of the disbursements in the action against the absconding debtor and be so recovered from him. R. S. O. 1887, c. 66, s. 17.

Cost of new
inventory not
allowed on re-
ceipt of new
writ.

9. The sheriff having made an inventory and appraisement on the first order of attachment against any absconding debtor, shall not be required to make, nor shall he be allowed to charge for, a new inventory and appraisement upon a subsequent order of attachment coming into his hands. R. S. O. 1887, c. 66, s. 18.

SALE OF CHATTELS.

Sale of goods
under order of
attachment.

10.—(1) The Court or a Judge may, at any time after an order of attachment has been in the hands of a sheriff, or other officer, for one month, direct him to sell any goods or chattels, except chattels real which have been attached.

(2) An order for sale may be made upon the application of a creditor having an order of attachment, or a writ of execution, in the hands of the sheriff, and shall be made if the Court or Judge is satisfied that the alleged debtor has in fact absconded indebted to the applicant, and that the property attached is not sufficient to pay in full the claims of the persons who have obtained orders of attachment, or execution, but this provision shall not be construed to restrict the authority of the Court or Judge to make an order in other cases; and in all cases terms may be imposed.

(3) The costs of the first order of attachment shall have priority over all execution debts and other costs. R. S. O. 1887, c. 66, s. 20.

[As to sales of shares, etc., in Companies, see secs. 10 to 16 of "The Execution Act," Chap. 77.]

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ATTACHMENT OF DEBTS DUE TO ABSCONDING DEBTOR.

11. In case notice in writing of the order of attachment has been duly served by the sheriff, or by or on behalf of the plaintiff, upon a person owing a debt or demand to, or who has the custody or possession of property or effects of, an absconding debtor, and in case such person after such notice pays the debt or demand or delivers the property or effects to the absconding debtor, or to any one for him, he shall be deemed to have done so fraudulently, and if the plaintiff recovers judgment against the absconding debtor, and the property and effects seized by the sheriff are insufficient to satisfy the judgment, such person shall be liable for the amount of the debt or demand, and for the property and effects or the value thereof. R. S. O. 1887, c. 66, s. 21.

Liability of persons paying debts to absconding debtor after notice of attachment.

12. If after notice as aforesaid a person indebted to the absconding debtor, or having custody of his property as aforesaid, is sued for the debt, demand or property by the absconding debtor, or by the person to whom the absconding debtor has assigned the debt, demand or property since the date of the order of attachment, he may, on affidavit, apply to the Court or a Judge, to stay proceedings in the action against himself, until it is known whether the property and effects so seized by the sheriff, are sufficient to discharge the sum or sums recovered against the absconding debtor, and the Court or Judge may direct an issue to try any disputed question of fact or make such other order as is proper. R. S. O. 1887, c. 66, s. 22.

Debtor if sued by defendant after service of notice of attachment may obtain stay of proceedings.

WHEN SHERIFF MAY SUE FOR OUTSTANDING DEBTS.

13. If the real and personal property, credits and effects of an absconding debtor prove insufficient to satisfy the executions obtained against him and claims certified under *The Creditors' Relief Act*, the sheriff may, by order of the Court or a Judge, to be granted on the application of any plaintiff or claimant sue for and recover from any person indebted to the absconding debtor, the debt, claim, property or right of action attachable under this Act, and owing to or recoverable by the absconding debtor, with costs of suit, in which action the defendant shall be allowed to set up any defence which would have availed him against the absconding debtor at the date of the order of attachment, and a recovery in the action by the sheriff shall operate as a discharge as against the absconding debtor; and the sheriff shall hold and apply the moneys recovered by him as part of the assets of the absconding debtor. R. S. O. 1887, c. 66, s. 23.

Debtor of defendant may be sued by sheriff if defendant's property is not sufficient to satisfy claims.

Rev. Stat. c. 78.

14. The statement of claim in the action by the sheriff shall contain an introductory averment to the effect following:

Averment to be inserted in Sheriff's statement of claim.

The plaintiff is Sheriff of (etc.) and sues under the provisions of *The Act respecting Absconding Debtors*, in order to recover from C. D., debtor to E. F., an absconding debtor, the debt due (or other claim, according to the facts) by the said C. D., to the said E. F., etc.

R. S. O. 1887, c. 66, s. 24.

Sheriff not bound to sue until creditor gives bond of indemnity.

15. The sheriff shall not be bound to sue as aforesaid until a bond is given by one or more of the plaintiffs or claimants with two sufficient sureties, who may be other of the plaintiffs or claimants, payable to the sheriff by his name of office in double the amount or value of the debt or property sued for, conditioned to indemnify him from all costs, losses and expenses to be incurred in the prosecution of the action or to which he may become liable in consequence thereof. R. S. O. 1887, c. 66, s. 25.

Sale of debts by sheriff.

Rev. Stat. c. 78.

16. If the real and personal property, credits and effects of an absconding debtor prove insufficient to satisfy the executions obtained against him and claims certified under *The Creditors' Relief Act*, and if there remain debts due to the absconding debtor, the attempt to collect which would be more onerous than beneficial to his creditors, the sheriff may, by an order of the Court or a Judge, sell such debts by public auction after such advertisement thereof as the Court or Judge may order, and pending such advertisement the sheriff shall keep a list of the debts to be sold open for inspection at his office, and shall give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than \$100 shall be sold separately, unless the Court or Judge shall otherwise order. 52 V. c. 11, s. 2, part.

Purchaser entitled to sue in his own name.

17. The person who purchases a debt from the sheriff may sue for it in his own name, and without any further order of the Court or Judge, as effectually as the absconding debtor might have done, and as the sheriff is by section 13 hereof authorized to do, and a bill of sale, which may be in the form in the Schedule to this Act, or to the like effect, signed and delivered to him by the sheriff, shall be *prima facie* evidence of such purchase and of the sheriff's authority to sell without proof of the handwriting of the sheriff, or of the writ or order, or of the sale, and no warranty on the part of the sheriff that the debt is due or otherwise shall be created by such sale and conveyance, and in any action by the purchaser of such debt the defendant shall be allowed to set up any defence which would have availed him against the absconding debtor at the date of the order of attachment. 52 V. c. 11, s. 2, part.

DISTRIBUTION OF PROCEEDS.

Who entitled to share if property proves insufficient to pay all.

18. In case the property and effects of the absconding debtor are insufficient to satisfy the executions and other claims certified, none shall be allowed to share, unless their proceed-

ings under this Act or *The Creditors' Relief Act*, or the provisions of *The Division Courts Act* respecting absconding debtors were commenced within six months from the date of the first order of attachment. R. S. O. 1887, c. 66, s. 26.

Rev. Stat.
cc. 78 and 60.

19. The Court or a Judge may delay the distribution, in order to give reasonable time for the obtaining of judgment or allowance of claim by persons who have commenced proceedings in due time against the absconding debtor. R. S. O. 1887, c. 66, s. 27.

Delay of distribution until claims established.

SURPLUS TO BE RESTORED.

20. In case at any time the sheriff has levied for distribution sufficient to pay all debts and claims for which proceedings had then been commenced, including costs, and one month has elapsed without proceedings being taken in respect of any other debt or claim, or in case after a period of one month from a distribution under the order of the Court or a Judge, whichever last happens, and after satisfying the several plaintiffs and claimants entitled, there is no other writ of attachment or execution against the same property and effects in the hands of the sheriff, or claim certified against the debtor, then, all the property and effects of the absconding debtor, or unappropriated money the proceeds of any part of such property and effects, remaining in the hands of the Sheriff, together with all books of account, evidences of title or of debt, vouchers and papers whatsoever belonging thereto, shall be delivered to the absconding debtor or to the person or persons in whose custody the same were found, or to the authorized agent of the absconding debtor, and thereupon the responsibility of the sheriff in respect thereto shall determine. R. S. O. 1887, c. 66, s. 28.

When all seizing creditors are satisfied, remaining property to be delivered up.

SCHEDULE.

BILL OF SALE OF A DEBT.

(Section 17.)

In consideration of the sum of \$ _____, the receipt whereof I do hereby acknowledge :

I, A. B., Sheriff of the County of _____, under and by virtue of an order of attachment dated _____, issued under *The Act respecting Absconding Debtors*, against the real and personal property, credits and effects of C. D., an absconding debtor, and under and by virtue of an order in that behalf, hereby sell and assign to E. F. all claim by the said absconding debtor, against G. H., of (describing the debtor), with evidences of debt and securities thereto appertaining ; but without any warranty of any kind or nature whatsoever.

NOTES.

Resident. The word "resident" is an ambiguous word and may receive different meanings according to the Statute in which it is found; *Re Bowie*, ex parte Breull (1880) 16 Ch. D. 484. Ordinarily residence denotes the place where an individual eats, drinks and sleeps or where his family or his servants eat, drink and sleep; *R. v. North Curry* (1825) 4 B & C 959; *R. v. Hammond* (1852) 17 Q.B. 772; *Grogan v. London & M. Ins. Co.* (1886) 53 L.T. 761. But a man may reside in one place and his wife and family in another; *Cartwright v. Hinds* (1883) 3 O.R. 384; *Wellington v. Whitechurch* (1863) 4 B. & S. 106. Where a man worked in Quebec but his wife and family lived across the river in Ontario where he often came to see them he was said to have a sufficient residence in Ontario to make him subject to Division Court process; *Re Ladower & Salter* (1876) 6 P.R. 305. Where a man has no permanent residence he "dwells" at the place where he may be temporarily residing, *Alexander v. Jones* (1866) L.R. 1 Ex. 133. But if the residence be in a foreign country merely lodging in Ontario for a temporary purpose will be insufficient to constitute a person a resident; *Macdougall v. Paterson* (1851) 11 C.B. 755; *Marsh v. Conquest* (1864) 17 C.B.N.S. 418; *Taylor v. Nicholl* (1845) 1 U.C.R. 416. Foreigners however who come into the jurisdiction and contract debts may acquire a sufficient residence to make their property attachable; *Ford v. Lusher* (1834) 3 O.S. 428; *Higgins v. Brady* (1864) 10 U.C.L.J. 268; *Kersterman v. McLellan* (1883) 10 P.R. 122. A man may have two permanent places of residence; *Batler v. Alewhite* (1859) 6 C.B.N.S. 747; *Pilgrim v. Knatchbull* (1865) 18 C.B.N.S. 798. Compulsory residence within the jurisdiction e.g. in prison does not constitute a person a resident, *Fournier v. Hogarth* (1892) 15 P.R. 72; *Dunston v. Paterson* (1858) 5 C.B.N.S. 267.

Indebted. The debt must be both due and payable before the action is commenced, *Kyle v. Barnes* (1883) 10 P.R. 20. An order cannot be granted where the cause of action is for unliquidated damages, *Clock v. Alfeld* (1836) 5 O.S. 504; *Clark v. Ashfield* (1837) R. & J. Dig. 4194. The Crown may proceed on a forfeited recognizance, *R. v. Stewart* (1880) 8 P.R. 297.

Departs from Ontario with Intent. It is necessary that the debtor shall have actually departed from Ontario before the order is made. The departure must have been with intent to defraud his creditors or the plaintiff or to avoid being arrested or served with process. If the creditor has reasonable grounds for inferring such intent the order will not be set aside; *Scott v. Mitchell* (1881) 8 P.R. 518. Departure for a mere temporary purpose is insufficient, *Shaw v. McKenzie* (1881) 6 S.C.R. 181. A departure to avoid arrest on criminal process is sufficient, *R. v. Stewart* (1880) 8 P.R. 297. Leaving Ontario permanently without making provision for payment of his debts would constitute a man an absconding debtor, *Coffey v. Scane* (1895) 22 A. R. 269; 25 O.R. 22; *Ex parte Osborne* (1813) 2 V. & B. 177. See also the cases collected in notes to R.S.O. c. 80.

Possessed of Property. The debtor must be possessed of property at the time of departing, *Higgins v. Brady* (1864) 10 U.C.L.J. 268; *Wakefield v. Bruce* (1875) 5 P.R. 77; *Offay v. Offay* (1867) 26 U.C.R. 363.

Not Exempt from Seizure. For exemptions see R.S.O. c. 77.

Affidavits for Order of Attachment. The affidavits for the attachment should be entitled in the action in which the writ has issued, C.R. 320. The debt should be as certainly sworn to as in an affidavit for an order for arrest, *McKenzie v. Russell* (1833) 3 O.S. 345. See as to proof of debt notes to R.S.O. c. 80.

It must be stated distinctly that the debtor was a resident of Ontario "lately doing business in Ontario" is insufficient, *Higgins v. Brady* (1864) 10 U.C.L.J. 268; but the residence may be shown by any of the affidavits used on the application, *Wakefield v. Bruce* (1875) 5 P.R. 77.

The departure with intent to defraud, leaving property must be stated especially and it is wise to follow the words of the statute.

The same particularity is not however required as was required in an affidavit to hold to bail when no order of a Judge was required nor as where per-

sonal liberty is involved, *Bank of Hamilton v. Baine* (2) (1887) 12 P.R. 439, and defects in the affidavits may be supplied by affidavits filed on behalf of the defendant, *Hart v. Ruttan* (1874) 23 C.P. 613; *R. v. Stewart*, (1880) 8 P.R. 297.

In an action by the Crown on a recognizance, an affidavit by the Crown Attorney is with the affidavits of the two other persons sufficient. *R. v. Stewart* (1880) 8 P.R. 297.

Where the plaintiff is a corporation the creditor's affidavit may be made by any officer, servant or agent; *C.R.* 519.

Corroborating Affidavits. The persons corroborating the departure with intent must swear they have *good* reason to believe, etc.—“has reason to believe” would be insufficient; *Meyers v. Campbell* (1848) 1 Chamb. R. 31. Where they reside far from the debtor's residence they should state the grounds of their belief; *Bank of Upper Canada v. Spafford* (1832) 2 O.S. 373.

Form of Order. When a writ of attachment commenced the proceedings, the Statute required that it should contain a summons to the debtor to put in special bail; *R.S.O.* (1887) c. 66, s. 4, and an ordinary appearance was a useless proceeding, *Offay v. Offay* (1867) 26 U.C.R. 363; *R. v. Stewart* (1880) 8 P.R. 297. The form of order given by *Holmsted & Langton*, p. 1193 contains also a summons, but there would appear to be no authority for the Judge to do more than order the attachment and appoint the time for putting in special bail. The defendant is summoned by the ordinary writ which precedes the order and it may be that an order for service out of the jurisdiction should be issued; *Fry v. Moore* (1889) 23 Q.B.D. 395; *Wilding v. Bean* (1891) 1 Q.B. 100; *Jay v. Budd* (1898) 1 Q.B. 12. If the order is refused by one Judge applications may be made to other Judges in succession either upon the same or further material; *Bank of Hamilton v. Baine* (1887) 12 P.R. 439.

Setting aside Order. A Local Master cannot make the order; *Bank of Hamilton v. Baine* (1888) 12 P.R. 418. A Judge of a County Court would have no power in a High Court action to set aside his own order; *Disher v. Disher* (1888) 12 P.R. 518. It would seem that an order for attachment is not of the class of *ex parte* orders which may be set aside under *C.R.* 358. See *Jury v. Jury* (1895) 16 P.R. 375. The order may however be set aside on an application in Chambers and on such application the questions of residence, departure, intent and debt may be tried; *Howland v. Rowe* (1865) 25 U.C.R. 467; *Jackson v. Randall* (1874) 6 P.R. 165; 24 C.P. 87; *Kyle v. Barnes* (1883) 10 P.R. 20. See this jurisdiction doubted; *Disher v. Disher* (1888) 12 P.R. 518. On setting aside the order the court may direct that no action be brought for anything done thereunder; *Hart v. Ruttan* (1874) 23 C.P. 613.

County Courts. For the jurisdiction in County Courts see *R. S. O. c. 55*, ante p. 234.

Effect of Order. The order does not bind the goods of the debtor until actual seizure; *Kingsmill v. Warrener* (1852) 13 U.C.R. 18; *Potter v. Carroll* (1860) 9 C.P. 442; nor his lands, *Robinson v. Bergin* (1883) 10 P.R. 127; *Doc d. Crew v. Clarke* (1841) R. & J. Dig. 5.

Attachment of Shares. If the debtor is possessed of shares in any association or corporation a copy of the order should be served upon the association or corporation with a notice that all the shares which the debtor has in the stock thereof are attached. See *R.S.O. c. 77*, s. 11.

Inventory. The inventory should describe the property attached so that it may be identified with reasonable certainty; *Drake* on attachment, s. 208. No appraisal need be made except of perishable property. The inventory must be signed by the Sheriff and two freeholders and returned to the Court with the order.

Perishable Property. When perishable property is attached it must be appraised and valued *on oath* by two competent persons. No sale can be made thereof unless within four days after notice of the seizure the plaintiff give a bond executed by two freeholders for double the appraised value. The sale must be by auction.

Superseding Division Court Attachment. Prohibition would, if necessary, be granted to restrain a clerk of a Division Court from paying out moneys paid into court on garnishee proceedings against the debtor; *Re Moore v. Wallace* (1889) 13 P.R. 201.

The Bailiff would have no lien upon the goods attached and demanded by the Sheriff for his fees; *Sneary v. Abdy* (1876) 1 Ex. D. 299; *Re Ross* (1866)

3 P.R. 394; and the right (if any) of the Division Court plaintiff to priority for the costs of his attachment and the Bailiffs fees thereunder must rest either on equitable principles or on s. 10 (3). The concluding words of s. 7 would seem to limit his rights to a ratable dividend only, even upon the costs, but in *Darling v. Smith* (1884) 10 P.R. 360, they were allowed as a first charge.

Sale of Chattels. The costs of an order for sale of the goods will be allowed as a first charge; *Darling v. Smith* (1884) 10 P.R. 360.

Costs of First Order. Only the costs of obtaining and executing the first order for attachment have priority over other claims and costs; *Hughes v. Field* (1881) 9 P.R. 127; *Darling v. Smith* (1884) 10 P.R. 360.

Attachment of Debts. Notice *in writing* must be given by the Sheriff to debtors of the defendant in order to bind the debts in their hands. If notice is not given the defendant may collect the same by action in his own name notwithstanding the order for attachment; *Slattery v. Turney* (1850) 7 U.C.R. 578. An assignment of the debt before the order for attachment would take priority over the attachment; *Clarke v. Proudfoot* (1852) 9 U.C.R. 290. *Hirsch v. Coates* (1856) 18 C.B. 757; *Ferguson v. Carman* (1866) 26 U.C.R. 26; *Macaulay v. Rumball* (1860) 19 C.P. 284; *Davis v. Freethy* (1890) 24 Q. B. D. 519; *Beaty v. Hackett* (1892) 14 P.R. 395.

An order authorizing the Sheriff to sue may be obtained *ex parte*; *Cleaver v. Fraser* (1857) 3 U.C.L.J. 107.

Where a third party has goods of the debtor in his possession an order may be made for their delivery to the Sheriff; *Buntan v. Williams* (1894) 16 P.R. 43.

Sale of Debts. The provision for the sale of debts was first introduced in 1889. Under an execution a Sheriff has no power to sell debts.

Distribution of proceeds. In *Macfie v. Pearson* (1885) 8 O.R. 745 it was held that plaintiffs, on certificates under the Creditors Relief Act, could not share in the money realized by a Sheriff under The Absconding Debtors Act, and that it was necessary for them to obtain judgment and execution in the ordinary way. In the revision of the Statutes in 1887 the rights of such creditors was provided for and it would seem that the proceeds must now be distributed ratably among all creditors who have claims in the Sheriff's hands either under executions or under the Creditor's Relief Act except that persons in the employment of the debtor are entitled to priority for the wages or salary due them not exceeding three months; R.S.O. c. 156. Division Court judgment creditors should serve a memorandum upon the Sheriff under s. 14 of The Creditors Relief Act, R.S.O. c. 78. Proceedings under the Creditors' Relief Act are not commenced within s. 18 until the affidavit is filed or served. The mere swearing of an affidavit within 6 months by a creditor will not be a sufficient commencement of proceedings to entitle him to share in the distribution; *Bank of Hamilton v. Aitken* (1893) 20 A.R. 616.

Contesting Claims. The estate of the absconding debtor being available for all execution creditors the proceedings to realize and distribute are analogous to administration proceedings and one creditor should be allowed to question the amount claimed by another; *Wills v. Carroll* (1883) 10 P.R. 142. The only summary method of contesting the claim of another creditor is under The Creditors Relief Act, R.S.O. c. 78, ss. 10 *et seq.* A judgment creditor whose proceedings were commenced too late to entitle him to share in the distribution may be a "creditor interested" in contesting the claims of a creditor entitled to share therein; *Bank of Hamilton v. Aitken* (1893) 20 A.R. 616. The Master in Chambers would have no power to set aside a judgment against an absconding debtor on the application of another creditor but the Divisional Court could do so; *Wills v. Carroll* (1883) 10 P.R. 142.

CHAPTER 80.

An Act respecting Arrest and Imprisonment for Debt.

As amended by 62 Vict. c. 11.

ARREST, WHEN MAY BE HAD, ss. 1-7.	SECURITY FROM DEBTORS IN CIVIL CUSTODY, ss. 15-25.
WRITS OF <i>Ca Sa.</i> , s. 8.	EXAMINATION OF DEBTOR, ss. 26, 27.
ORDERS FOR PAYMENT OF MONEY, s. 9.	EXECUTION AGAINST GOODS AND LANDS, s. 28.
PERSON HAVING CARRIAGE OF JUDGMENT TO BE DEEMED PLAINTIFF, s. 10.	DISCHARGE FROM CUSTODY, s. 29.
DELAY BEFORE COMMITTAL TO GAOL, ss. 11, 12.	PROVISION IN CASE OF SEPARATION OF UNITED COUNTIES, ss. 30, 31.
CUSTODY OF PERSONS ARRESTED, s. 13.	LIABILITY OF SHERIFF FOR ESCAPE, s. 32.
GAOL LIMITS, s. 14.	DEBTORS IN CRIMINAL CUSTODY, s. 33.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

ARREST.

1. In case a party or plaintiff being a creditor of, or having a cause of action against a person liable to arrest, by affidavit of himself or some other person shews to the satisfaction of a Judge of the High Court, or to the Judge of a County Court, that such party or plaintiff has cause of action against such person to the amount of \$100 or upwards or that he has sustained damage to that amount, and also by affidavit shews such facts and circumstances as satisfy the Judge, that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the said party or plaintiff in particular, the Judge may order that the person against whom the application is made, shall be arrested and held to bail for such sum as the Judge thinks fit, and the Judge or the acting Judge of the County Court, may grant an order for arrest where process is intended to be sued out of or an action has been commenced in the High Court, as well as in his own Court. R. S. O. 1887. c. 67, s. 1. Rules 1888, No. 1045.

Defendant may be held to bail on affidavit of certain facts and order of a judge.

2. A party or plaintiff formerly entitled to obtain the writ of arrest called *ne exeat*, is now to proceed under section 1 of this Act. R. S. O. 1887, c. 67, s. 3.

Application of statute.

Arrest restricted to not less than \$100.

3. No order to arrest and hold to bail shall be made for a cause of action less than \$100, but such order may be issued when the cause of action equals or exceeds that sum. R. S. O. 1887, c. 67, s. 4.

Privileged persons not to be arrested.

4. No person shall be subject to arrest who, by reason of any privilege, usage or otherwise, is by law exempt therefrom. R. S. O. 1887, c. 67, s. 5.

Arrest for non payment of money, costs, etc., abolished.

5. Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges or expenses, payable by a judgment or order of the High Court or of a Judge thereof, or by a judgment or order of a County Court or a Judge thereof, is abolished; and no person shall be liable to arrest for non-payment of costs. R. S. O. 1887, c. 67, s. 6.

No married woman to be arrested.

6. No married woman shall be liable to arrest either on mesne or final process. R. S. O. 1887, c. 67, s. 7.

Arrest on claim or judgment for a penalty.

7. No person shall be arrested or imprisoned on a claim or on a judgment recovered against him as a debtor for a penalty or sum of money in the nature of a penalty or forfeiture, whether the claim or judgment be in the name of such person alone, or in the form of proceeding known as *qui tam*, etc. (notwithstanding anything to the contrary in any statute providing for the recovery of such penalties or sums by action), except in cases and under circumstances where, on claims or judgments for ordinary debts, parties can be arrested or imprisoned. R. S. O. 1887, c. 67, s. 8.

WRITS OF CAPIAS AD SATISFACIENDUM.

Where defendant held to special bail *ca. sa.* may issue.

8. Where the defendant has been held to special bail upon a Judge's order made under this Act, it shall not be necessary to obtain another order before suing out a writ of *capias ad satisfaciendum* or to file any further affidavit than that upon which the order was obtained in the first instance; but where the defendant has not been so held to special bail, if the plaintiff in the action, by the affidavit of himself or some other person shews to the satisfaction of a Judge of the High Court, or where the case is in a County Court, to the Judge or acting Judge of such Court, that he has recovered judgment against the defendant for the sum of \$100 or upwards, exclusive of costs, and also by affidavit shews such facts and circumstances as satisfy the Judge that there is good and probable cause for believing either that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular, or that the defendant has parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution, the Judge may

When to obtain *ca. sa.* affidavits necessary and the contents thereof.

order that a writ of *capias ad satisfaciendum* be issued.
R. S. O. 1887, c. 67, s. 9.

9. Every order of the High Court, and of a County Court, directing payment of money or of costs, charges or expenses, shall, so far as it relates to such money, costs, charges, or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of this Act; and the said persons shall respectively have the same remedies, and the Courts and Judges and the officers of justice shall in such cases have the same powers and duties, as in corresponding cases under this Act. R. S. O. 1887, c. 67, s. 10.

Orders for payment of money to be deemed judgments.

10. In case a judgment or order of the High Court directs the payment of money into Court, or to the credit of any cause, or otherwise than to any person, the person having the carriage of the judgment or order, so far as relates to, the payment, shall be deemed the person to receive payment or the plaintiff (as the case may be) within the meaning of this Act. R. S. O. 1887, c. 67, s. 11.

Person having carriage of the judgment, etc., to be deemed the plaintiff.

DELAY BEFORE COMMITTAL TO GAOL.

11. The Act of the Imperial Parliament, passed in the 32nd year of the Reign of His late Majesty King George the Second, chaptered 28, and intituled "An Act for Relief of Debtors with respect to the Imprisonment of their Persons" and to oblige Debtors who shall continue in execution in Prison beyond a certain length of time, and for sums not exceeding what are mentioned in the Act, to make discovery of "and deliver upon oath their estates for their creditors' benefit," is not, nor is any part thereof, in force in this Province. 55 V. c. 15, s. 1.

32 Geo. II. c. 28, declared not to be in force in Ontario.

12. The sheriff at the request of a person arrested under civil process shall grant to such person a delay of twenty-four hours after his arrest before committing him to gaol, and shall take such person for the said twenty-four hours to some safe and convenient house in his shrievalty; provided such person prepays to the sheriff a sum of money sufficient to cover the sheriff's reasonable fees and expenses incident to the delay. 55 V. c. 15, s. 2.

Sheriff to allow debtor twenty-four hours delay before committing him to gaol.

CUSTODY OF PERSONS ARRESTED.

13. A person arrested and committed to gaol in any other county than that in which he resided or carried on business at the time, shall be entitled to be transferred to the gaol of his own county, on prepaying the expense of his removal; and the sheriff in whose county he was arrested

Person arrested out of his county may be transferred to it upon paying the cost.

may, if he is satisfied of the facts, transfer him accordingly; but if the sheriff declines to act without an order of the Court or a Judge, such an order shall be made on the application of the prisoner, and notice to the opposite party. R. S. O. 1887, c. 67, s. 12.

GAOL LIMITS.

Gaol limits.

14. The limits of every county for judicial purposes shall be the limits of the gaol of the county. R. S. O. 1887, c. 67, s. 13.

SECURITY FROM DEBTORS IN CIVIL CUSTODY.

Sheriff may take security from debtors in custody.

15. The sheriff of a county may take from a debtor confined in the gaol thereof, in execution or upon mesne process, a bond with not less than two nor more than four sufficient sureties, to be jointly and severally bound in a penalty of double the amount for which the debtor is so confined, conditioned, that the debtor will observe and obey all notices, or orders of Court touching or concerning the debtor, or his appearing to be examined *viva voce*, or his returning and being remanded into close custody, and that upon reasonable notice to them or any of them, requiring them so to do, they will produce the debtor to the sheriff, and also that the debtor will within thirty days, cause the bond, or the bond that may be substituted for the same, according to the provisions hereinafter contained, to be allowed by the Judge of the County Court of the County wherein the debtor is confined, and the allowance to be endorsed thereon by the Judge: and for this purpose the sheriff shall, upon reasonable notice given by the debtor, cause such first mentioned bond to be produced before the Judge. R. S. O. 1887, c. 67, s. 14.

Surety to make affidavit, etc.

16. The sheriff may also require each surety, where there are only two, to make oath in writing, to be annexed to the bond, that he is a freeholder or householder in some part of Ontario (stating where), and is worth the sum for which the debtor is in custody (naming it) and \$200 more, over and above what will pay all his debts; or where there are more than two sureties, then he may require each surety to make oath as aforesaid, that he is a freeholder or householder as aforesaid, and is worth one-half the sum for which the debtor is in custody (naming it), and \$200 more, over and above what will pay all his debts. R. S. O. 1887, c. 67, s. 15.

On receipt of bond, Sheriff may allow the debtor to go at large.

17. Upon receipt of the bond, accompanied by an affidavit of a subscribing witness of the due execution thereof, and by the sureties' affidavits of sufficiency, if required by the sheriff, the sheriff may permit and allow the debtor to go out of close custody in gaol; and so long as the debtor in all respects observes the conditions of the bond, the sheriff shall not be

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liable to the party at whose suit the debtor is confined in any action for the escape of the debtor from gaol. R. S. O. 1887, c. 67, s. 16.

18. The debtor may apply for the allowance of the bond upon four clear days' notice in writing to the plaintiff or his solicitor, who at the time of the application may object to the sufficiency of the sureties; and if the Judge refuses allowance of the bond, then the debtor may cause another bond, made to the sheriff in the same terms and under the same conditions, to be executed without further application to the sheriff, and may apply in like manner and upon like notice for the allowance thereof; and the bond, if allowed and indorsed as aforesaid, shall be substituted for and have the like effect in all respects, as the bond so first given to the sheriff as aforesaid would have had upon the allowance thereof, and the like remedies shall be had thereon, and the first given bond shall thereupon become void. R. S. O. 1887, c. 67, s. 17.

Application for allowance of bond to be made on motion, etc.

19. Upon the allowance being so indorsed, the sheriff shall be discharged from all responsibility respecting the debtor, unless the debtor is again committed to the close custody of the sheriff in due form of law. R. S. O. 1887, c. 67, s. 18.

When bond allowed, the Sheriff discharged from responsibility.

20. Persons who give bail under a writ of *capias ad satisfaciendum* shall not be bound to remain within the gaol limits, but may depart therefrom at their discretion; and when a person desires to give bail under such a writ, the condition of the bond to the sheriff shall provide that the person arrested shall observe and obey all notices, orders and rules of the Court concerning the debtor or person ordered to pay, or his appearing to be examined *viva voce* or otherwise, or his returning and being remanded into close custody; and the party or his bail shall not be entitled to claim longer time for so observing or obeying than he would have been entitled to if the party had been on the limits according to the practice before the 4th day of May, 1859, but the Court may grant further time if of opinion that the same may be done without substantial injury to the interests of the party to receive the money. R. S. O. 1887, c. 67, s. 19.

Conditions of bail-bond under writ of *ca. sa.*

21. In lieu of giving bail to a sheriff, a person arrested either on execution or mesne process, or any person on his behalf may deposit with the sheriff the amount for which he is arrested, and where the person is held under an order for arrest the further sum of \$40, and the said money shall stand as a security in place of and for the purposes of the bond provided for by sections 15 and 20 of this Act, or of the security provided for by the Rules of Court (as the case may be), and the said money shall for the purposes aforesaid be subject to the order of a Judge of the Court from which the process issued, as the case may require, but such deposit shall be repayable to the party depositing

Deposit in lieu of bail on arrest under civil process.

the same upon the sheriff being furnished with a certificate of the Judge or officer who allows the same, that the bond provided for by sections 15 or 20 or the bond or other security provided for by the Rules of Court (as the case may be) has been perfected and allowed. 55 V. c. 15, s. 3; 56 V. c. 5, s. 13. 62 V. c. 11, s. 7.

If the sureties become insufficient, Sheriff may re-take the debtor.

22. In case the sheriff has good reason to apprehend that any surety has after entering into the bond, become insufficient to pay the amount sworn to, the sheriff may again arrest the debtor, and detain him in close custody. R. S. O. 1887, c. 67, s. 20.

The sureties may plead such arrest.

23. The sureties of the debtor may set up the arrest and detention as a defence to any action brought against them upon the bond entered into by them, and the defence if sustained in proof shall wholly discharge them; and the debtor may again be allowed to go at large, on giving to the sheriff a new bond with sureties as aforesaid. R. S. O. 1887, c. 67, s. 21.

Bond may be assigned.

24. Upon breach of the condition of any such bond, the party at whose suit the debtor is confined may require the sheriff to assign the same to him, and the assignment shall be made in writing, under the seal of the sheriff and attested by at least one witness, and the assignee of the sheriff or the executors or administrators of the assignee may maintain an action in his or their own names upon the bond, which action the sheriff shall have no power to release; but upon executing an assignment as aforesaid, the sheriff shall be thenceforth discharged from all liability on account of the debtor or his safe custody. R. S. O. 1887, c. 67, s. 22.

Sureties may surrender debtor.

25. The sureties of any debtor may surrender him into the custody of the sheriff at the gaol, and the sheriff, his deputy or gaoler shall there receive the debtor into custody, and the sureties may set up the surrender or offer to surrender and the refusal of the sheriff, his deputy or gaoler to receive the debtor into custody at the gaol, as a defence to any action brought on the bond for a breach of the condition happening after the surrender or tender and refusal, and the defence if sustained in proof, shall discharge them; but the debtor may again be allowed to go at large, on giving to the sheriff a new bond, with sureties as aforesaid. R. S. O. 1887, c. 67, s. 23.

Debtor on bail liable to be examined.

Rev. Stat. s. 81.

26. The party at whose suit any debtor has been confined may, at any time while the debtor is at large upon bail, apply to the Court or Judge for an order for the examination of the debtor, in the manner provided in *The Act respecting the Relief of Indigent Debtors*, and in case the debtor neglects or omits to submit himself to be examined pursuant to the order, or refuses to make full answer in respect to the matters touching which he is examined, to the satisfaction of the Court

or Judge, the Court or a Judge may order the debtor to be committed to close custody, and the sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order of the Court or a Judge for again allowing him to go out of close custody, on giving the necessary bond as aforesaid, or until he is otherwise discharged by due course of law. R. S. O. 1887, c. 67, s. 24.

Or be re-committed.

27. A new order may be granted on the debtor shewing that he has submitted himself to be examined and made full answer as aforesaid, and has thereafter given to the plaintiff or his solicitor ten days' notice of his intention to apply. R. S. O. 1887, c. 67, s. 25.

On answering debtor may be again allowed to go at large.

28. The party at whose suit a debtor has been confined in execution may, wherever the debtor has been admitted to bail, sue out writs against his goods and lands, notwithstanding that the debtor has been charged in execution; and the writ shall not be stayed, but shall be proceeded with until executed, although the debtor be re-committed to close custody. R. S. O. 1887, c. 67, s. 26.

Plaintiff may have execution against property of debtor on bail.

DISCHARGE FROM CUSTODY.

29. A person arrested under a writ of *capias ad satisfaciendum* or under an order of attachment, though he is not confined to close custody but has given bail may apply for and obtain his discharge in the same manner and subject to the same terms and conditions as nearly as may be as an execution debtor who is confined to close custody. R. S. O. 1887, c. 67, s. 27.

Discharge of *ca. sa.* debtor not in close custody.

SEPARATION OF UNITED COUNTIES.

30. A person arrested or held to bail before the separation of a junior from a senior county, and liable to be imprisoned, shall be so imprisoned in the gaol of the county in which he was arrested; and all proceedings in the action in which a person was so arrested or held to bail, and all proceedings after judgment founded on the arrest or holding to bail, shall be carried on as if the arrest or holding to bail had taken place in such county as a separate county; and in case the proceedings are to be had in the junior county, all the records and papers relative to the case shall be transmitted to the proper officer of the junior county. R. S. O. 1887, c. 67, s. 28.

Proceedings under bailable process in cases of dissolution of a Union of Counties.

31. In case a debtor or other person is admitted to bail in a union of counties, and the union is afterwards dissolved, or one or more counties are separated therefrom, and in case

Gaol for debtor where United Counties, dissolved.

s.

such person after the dissolution of the union is surrendered or ordered to be committed to close custody, he shall be surrendered or committed to the sheriff of the county in which he is arrested, and be imprisoned in the gaol thereof. R. S. O. 1887, c. 67, s. 29.

LIABILITY OF SHERIFF FOR ESCAPE.

Sheriff only to be liable for damages sustained.

32. If a debtor in execution escapes out of legal custody, the sheriff, bailiff, or other person having the custody of the debtor, shall be liable only to an action for damages sustained by the person or persons at whose suit the debtor was taken or imprisoned, and shall not be liable to any other action in consequence of the escape. R. S. O. 1887, c. 67, s. 30.

DEBTORS IN CRIMINAL CUSTODY.

This Act not to extend to debtors in custody on criminal charges.

33. None of the foregoing provisions relative to the discharge from custody or admission to bail shall extend or be applicable to debtors who are at the same time in custody upon any criminal charge. R. S. O. 1887, c. 67, s. 31.

NOTES.

Ca. re. An order for arrest before judgment is equivalent to the old Writ of *capias ad respondendum*.

Cause of Action for \$100. The facts from which a cause of action appears should be shown, e. g., where the action is on a negotiable instrument it should be shown that it is overdue before action; *Clarke v. Clarke* (1842) 1 U.C.R. 395; *Ross v. Hurd* (1853) 1 P.R. 158; and still unpaid; *Pawson v. Hall* (1853) 1 P.R. 294; and it should appear reasonably therefrom either that the notes were payable to the plaintiff or that he is the lawful holder thereof; *Jones v. Gress* (1866) 25 U.C.R. 594; where the action is on a money bond it should show to whom the bond was made; *Case v. McVeigh* (1840) R. & J. Dig. 194, and if on another sealed instrument upon the nature thereof; *Clarke v. Clarke* (1857) 3 U. C. L. J. 149; when it is for work and labor, it should be shown that it was done at defendants request; *Hall v. Brush* (1840) R. & J. Dig. 194, and if for goods that they were sold and delivered to the defendant or on his request; *McDonnell v. Kelly* (1848) 4 U. C. R. 394; *Handley v. Franchi* (1866) L. R. 2 Ex. 34; *Diamond v. Cartwright* (1872) 22 C. P. 494; if more than one claim is sued upon, each should be properly stated; *McKenzie v. Reid* (1842) 1 U.C.R. 396; *Barry v. Eccles* (1846) 2 U. C. R. 383. In short, enough must be shown on the face of the affidavit to afford ground for an indictment for perjury; *Handley v. Franchi* (1866) L. R. 2 Ex. 34. For examples of sufficient affidavits as to debt see *Ellerby v. Walton* (1857) 2 P. R. 147 followed in *Scott v. Mitchell* (1881) 8 P. R. 518; *McIntyre v. Brown* (1859) 4 U. C. L. J. 85; *Ingraham v. Cunningham* (1830) Draper 109.

Good and Probable Cause. The facts and circumstances justifying the inference that the defendant unless forthwith apprehended is about to quit Ontario with intent to defraud must be set out; *Demill v. Easterbrook* (1864) 10 U.C.L.J. 246. The Judge must be satisfied that the defendant intends to leave forthwith; *Bowers v. Flower* (1859) 3 P. R. 62. If the circumstances warrant a reasonable man in the plaintiff's position drawing the necessary inferences the order will stand; *Scott v. Mitchell* (1881) 8 P. R. 518. Where the plaintiff bases his belief on the information of others their names should be given, see C. R. 518; *Gilbert v. Stiles* (1889) 13 P. R. 121, but if other affidavits are filed stating facts which would justify the belief, the defect will be cured; *Watson v. Charlton* (1876) 40 U.C.R. 142.

Intent to Defraud. Merely leaving for a temporary purpose is insufficient; *Shaw v. McKenzie* (1881) 6 S.C.R. 181. If the debtor, a resident, is about to withdraw permanently from the jurisdiction, that unexplained by him is quite sufficient to warrant his arrest, the inference drawn and justly drawn being, that in so departing, and withdrawing his person from the jurisdiction, there is intent to defraud. If he can on motion for his discharge show that he had no such intent, it is open for him to do so, but the intent will not be rebutted merely by the explanation that the debtor is going away in order to better his condition, or that his intention to depart is open and notorious; *Coffey v. Scane* (1895) 22 A.R. 269; 25 O.R. 22; *Robertson v. Coulton* (1881) 9 P.R. 16; *McVeain v. Ridler* (1897) 17 P. R. 353, but see *Tooth v. Frederick* (1891) 14 P. R. 287; *Scane v. Coffey* (1892) 15 P. R. 112; *Rogers v. Knowles* (1891) 14 P. R. 290 n. which must now be treated as over-ruled, see 17 P. R. 353.

Where a defendant although he made an affidavit, made no reference to his financial condition he was refused his discharge; *Vansickle v. Boyd* (1892) 14 P. R. 469.

Foreigners. A foreigner who contracts a debt in a foreign country, and comes to Ontario for a temporary purpose is not liable to arrest on leaving this province to return to his own country; *Frear v. Ferguson* (1851) 2 C. L. Chamb. 144; *Smith v. Smith* (1883) 9 P.R. 511. *Ex parte Gutierrez* (1879) 11 Ch. D. 298; *Rice v. Fletcher* (1889) 13 P. R. 46; *McPhaden v. Bacon* (1873) 9 U. C. L. J. N. S. 226; *Elgie v. Butt* (1899) 19 C. L. J. 59. But where a foreigner fraudulently absconds from his own country, and the creditor follows him, and finds that he intends to leave Ontario, not to return to his

own country, but to go to some other country, the order will be made for his arrest; *Brett v. Smith* (1855) 1 P. R. 309; *Butler v. Rosenfeldt* (1879) 8 P. R. 175; *Meyer Rubber Co. v. Rich* (1891), and if he has become a resident of Ontario, even though his intention is to return to the country where he has his legal domicile he will not be discharged; *Romberg v. Steenbock* (1854) 1 P. R. 200; *Blumenthal v. Solomon* (1856) 2 P. R. 51; *Palmer v. Rogers* (1860) 6 U. C. L. J. 188.

Where a defendant went to Chicago in 1866 owing debts contracted in Ontario and returned in 1877 for a temporary purpose he was discharged from arrest; *Clements v. Kirby* (1877) 7 P. R. 103, and this decision is said not to be inconsistent with the subsequent case of *Kersterman v. McLellan* (1883) 10 P. R. 122. Where the defendant left Ontario in 1882 owing debts and, having in the meantime acquired a residence and domicile in Michigan, returned to Ontario for a temporary purpose in 1883, his intent to return to Michigan was considered to be with intent to defraud, see per *Osler J. A., Erickson v. Brand* (1888) 14 A. R. 614, at p. 653. Where a defendant left Ontario to better his condition taking no assets with him and returned upon a temporary visit to attend his mother's funeral he was held to be liable to arrest; *McVeain v. Ridler* (1897) 17 P. R. 353.

Setting Aside Order. If the material on which the order is granted is irregular or insufficient it may be appealed from as any other order of a Judge may be appealed from, but if regularly obtained, that is on materials technically sufficient, it cannot (save in very rare and exceptional cases) be set aside on the merits, per *Osler J. A., Erickson v. Brand* (1888) 14 A. R. 614 at p. 649. On an application to set aside an order as distinguished from a motion to discharge the defendant from custody, no new material can be used; *Damer v. Busby* (1871) 5 P. R. 356; *Gilbert v. Stiles* (1889) 13 P. R. 121; *Scane v. Coffey* (1892) 15 P. R. 112. The order is not an *ex parte* order within C. R. 358, and a Judge has no authority to set aside his own order, *Jury v. Jury* (1895) 16 P. R. 375; *McNabb v. Oppenheimer* (1885) 11 P. R. 214, see also *Gossling v. McBride* (1897) 17 P. R. 585.

Ne Exeat. The writ of *ne exeat provincia* is a high prerogative writ originally applicable to purposes of state but afterwards extended to private transactions. It was confined to cases of equitable bail; *Dick v. Swinton* (1813) 1 Ves. & B. 373; *Jackson v. Petrie* (1804) 10 Ves. 164; 7 P. R. 368; *Whitehouse v. Partridge* (1818) 3 Swanst 377; 19 R. R. 216.

It would not be granted to a plaintiff residing in a foreign country; *Smith v. Nethersole* (1831) 2 Russ. & M. 450, but was granted against a foreigner in England only for a temporary purpose; *Flack v. Holm* (1820) 1 J. & W. 405; 21 R. R. 202 *sed quaere*.

The writ was formerly issued in actions of account; *Hannay v. McEntire* (1805) 11 Ves. 55; *Flack v. Holm* (1820) 1 J. & W. 405, 21 R. R. 202; against trustees, *Taylor v. Leitch* (1765) 1 Dick. 380; *Howkins v. Howkins* (1860) 1 Dr. & Sm. 75; against executors, *Pannell v. Taylor* (1823) T. & R. 100; against a husband for alimony, *Harn v. Harn* (1858) 4 U. C. L. J. 261; *Richardson v. Richardson* (1880) 8 P. R. 274, against a person who had induced the plaintiff by fraud to lend money on a mortgage of land to which he knew the mortgagor had no title; *Hunter v. Mountjoy* (1858) 6 Gr. 433.

Privilege from Arrest. The following persons are privileged from arrest. Members of Legislature, during and for 20 days before and 20 days after each session; R. S. O. c. 12, s. 50. Members of Parliament during and 40 days before and after each session; R. S. C. c. 11, s. 3. *Wadsworth v. Boulton* (1851) 2 C. L. Chamb. 76; *Goudy v. Duncombe* (1847) 1 Ex. 430, and an order for arrest against a member is irregular although not intended to be put in execution till the privilege expires; *Cassidy v. Stuart* (1841) 2 M. & G. 437.

Perhaps a consul, *Clarke v. Cretico* (1808) 1 Taunt 106, unless an ordinary resident appointed and acting as a consul; *Viveash v. Becker* (1814) 3 M. & S. 284, 15 R. R. 488. Judges of the County Courts and Surrogate Courts are privileged; *Adams v. Ackland* (1851) 7 U. C. R. 211; *Michie v. Allen* (1851) 7 U. C. R. 482.

A coroner or deputy coroner while preparing to hold an inquest, *Ex parte* the deputy coroner of Middlesex (1861) 6 H. & N. 501.

A magistrate attending court in discharge of his duty; *Clendenning v. Browne* (1854) 3 Ir. C.L.R. 115.

Clerks of County Courts, Deputy Clerks of the Crown and clerks of Assize while engaged in their official duties or going to or returning from their offices, *re Mackay v. Goodson* (1868) 27 U.C.R. 263.

Persons attending as parties, attorneys, witnesses or bail on judicial proceedings on, their way to, or returning therefrom whether compelled by process or not; *Lightfoot v. Cameron* (1777) 2 W. Bl. 1113; *Newland (or Newton) v. Harland* (1889) 8 Scott 70, 3 Jur. 679; *Childerston v. Barrett* (1811) 11 East 439; *Walpole v. Alexander* (1782) 3 Doug. 45.

The privilege extends to persons attending a police court as prosecutors; *Montague v. Harrison* (1857) 3 C.B.N.S. 292, and to parties and witnesses attending before arbitrators; *Spence v. Stuart* (1802) 3 East 89, 6 R.R. 549.

A common informer is not privileged; *Ex parte Cobbett* (1857) 7 E. & B. 955.

Barristers while on circuit, *Meekins v. Smith* (1791) 1 H. Bl. 636; *Adams v. Ackland* (1850) 7 U.C.R. 211, or attending to hear judgment, *Newland (or Newton) v. Harland* (1839) 8 Scott 70, 3 Jur. 679; but a barrister while returning from petty sessions where he had been engaged without a previous retainer was held not to be privileged; *Newton v. Constable* (1841) 2 Q.B. 157.

A solicitor on his way to and from attendance at Court for a client who is a party to a cause; *Williams v. Webb* (1843) 2 Dowl. N. S. 904; or attendance before a taxing master; *Re Hope* (1845) 9 Jur. 856. But if he unreasonably deviates from a direct way the privilege will be lost; *Jones v. Rose* (1847) 11 Jur. 379; *Walsh v. Wilson* (1851) 1 Ir. Ch. R. 610.

A parliamentary agent whilst going to or returning from the House on a matter there pending. *Ex parte Watkins* (1837) 1 Jur. 236; *Atty. Gen. v. Skinner's Co.* (1837) 1 Cooper 1.

A clergyman whilst officiating in a chapel is privileged; *Goddard v. Harris* (1831) 7 Bing. 320.

A person accused of a criminal charge whose attendance in Court is required is privileged from arrest on civil process when returning home from Court while out on bail or remand; *Gilpin v. Cohen* (1869) L.R. 4 Ex. 131, but not while returning home after acquittal; *Goodwin v. Lordon* (1834) 1 A. & E. 378; *Hare v. Hyde* (1851) 16 Q.B. 394; *Jacobs v. Jacobs* (1835) 3 Dowl. P.C. 675.

An officer executing process; *Welby v. Beard* (1826) Tay 304.

A grand juror whilst attending or going to or returning from court; *Mittleberger v. Clarke* (1848) 5 O.S. 718.

The principle upon which the privilege rests is that a suitor who has obtained a judgment in a civil action cannot use the process of the court for the purpose of withdrawing from another court a witness or other person without whose presence full justice cannot be done, *Montague v. Harrison* (1857) 3 C.B.N.S. 292, 299.

A slight deviation will not deprive the party of the privilege; *Pitt v. Coombs* (1834) 5 B. & Ad. 1078; but it does not exist while attending to other business; *Strong v. Dickenson* (1836) 1 M. & W. 488, or where after the adjournment of a hearing to a subsequent day, the person did not return home for want of means; *Spencer v. Newton* (1837) 6 A. & E. 630; 1 N. & P. 823; but will continue during an adjournment to another period on the same day, *Bishton v. Nesbitt* (1834) 1 M. & Rob. 347. A witness stopping on the way to the hearing at a place where papers he is required to produce have been kept is privileged even though while there he is sorting his papers to make the selection; *Rickett v. Gwiney* (1819) 1 Chit. 682.

It is only process to enforce civil obligations that is subject to privilege, but process for crimes or for acts in the nature of offences, e. g. contempt of court, is not; *R. v. Douglas* (1842) 3 Q. B. 825; *re Freston* (1883) 11 Q.B.D. 545; *re McIntyre* (1856) 2 P.R. 74.

Process for Contempt. A judgment or order by which a person is required to do some act whether it be to execute or to procure the execution of a deed or discharge of mortgage though it may involve the payment of money to some one other than the opposite party, is not a judgment or order for payment of

money within the act, and the same may be enforced by attachment. *Berry v. Donovan* (1893) 21 A. R. 14; *Bates v. Bates* (1880) 14 P. D. 17; *Pritchard v. Pritchard* (1889) 18 O. R. 173. An attachment lies against a receiver as an officer of the court for default in compliance with an order to pay into Court money found to be in his hands as receiver. *Fawkes v. Griffin* (1898) 18 P. R. 48.

Married Women. An order for commitment of a married woman for refusing to attend and be examined as a judgment debtor is not *mesne* or final process. *Metropolitan Loan and Savings Co. v. Mara* (1880) 8 P. R. 355; *Watson v. Ontario Supply Co.* (1890) 14 P. R. 96. Such imprisonment is for contempt. *Henderson v. Dickson* (1860) 19 U. C. R. 592. And where a married woman had been committed for failing to attend upon a judgment summons issued from a Division Court upon a personal judgment for a debt contracted while she was a widow, the Court refused to discharge her upon a *habeas corpus*. *Re Teasdall v. Brady* (1898) 18 P. R. 104.

Penalty. Compare R. S. O., c. 147, s. 24 where imprisonment is provided for default in payment of a penalty.

Bail to the Limits. Before 4th May, 1859, persons giving bail of the kind provided for in section 15, were bound by the condition of the bond to remain within the gaol limits, and if they departed therefrom even for a temporary purpose the bail became fixed with liability. The condition of the bond now omits that requirement; but the authorities relating to such bonds may be consulted as to the rights of the parties upon the bond now provided for. At common law the sheriff might admit to bail, but was under no obligation to do so. Prisoners in case of refusal had to resort to the proceeding *de homine replegiando*. By 23 Hen. vi c. 9, sheriffs were directed to let prisoners arrested by them, or in their custody out of prison upon reasonable securities of sufficient persons to keep their days. The amount of the security was not defined and as the cause of action expressed in the writ was in those days nearly always fictitious the Statute, 13 Car. II Stat. 2, c. 2, required the sheriff to take security only in £40 unless the true cause of action was expressed in the writ.

The Sheriff is therefore now obliged to admit all persons arrested on *mesne* process to bail if the sureties are sufficient. *Calcutt v. Ruttan* (1854) 13 U. C. R. 220. The bail taken by the sheriff is known as bail *below*, and the bond is conditioned to be void if special bail is put in, see C. R. 1030, and Form 199, *Holmsted & Langton* pp. 1174, 1459. Special bail is known as bail *above*, see C. R. 1036 *et seq.* If the defendant be not prepared to give either bail *below* or bail *above* but desires his liberty, he may give bail under s. 15, which is still known as "bail to the limits." The provisions of s. 15 apply to debtors in custody on *mesne* as well as on final process; *Clegg v. McNab* (1853) 1 P. R. 150, (and it is not necessary that the debtor should be actually conveyed to gaol before the bail is taken, *Smith v. Foster* (1861) 11 C. P. 161).

Care must be taken in the preparation of the bond to follow the words of the Statute as to the condition thereof as in the event of the bond not being in accordance with the act, the sheriff is liable, as for an escape, even though the plaintiff may have taken an assignment. *Kingan v. Hall* (1864) 23 U.C.R., 503; *Hicks v. Godfrey* (1865) 15 C. P. 262.

A breach of the bond would not be committed by failure to attend upon an examination unless an order requiring the debtor to attend has been made or its equivalent, i. e. an appointment by a duly authorized examiner, issued; *Hicks v. Godfrey* (1865) 15 C. P. 262.

Discharge from Custody. See C. R. 1047; *Holmsted & Langton* p. 1181.

Escape. Sec. 32 is substantially identical with English Statute 5 & 6 Viet., c. 98, s. 31, for which 50-51 Vict. c. 55, s. 16 Imp. is now substituted. The measure of damages in the value of the custody of the debtor at the time of his escape; *Arden v. Goodacre* (1851) 11 C. B. 371; *R. v. Sheriff of Leicestershire* (1850) 9 C. B. 659; *Moore v. Moore* (1858) 25 Beav. 8; *Harkin v. Raddon* (1859) 1 Chy. Chamb. 133, and that value is to be estimated by seeing what the value of the effect of the pressure is likely to be; *Macrae v. Clarke* (1866) L. R. 1 C. P. 403, but the damages will be confined to the amount for which bail is ordered to be taken. *Taylor v. McEwan* (1867) 27 U. C. R. 126.

2. PARENT AND CHILD.

CHAPTER 168.

An Act respecting Infants.

CUSTODY OF INFANTS, ss. 1, 2.
 INFANT'S REAL ESTATE, ss. 3-10.
 GUARDIANS, ss. 11-19.

Appointment, ss. 11-15.
 Direction by Court, s. 16.
 Removal, s. 17.
 Authority, s. 19.

WHAT COURT OR JUDGE HAS JURIS-
 DICTION UNDER CERTAIN SEC-
 TIONS, s. 18.

POWER OF SURROGATE COURTS IN MAT-
 TERS OF GUARDIANSHIP, ss. 20,
 21.

COMPULSORY ATTENDANCE OF WIT-
 NESSES, s. 22.

FATHER'S AUTHORITY IN RESPECT OF
 RELIGIOUS FAITH OF CHILD,
 s. 23.

HER MAJESTY, by and with the advice and consent of the
 Legislative Assembly of the Province of Ontario, enacts
 as follows:—

CUSTODY OF INFANTS.

1.—(1) The High Court or Surrogate Court, or any Judge of either Court, may, upon the application of the mother of an infant (who may so apply without next friend) make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as the Court or Judge may think just.

Court may
 make order as
 to custody of
 and right of
 access to
 infants.

(2) The Court or Judge may also make order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant is entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father or the value of the estate the Court or Judge thinks just and reasonable. R. S. O. 1887. c. 137, s. 1.

Order as to
 maintenance.

Order not to be made in favour of mother guilty of adultery.

2. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person. R. S. O. 1887, c. 137, s. 2.

INFANT'S REAL ESTATE.

A sale of the estate of infants may be authorized.

3.—(1) Where an infant is seised or possessed of or entitled to any real estate in fee or for a term of years, or otherwise howsoever, in Ontario, and the High Court is of opinion that a sale, lease or other disposition of the same, or of a part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by a person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper.

No sale contrary to a devise, etc.

(2) But no sale, lease, or other disposition shall be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant or for his use. R. S. O. 1887, c. 137, s. 3.

The application to be by next friend or guardian.

4. The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards unless the Court otherwise directs or allows. R. S. O. 1887, c. 137, s. 4; 60 V. c. 3, s. 3.

When a substitute may be appointed to convey.

5. Where the Court deems it convenient that a conveyance should be executed by some person in the place of an infant, the Court may direct some other person in the place of the infant to convey the estate. R. S. O. 1887, c. 137, s. 5.

Deeds executed in behalf of infants to be valid.

6. Every such conveyance, whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. R. S. O. 1887, c. 137, s. 6.

The Court to direct the application of proceeds.

7. The moneys arising from such sale lease or other disposition shall be laid out, applied and disposed of in such manner as the Court directs. R. S. O. 1887, c. 137, s. 7.

8. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of, if no sale or other disposition had been made thereof. R. S. O. 1887, c. 137, s. 8.

Quality of surplus moneys upon sale of real estate.

9. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court or Judge may direct the payment of such sum in gross, out of the purchase money to the person entitled to dower, as may be deemed upon the principles applicable to life annuities a reasonable satisfaction for such estate; or may direct the payment to the person entitled to dower of an annual sum, or of the income or interest to be derived from the purchase money, or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money, or any part thereof, as may be necessary. R. S. O. 1887, c. 137, s. 9.

In cases of dower a composition may be made.

10.—(1) Where by a will or other instrument property is given beneficially to any person for his life with a power of devising or appointing the same by will in favour of his children, or in favour of one or more of his children, the High Court may on the application, or with the consent, of the said tenant for life, order that such portion of the proceeds of the said property, as it may consider proper shall be applied towards the maintenance or education of any infant child in whose favour the said power might be exercised, notwithstanding there is a gift over in the event of there being no children to take under the said power, or notwithstanding there is a right conferred upon the said tenant for life or upon some other person in the said event to make a disposition of the said property in favour of some person or persons other than the said children. 57 V. c. 21, s. 1.

Order for maintenance where estate settled for life with power of appointment in favour of children of life tenant.

(2) This section shall extend to property coming within its terms where the will or other instrument under which it is held has gone into operation or has been executed before the passing hereof. 57 V. c. 21, s. 2.

Application of section.

APPOINTMENT OF GUARDIANS.

11. The Surrogate Court for the county within which an infant resides may appoint the father of the infant to be guardian; or may with the consent of the father appoint

Right to appoint guardians.

some other suitable person or persons; but if the infant is of the age of fourteen years or over, neither of such appointments shall be made without the consent of the infant; or, if the infant has no father living or any legal guardian authorized by law to take the care of his person and the charge of his estate, the said Court may appoint a guardian or guardians of the infant; and letters of guardianship granted by a Surrogate Court shall have force and effect in all parts of Ontario; and an official certificate of the grant may be obtained as in the case of letters of administration; and a return of every appointment and removal of a guardian shall be made by registrars respectively to the Surrogate Clerk in like manner as is required by *The Surrogate Courts Act* in the case of grants of probate or administration; but this section shall not be construed as depriving the High Court of jurisdiction in such matters. R. S. O. 1887, c. 137, s. 10.

Rev. Stat. c.
59.

When Judges
of Surrogate
Courts may
appoint guar-
dians.

12. Upon the written application of the infant, or the friend or friends of the infant, residing within the jurisdiction of the Surrogate Court to which application is made, and after proof of twenty days' public notice of the application, in some newspaper published within the county or district of the Surrogate Court to which the application is made, the Judge of the Court may appoint some suitable and discreet person or persons to be guardian or guardians of the infant. R. S. O. 1887, c. 137, s. 11; 55 V. c. 29, s. 1.

Such guar-
dians to give
security by
bond.

Rev. Stat.
c. 220.

Condition of
bond.

13. Subject to the provisions of *The Act respecting the Acceptance of Certain Incorporated Companies as Sureties*, the Judge shall take from every guardian appointed under sections 11 and 12, a bond in the name of the infant, in such penal sum and with such securities as the Judge directs and approves, having regard to the circumstances of the case, and such bond shall be conditioned that the said guardian will faithfully perform the said trust, and that he, or his executors or administrators, will, when the said ward becomes of the full age of twenty-one years, or whenever the said guardianship is determined, or sooner if thereto required by the said Surrogate Court, render to his ward, or to his executors or administrators, a true and just account of all goods, moneys, interest, rents, profits or other estate of the ward, which shall have come into the hands of the guardian, and will thereupon without delay deliver and pay over to the said ward, or to his executors or administrators, the estate or the sum or balance of money which may be in the hands of the said guardian belonging to the ward, deducting therefrom and retaining a reasonable sum for the expenses and charges of the guardian, and the bond shall be recorded by the registrar of the Court in the books of his office. R. S. O. 1887, c. 137, s. 12.

Bond to
be recorded.

On death of
father, mother

14.—(1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone,

when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. to be guardian alone, or jointly with others.

(2) Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the High Court or Surrogate Court, or any Judge of either Court, may from time to time appoint a guardian or guardians to act jointly with the mother, as such Court or Judge shall see fit. R. S. O. 1887, c. 137, s. 13.

15.—(1) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of the infant (if the infant be then unmarried), and where guardians are appointed by both parents they shall act jointly. Mother may appoint guardian in certain cases.

(2) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the Court or a Judge after her death, if it be shewn to the satisfaction of the Court or a Judge that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act as aforesaid, or make such other order in respect of the guardianship as the Court or Judge shall think right. R. S. O. 1887, c. 137, s. 14.

16. In the event of guardians being unable to agree among themselves or with the father upon a question affecting the welfare of an infant, any of them or the father may apply to the Court for its direction, and the Court, or Judge, may make such orders regarding the matter in difference as to the Court or Judge seems proper. R. S. O. 1887, c. 137, s. 15. Direction by Court on matters affecting infant.

17. Testamentary guardians and trustees, and guardians appointed or constituted by virtue of this Act shall be removable by the Court or Judge, for the same causes as other guardians and trustees. R. S. O. 1887, c. 137, s. 16. Removal of guardians

18. The Surrogate Court or Judge referred to in sections 1, 14, 15, 16 and 17, is the Surrogate Court or Judge of the county where the infant or respondents, or any of them, reside. R. S. O. 1887, c. 137, s. 17. What Surrogate Court or Judge to act.

Authority of Guardians.

19. Unless where the authority of a guardian appointed or constituted under sections 14 or 15 is otherwise limited, the guardian of any infant appointed or constituted under or by virtue of this Act during the continuance of his guardianship, Guardian's authority.

1. Shall have authority to act for and on behalf of the said ward; To act for ward.
2. May appear in any Court and prosecute or defend any action in his or her name; To appear in actions.

To manage
real and per-
sonal estate,
etc.

To bind ward
an apprentice.

Limitation of
apprentice-
ship.

3. Shall have the charge and management of his or her estate, real and personal, and the care of his or her person and education ;

4. And in case the infant is under the age of fourteen years, ma with the approbation of two of Her Majesty's ustices of the Peace and the consent of he ward (or in case the infant is not under the age of fourteen years, then with the consent of the ward only), place and bind him or her an apprentice to any lawful trade, profession or employment; the apprenticeship, in case of males, not extending beyond the age of twenty-one years, and in case of females, not beyond the age of eighteen years, or the marriage of the ward within that age. R. S. O. 1887, c. 137, s. 18.

POWERS AND PRACTICE OF SURROGATE COURTS.

In matters of
guardianship,
Courts to have
same powers
for examina-
tion of wit-
nesses and en-
forcing de-
crees, etc., as
in testamen-
tary matters.

Rev. Stat.
c. 59.

20. In all matters and applications touching or relating to the appointment, control or removal of guardians, and the security to be given, the custody, control of or right of access to an infant, and otherwise, the several Surrogate Courts shall have the like powers, jurisdiction and authority for the examination of witnesses, the production of deeds and writings, and generally for the enforcing of all orders, and judgments made or given as are given to them by *The Surrogate Courts' Act* in matters testamentary ; and all orders and judgments may be appealed from to a Divisional Court of the High Court of Justice in the manner provided in the said Act in respect of appeals in matters testamentary. R. S. O. 1887, c. 137, s. 19 ; 58 V. c. 13, s. 46.

Procedure un-
der this Act.

Rev. Stat.
c. 59.

21. The practice and procedure shall, except where otherwise provided for by Rules under *The Surrogate Courts' Act*, conform, as nearly as the circumstances of the case will admit, to the practice and procedure prescribed by the said Act, and all the powers given by the several sections of that Act, to the Judges mentioned in sections 86 and 88 of the said Act, may from time to time be exercised by them, for the purpose of simplifying and expediting the proceedings, and for fixing and regulating the fees to be taken by officers and by solicitors and counsel respectively for business and proceedings done and taken under this Act in the several Surrogate Courts. R. S. O. 1887, c. 137, s. 20.

Court or
Judge may
compel the
attendance of
witnesses.

22. The attendance of any person to testify on oath respecting any matter in any proceeding under this Act may be enforced by order made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in an action, or affidavits respecting such matter may be received. R. S. O. 1887, c. 137, s. 21.

Religious
education.

23. Nothing herein contained shall be construed to change the law as to the authority of the father in respect of the religious faith in which his child is to be educated. R. S. O. 1887, c. 137, s. 22.

NOTES.

Custody. At common law the father was entitled to the custody of his infant children, and a very strong case was required before, in Chancery, his rights would be interfered with; *Re. Finn* (1848) 2 DeG. & Sm. 457. In *Smart v. Smart* (1892) A.C. 425, the Court refused to take children from the custody of the mother where the father was intemperate and had by his conduct rendered it impossible that he and his wife could live together.

The father's rights were modified in England by Talfourd's Act (2 & 3 Vict. c. 54) by which the Court was given an absolute control of infants under 7 years of age; *Warde v. Warde* (1849) 2 Ph. 786, and when, in the exercise of that absolute control, it was of opinion that a child within the statutory age should be removed from the father's custody, other children were also removed because of the principle that one child should not be separated from the others. In Ontario an Act somewhat similar to Talfourd's Act was in operation until 1887, the age within which control was given to the Courts being fixed at 12 years; R.S.O., 1887 c. 130.

In England the Custody of Infants Act 1873 (36 & 37 V., c. 12) increased the statutory age to 16.

Discretion Now Absolute. S. (1) of the present act gives the Court an absolute discretion and under it orders have been made which would not have been made under the former law. The sub-section (1) is copied from the English Guardianship of Infants Act (49 & 50 V., c. 27) s. 5. The discretion therein given is a judicial discretion and must be exercised having regard to matters mentioned in the section. These are (1) the welfare of the infant (2) the conduct of the parents, and (3) the wishes as well of the mother—who is put first—as of the father. On the first point in cases of children of tender years it is important for children that they should be brought up in their tender years on terms of affection with one another, and also that they should know both their parents. As to the conduct of the parents, the whole conduct on each side must be taken into consideration, and the parents are not to be treated in an unequal manner,—they are to be put on an equality—except that there may be some conduct of the mother, which may be much more important in regard to her children than that of the father and *vice versa*. The wishes of each parent must be considered without regard to any rights to which before the act, the father was entitled. The act is a mother's act, and is intended to interfere to a very great extent with regard to the rights of the father which are no longer paramount; *Re. A. & B.* (1897) 1 Ch. 786.

Mr. Justice Street has stated the law as follows:—

Where a husband has done no wrong and is able and willing to support his wife and child the Court will not take away from him the custody of the child, merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. The discretion given by the act is to be exercised as a shield for the wife where a shield is required against a husband with whom she cannot be required to live; it is not to be exercised as a weapon put into the hands of a wife, with which she may compel an inoffending husband to live where she sees fit. The husband still has the right to say within reasonable bounds where he and his family shall live, and if his wife chooses to live in another place she must leave her children behind her; *Re Mathieu* (1898) 28 O.R. 546. The case of *Re A. & B.* (1897) 1 Ch. 786, was not cited by counsel nor referred to by the Court in *Re Mathieu*. It is submitted that the reasonableness of the conduct of the wife and the welfare of the wife should have received consideration and a compromise made if neither party was really in fault. In *Re A. & B.* the custody of the infants was committed to the father and mother each for six months in each year.

Where the husband and wife had separated and a person who was objectionable to the wife was living with the husband and the husband proposed to

leave the jurisdiction with the child—a boy of ten years—the custody was committed to the mother; *Re Witten* (1887) 57 L. T. 336.

Where the father was a man of drunken habits and evil conversation and the mother was a moral and sober woman who had left him for just cause, and the maternal grandmother was able and willing to support the mother and her children, the children aged 5 and 8 respectively, were left in the custody of the mother; *Re Dickson* (1888) 12 P. R. 659.

Where a foreign court having jurisdiction, had, in granting her a divorce, given the custody to the mother, and the husband had been guilty of misconduct, the child—a girl aged eight years—was given into the custody of the mother; *Re Davis* (1894) 25 O. R. 579.

Where the father was blameless and the mother had left him without any cause except she preferred to live in Ontario instead of Florida, the custody was given to the father; *Re Mathieu* (1898) 29 O. R. 546; see also *Constable v. Constable* (1886) 34 W. R. 649.

Where the father had been guilty of adultery, and had made unfounded insinuations against his wife's chastity, and had used foul and indecent language to her and the children and had been harsh and, at times, cruel to her and them, the custody was given to the mother; *Re Young* (1898) 29 O. R. 665.

Where both father and mother had been guilty of matrimonial misconduct, and both were able and willing to support the children, the custody was committed to each for six months in each year; *Re A. & B.* (1897) 1 Ch. 786.

In an alimony suit the custody can be given to the wife without a petition; *Munro v. Munro* (1868) 15 Gr. 431.

Rescinding Order. Where a husband had in divorce proceedings been declared unfit to have the custody of the children, aged 15 and 10, and the custody was given to the wife, the Court, on its afterwards appearing that the mother was no longer fit to have the custody, and that the father was leading a respectable life, transferred the custody to the father; *Witt v. Witt* (1891) P. 163.

Separation of Children. All the children should be brought up together and the Court should not divide the custody; *Warde v. Warde* (1849) 2 Ph. 768; *Re Elderton* (1883) 25 Ch. D. 220; *Smart v. Smart* (1892) A.C. 425; *Re Young* (1898) 29 O.R. 665.

Agreements Respecting Custody. The general rule is indisputable that any agreement by which a father relinquishes the custody of the child and renounces the rights and duties which, as a parent, the law casts upon him is illegal as contrary to public policy; *Vansittart v. Vansittart* (1858) 2 DeG. & J. 259; *Roberts v. Hall* (1882) 1 O. R. 388; *Kennedy v. May* (1863) 7 L.T. 819; *Hope v. Hope* (1857) 8 DeG. M. & G. 731. and a consent by a father, though for valuable consideration may be at any time revoked; *Reg. v. Smith*, (1853) 22 L.J. Q.B. 116. But such a contract may be valid if the conduct of the father has been such that the Court would have removed the children from his custody; *Swift v. Swift* (1865) 34 Beav. 266; 4 DeG. J. & S. 710. And where on a compromise of a divorce suit it was agreed that the children should be kept at such school as the husband should direct, and that their holidays be passed at such places as the trustees of a deed of separation should direct, the stipulation as to the holidays was enforced; *Hamilton v. Hector* (1871) L.R. 6 Ch. 701.

Maintenance. Subsection (2) of section 1 is not in The English Act. The Court always had power to order maintenance out of the property of an infant, but had no power to order the father to maintain him; *Wellesly v. Beaufort* (1828) 2 Russ. 19; 31 R.R. 15.

Mother Guilty of Adultery. Sec. 2 has come down through the several revisions of the statutes from 18 V. c. 126 s. 4. It places a limitation upon the rights of the mother which does not exist, except as a matter of discretion, in England.

Infant's Real Estate. Except under order of the Court, no lease can be made of an infant's real estate which will be binding after his minority has ceased; *Clarke v. McDonell* (1890) 20 O.R. 564. An estate tail in possession may be

sold under the Act, *Re Gray* (1895) 26 O.R. 355. Section 3 cannot be used to sell an infant's estate for a parent's benefit; *Re Hibbard* (1891) 14 P.R. 177; *re McDonald* (1850) 1 Gr. 90; *Kellar v. Tache* (1868) 1 Ch. Chamb. 388. Our statute has no English equivalent. It appears to have been taken from the New York Statutes; see *Rev. Stat. New York* (1852) pp. 359, 360. The Court may order a sale to pay debts of the deceased father of the infants; *Re Barker* (1875) 6 P.R. 22; but sale will not be directed to pay debts of the ancestor to which the infant's estate is liable unless the estate will sustain loss or the creditors are about to sue; *Re Boddy* (1858) 4 Gr. 144.

A mother petitioning for sale will be required to release a life interest vested in her; *Re Kennedy* (1868) 1 Ch. Chamb. 97.

The sale can only be made when necessary for maintenance or salvage; and where the rents were greater than the interest on the produce would amount to, the application was refused; *Re Phelan* (1857) 6 P.R. 259. It is not the immediate but the ultimate benefit to the infants which must be regarded; *Re McDonald* (1868) 1 Ch. Chamb. 97. It is doubtful if a suggested depreciation by reason of the extension of a city in a different direction is a depreciation within s. 3; *Re Wilson* (1877) 7 P.R. 244. The Court may allow an exchange under the words sale, lease "or other disposition"; *Re Bishoprick* (1874) 21 Gr. 589.

Contrary to Devise or Grant. Where the ultimate devise was in favor of one of the infants only, with provisions for substitution, *Re Callicott* (1868) 1 Ch. Chamb. 182, and where the property was to be equally divided among the children on the youngest attaining 21 years, *Re Smith* (1875) 6 P.R. 282, and where there was a devise over to collaterals, *Re Wilson* (1877) 7 P.R. 244, it was held that the sale would be in violation of s. 3 (2) and the applications were refused.

Consent of Infants. The consent of a majority is sufficient. *Re Harding* (1889) 13 P.R. 112, see R.S.O. c. 1; s. 8 (34). Where some of the infants are out of the jurisdiction, their consent may be dispensed with; *Re Lane* (1882) 9 P.R. 251, and so may the consent of an imbecile; *Re Delanty* (1889) 13 P.R. 143. The consent is required only to a sale, not to a particular offer, and where the infants had consented to the acceptance of a particular offer which was not carried out, a subsequent offer at a lower price was accepted without a further examination; *Re Bennett* (1897) 17 P.R. 498.

The consent is ascertained by an examination of the infant under C.R. 966, and must be annexed to the petition. A certificate of the examination is insufficient; *Re Axford* (1875) 6 P.R. 192. The practice as to applications is laid down in C.R. 960-970; *Holmsted & Langton* pp. 1124-1132.

A subsequent purchaser will not be allowed to object to a title upon the ground that the order for sale did not disclose jurisdiction when it appears on the face of the order that the sale is for the infant's benefit; *Blean v. Blean* (1885) 10 O.R. 693.

Rights of Succession not to be Altered. The conversion from realty into personality is not to have any greater effect than is necessary for accomplishing the immediate purpose so far as the rights of persons claiming in succession to the infant are concerned; *Fitzpatrick v. Fitzpatrick* (1874) 6 P.R. 134, see *Lunatics, R.S.O. c. 65, s. 13* and cases cited p. 246.

Dower. Where the consent required by s. 9 could not be obtained because of the lunacy of the dowress an order was made barring her estate; *re Colthart* (1882) 9 P.R. 356; see now R.S.O. c. 164, ss. 13, 16.

Order for Maintenance. The provision for maintenance of an infant presumptively entitled in s. 10 is hard to understand. The section speaks of the "proceeds of the property." By what authority is the property to be sold? Upon what principle is the Court to proceed in depriving the contingent remainderman of his property? See the section criticized, 14 C.L.T., 207.

Surrogate Guardians. Guardians appointed by the Surrogate Court who have given security, have the authority conferred upon them by s. 19 over the property of the infant. Without an appointment by the Surrogate Court, a father would have no power to give an effectual discharge for money payable to his infant child. The guardian so appointed has power to receive and give an effectual discharge for a legacy payable to the infant; *Huggins v. Law* (1887) 14 A. R. 383. When it is necessary to seek the aid or intervention of the Court in respect of moneys belonging to an infant which have not reached

the guardians' hands, the Court may require them to be paid into Court; *Mitchell v. Richey* (1867) 13 Gr. 445. *Re Mathers* (1898) 18 P. R., 13.

Insurance moneys may be paid to guardians appointed by a Surrogate Court, R. S. O., c. 203, s. 155 (2); but not to mere testamentary guardians; *Campbell v. Dunn* (1892) 22 O. 98.

A guardian appointed by a Surrogate Court may without leave of the Court make a lease of the infant's real estate for the term of the infants minority, but not for a longer period; *Clarke v. MacDonell* (1898) 20 O. R. 564.

The provisions of secs. 155-157 of the Ontario Insurance Act, R. S. O. c. 203, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent there with.

"And therefore a tatrix of infants duly appointed in the Province of Quebec is not entitled *qua tatrix* to moneys of the infant paid into Court under sec. 157 of the Act, but she may, under sec. 155, s.s. 2, be appointed a trustee of the fund and receive it, upon giving proper security," *re Berryman* (1897) 17 P. R., s. 73.

Mother to be Guardian. S. 14 is taken from the English "Guardianship of Infants Act (1880)" (49 & 50, V. c. 27) s. 2. Before that act a father could appoint a guardian by testament and that guardian was sole guardian notwithstanding that the mother might survive; *per Rigby L. J.*, *re A. & B.* (1897) 1 Ch. 786, 793.

Mother may Appoint Guardian. S. 15 is taken from the English Act next above mentioned, s. 3 (1) (2). By it a new right is given to the mother; *per Rigby L. J.* (1897) 1 Ch. 793. The appointment must be by will, or by an instrument under seal; *re Chilliman* (1894) 25 O. R. 268. Where a guardian is appointed by the mother to act during the lifetime of the father, the person so appointed does not become guardian by the mere act of appointment, the appointment must be confirmed by the Court, and until confirmation it has no binding effect. The appointment must be made jointly with the father. The confirmation by the Court cannot take place during the mother's lifetime. The appointment can be confirmed only when the Court is satisfied that the father is for some reason unfit to be sole guardian. Although the appointment be not "jointly with the father" effect will be given to it; *Re G.* (1892) 1 Ch. 292.

Direction of Court on disagreement. S. 16 is from s. 3 (3) of the English Act of 1886.

Religious Faith. The wishes of the father as to the religion of the child must be regarded by the Court and must be enforced unless there is some strong reason for disregarding them. *Re McGrath* (1893) 1 Ch. 143; *re Chilliman* (1894) 25 O. R. 268; *Re Ross* (1876) 6 P. R. 285; *Re Agar-Ellis* (1878) 10 Ch. D. 49; (1883) 24 Ch. D. 317; *Re Besant* (1879) 11 Ch. D. 508; *Re Scanlan* (1888) 40 Ch. D. 200; *Davis v. Davis* (1862) 10 W. R. 245; *Re Newbery* (1866) L. R. 1 Ch. 263.

The making of the children wards of the Court by the father is not an abandonment of his parental authority; *Re Agar-Ellis* (1878) 10 Ch. D. 49.

A contract entered into before marriage that the children shall be brought up in a particular religion is not binding upon the father and cannot be enforced. *Re Browne* (1852) 2 Ir. Ch. R. 151; *Andrews v. Salt* (1873) L. R. 8 Ch. 622; *Re Meades* (1871) Ir. L. R. 5 Eq. 98; *Re Andrews* (1873) L. R. 8 Q. B. 154.

If a good and honest father, taking into his consideration the past teaching to which his children have been in fact subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare temporal and spiritual that he should take means to counteract that teaching and undo its effect, he is by law the sole judge of that; *Re Agar-Ellis* (1878) 10 Ch. D. at p. 74. During the father's lifetime the right to control their religion may be forfeited (a) by moral misconduct; *Wellesley v. Wellesley* (1829) 2 Bli. N. S. 124; 31 R. R. 15 (b) by the profession or immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; *Shelley v. Westbrook* (1821) Jacob 266; 23 R. R. 47; *Thomas v. Roberts* (1850) 3 DeG. & Sm. 758; see *Re Besant* (1879) 11 Ch. D. 508 or (c) by a course of conduct which would make a resumption of his authority injurious towards the children; *Re Newton* (1896) 1 Ch. 740—see these propositions laid down by the Court of Appeal; *Re Agar-Ellis* (1878) 10 Ch. D. 49 at p. 72.

In *re Newton* (1896) 1 Ch. 740, a Roman Catholic father had allowed his two infant children by a deceased Protestant wife to be brought up in the Protestant

faith until one was fifteen and the other eleven years of age, and the Court after an interview with the elder was of opinion that it was for the benefit of the children that they should continue to be educated as Protestants upon the ground that by his conduct he had abdicated the right to control their religious training.

Upon a judicial separation obtained by the wife for cruelty and adultery, the Court refused to give her the custody of the children as she intended to bring them up as Roman Catholics, a religion different from that of the father—although both husband and wife were Roman Catholics at the time of the marriage, and the children aged nine and seven years had, during the cohabitation been educated in that faith; *D'Alton v. D'Alton* (1878) 4 P. D. 87. The children were, therefore committed to the custody of a school mistress with right of access to both parents, *ib.*

Where a child's religious convictions are so deeply rooted that interference by the father would be injurious to the happiness and welfare of the child, the Court has jurisdiction to restrain a father from interfering, but such jurisdiction must be exercised with extreme caution; *Re Meades* (1871) Ir. R. 5 Eq. 98. *Re Grimes* (1877) Ir. R. 11 Eq. 465.

Where religious instruction in a different faith from that of the father had been given by the mother without his consent or knowledge the court declared that they should be brought up in the father's faith and restrained the mother from taking them to her place of worship without his consent; *Re Agar-Ellis* (1878) 10 Ch. D. 49.

On a contest between the father and mother as to the custody of a child of tender years the question of religious faith is not a pressing one, and if the custody is given to the mother, leave will be reserved to the father to raise the question when the child is older; *Re Dickson* (1888) 12 P.R. 659.

After the father's death his children must be educated in his faith; *Skinner v. Orde* (1871) L.R. 4 P.C. 60. In making an order giving the custody of a child of a Roman Catholic father to a Protestant mother, the Court ordered that at a fitting age she should be instructed in the doctrines of the Roman Catholic Church and directed that when she had arrived at seven years of age a further application to the Court should be made touching her guardianship and religious education; *Austin v. Austin* (1865) 34 Beav. 258; affirmed (1865) 4 DeG. J. & S. 716. Where a child was baptized a Roman Catholic at the instance of the father who shortly afterwards died and the Protestant mother brought the child up a Protestant until she was eight and a half years of age, the Court declined to enquire whether the child had acquired religious views, and ordered the child to be brought up in the Roman Catholic faith; *Hawksworth v. Hawksworth* (1871) L.R. 6 Ch. 589. A mother who brings a child up in a different religion from that of the father may be removed from the office of guardian; *Re Hunt* (1843) 2 Connor & Lawson 373; *Skinner v. Orde* (1871) L.R. 4 P.C. 60; but the Court will not take a child of tender years out of the custody of its mother, merely upon the ground of different religious faith; *Austin v. Austin* (1865) 34 Beav. 257.

The directions of the father's will as to religion must be followed; *Davis v. Davis* (1862) 10 W.R. 245.

But where a child, notwithstanding the father's faith or the directions in his will has been brought up in a different faith and the Court is satisfied upon an interview that the distinctive doctrines have taken a firm hold upon his mind, and that a change would not be for his welfare, it is too late to give directions that he be educated in the faith of his father; *Stourton v. Stourton* (1857) 8 De.G. M. & G. 760; *Witty v. Marshal* (1841) 1 Y. & C. C.C. 68; *Re Browne* (1858) 8 Ir. Ch. R. 172; but these cases are not to be extended; *Hawksworth v. Hawksworth* (1871) L.R. 6 Ch. 539; *Re Agar-Ellis* (1878) 10 Ch. D. 49.

Notwithstanding that under s. 14 (1) the mother is guardian when no guardian has been appointed by the father, additional guardians may be appointed by the Court under sub-section 2, so that the faith of the father may be observed; *Re Scanlan* (1888) 40 Ch. D. 290; *Re Magees* (1892) 31 L.R. Ir. 513.

And where there are joint guardians an order may be made directing the children to be brought up in the faith of the father without interfering with the mother's custody; *Re Montague* (1884) 28 Ch. D. 82.

Where the children have with the father's consent been baptized and educated during his lifetime in the mother's faith such education may be continued after his death; *Re Garnett* 20 W.R. 222; *Re Clark* (1882) 21 Ch. D. 817, notwithstanding a contrary direction in the father's will; *Hill v. Hill* (1862) 10 W.R. 400.

SUPREME COURT APPEALS.

60-61 VICTORIA. (DOMINION.)

CHAPTER 34.

An Act respecting the Supreme Court of Ontario and the Judges thereof.

(Assented to 29th, June 1897.)

Preamble.

Whereas, by Acts of the Legislature of the Province of Ontario it is provided to the effect hereinafter mentioned with respect to appeals to the Supreme Court of Canada, and it is desirable to confirm hereby the provisions of the said Acts; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

No appeal to
Supreme
Court of
Canada from
Court of
Appeal for
Ontario.

Exceptions.

1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Appeal for Ontario, except in the following cases:—

(a) Where the title to real estate or some interest therein is in question;

(b) Where the validity of a patent is affected;

(c) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs;

(d) Where the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

(e) In other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

(f) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

Judges of
Supreme
Court of
Ontario to
reside at or
near Toronto.

2. The judges of the Supreme Court of Judicature for Ontario shall reside at the City of Toronto or within five miles thereof, but leave to reside elsewhere in the Province for any specified time may be granted from time to time by the Governor in Council.

NOTES.

Act Not Retrospective. The Act limiting the right of appeal does not apply to proceedings which were pending on 29th June 1897, when it came into force; *Hyde v. Lindsay* (1898) 18 C.L.T. 373.

Preamble. The Act referred to in the preamble is R.S.O. c. 49, s. 2, which provides that "in any action respecting property or civil rights whether for damages or for specific relief the judgment of the Court of Appeal for Ontario shall be final except in certain cases, which exceptions are similar to the exceptions in the Dominion Act. This Act was declared by the Supreme Court more than once to be *ultra vires* and not binding upon it; *Clarkson v. Ryan* (1890) 17 S.C.R. 251. The Ontario Act contains no provision similar to s. 1 (f).

Title to Land. Where a second mortgage for more than \$1,000 upon land is attacked as a fraud upon creditors and pending the action the land is sold and the surplus over the first mortgage is less than \$1,000 no appeal will lie. The title to land is not then in question; *Jermyn v. Tew* (1898) 28 S.C.R. 497; Where a lessee claimed to hold the property under a verbal agreement of sale title to land was in question; *Blachford v. McBain* (1890) 19 S.C.R. 42.

Where a defendant has innocently encroached with his building upon plaintiff's land and there is no contest as to the bare ownership of the piece in dispute, but the defendant claims to hold it on payment of reasonable indemnity title is in question; *Delorne v. Cusson* (1897) 28 S.C.R. 66, and where the action is to establish boundaries an appeal lies; *McGoey v. Leamy* (1897) 27 S.C.R. 193. In an action to quash a by-law for the expropriation of land the title to land is in question; *Murray v. Westmount* (1897) 27 S.C.R. 579. The words "title to real estate or some interest therein" would include an easement; *Chamberland v. Fortier* (1894) 23 S.C.R. 371.

Amount in Controversy. Subsections (c) and (f) must be read together; (f) is similar to the provision respecting appeals from Quebec (54 & 55 V. c. 25, s. 3.) The proper way to determine the amount in controversy is to look at the amount demanded by the statement of claim even though the actual amount in controversy in the Court appealed from less than \$1,000; *Laberge v. Equitable Life Assurance Society* (1894) 24 S.C.R. 59; but it is only the pecuniary interest of the party appealing which can be considered; *Labelle v. Barbeau* (1889) 16 S.C.R. 390; *Hood v. Sangster* (1889) 16 S.C.R. 723. Where the claim of creditors attacking a fraudulent conveyance was under the appealable amount the appeal was quashed although the value of the land was \$11,000; *Flatt v. Ferland* (1892) 21 S.C.R. 32. Where defendants claim more than the appealable amount as a set off against the plaintiff's claim, and their claim is disallowed they may appeal; *Hunt v. Taplin* (1895) 24 S.C.R. 36. Where a claim was originally for \$880, and the interest and judgment for more than \$2,000 was entered after some years and the judgment debtor filed a petition disavowing the appearance of his attorney which was dismissed, it was held he had the right to appeal; *Dawson v. Dumont* (1891) 20 S.C.R. 709. If there are separate claims against several respondents each under the appealable amount there is no right to appeal; *Stephens v. Girth*; *Re Ontario Express and Transportation Co.* (1895) 24 S.C.R. 716. Where the amount involved by the judgment was under the appealable amount, the fact that under certain contingencies more might become involved gives no right to appeal; *Rodier v. Lapierre* (1892) 21 S.C.R. 69; *MacDonald v. Galivan* (1898) 28 S.C.R. 258. A claim by an assignee under the appealable amount was defeated by a claim over the appealable amount against the assignor. The assignee had no right of appeal; *La Banque du Peuple v. Trottier* (1898) 28 S.C.R. 422. Where property seized under an execution is of a value over the appealable amount, and a claimant thereof fails in establishing his title in the Court below he may appeal although the amount of the execution is under \$1,000; *King v. Dupus* (1898) 28 S.C.R. 388, and cases there cited.

Although a contested claim against an insolvent estate is over \$1,000, if the claim of the creditor contesting it is less than that sum he cannot appeal; *Lachance v. La Societe de Piets et de Placements de Quebec* (1896) 26 S.C.R. 200.

Although the amount claimed may have been made to exceed the appealable amount by including Statute barred interest the appeal will lie. *Ayotte v. Boucher* (1883) 9 S.C.R. 460.

If the judgment deals in any way with property of which the value is not ascertained an affidavit should be filed as early as possible shewing the value

thereof; *Joyce v. Hart* (1877) 1 E.C.R. 321 at p. 338; *Muir v. Carter* (1888) 16 S.C.R. 473; *Dreschel v. Auer Incandescent Light Co.* (1898) 28 S.C.R. 268.

It will be noticed that sub-sec. (c) speaks of the amount in controversy "*in the appeal*" Questions have arisen as to the right of appeal when by the addition of interest before judgment the amount, although originally below, has reached the appealable amount. Except for the provisions of sub-sec. (f) the right to appeal would then be clear; *Gooroopersad Khoond v. Juggutchunder* (1860) 13 Moo. P.C. 472; *Quebec Fire Assce. Co. v. Anderson* (1860) 13 Moo. P.C. 477; but by the addition of sub-sec. (f) the authorities upon Quebec appeals may be applicable. S. 29 of the Supreme and Exchequer Court Act (R.S.C. c. 135) prohibits an appeal from Quebec "in any action cause or matter wherein the amount in controversy" does not amount to \$2,000, and the amount is determined as in sub-sec. (f) by the amount demanded, not that recovered.

In *Dufresne v. Guevremont* (1896) 26 S.C.R. 216; the amount demanded was under the appealable amount, but judgment was recovered for a sum in excess thereof by means of the addition of interest; but the right to appeal was denied.

If the jurisdiction depends upon the amount in controversy *in the appeal*, interest after verdict and before judgment may be considered in estimating the appealable sum; *Bank of New South Wales v. Owston* (1879) 4 App. Cas. 270.

See *Quebec Montmorency and Charlevoix Ry. Co. v. Mathieu* (1891) 19 S.C.R. 426.

Future Rights. The rights must be "vested," not merely "contingent" rights; *O'Dell v. Gregory* (1895) 24 S.C.R. 661; "Annual rents" mean ground rents; *Rodier v. Lapierre* (1892) 21 S.C.R. 69. The words "affecting future rights" are governed and qualified by the preceding words, and to make a case appealable not only must future rights be bound but the future rights so bound must relate to some of the matters or things specified or a like demand of a public or general nature; *Gilbert v. Gilman* (1889) 16 S.C.R. 189; *Rodier v. Lapierre* (1892) 21 S.C.R. 69; *O'Dell v. Gregory* (1895) 24 S.C.R. 661; *MacDonald v. Galivan* (1898) 28 S.C.R. 258.

It would seem to be clear that as to "demands of a like nature, etc.," they are governed by the words "affecting future rights." Whether these latter words govern also the specified matters in the sub-section, as annual rents, etc., would appear to be more doubtful. It would seem however, that the words should be interpreted in the same manner as the concluding words of s. 29 (b) relating to Quebec Appeals, and those words, "affecting future rights" it is settled by the preceding words; *Lariviere v. School Commissioners* for the County of (1894) 23 S.C.R. 723.

As to rent, fee, &c., must be the matter really in controversy and not something collateral thereto; *Chagnon v. Normand* (1889) 16 S.C.R. 400.

Actions for demands of the following nature are not within sub-sec. (f). For an instalment on a contract; *Gilbert v. Gilman* (1889) 16 S.C.R. 189. For a monthly instalment on an annuity under a will; *Rodier v. Lapierre* (1892) 21 S.C.R. 69.

For a separation between husband and wife where the result would be to defeat a contingent right; *O'Dell v. Gregory* (1895) 24 S.C.R. 661.

For a half yearly payment of interest on moneys left by will; *Raphael v. Maclaren* (1897) 27 S.C.R. 310.

For an allowance for maintenance of a minor up to 14 years of age; *MacDonald v. Galivan* (1898) 28 S.C.R. 258.

For an instalment of a pension; *La Banque du Peuple v. Trottier* (1898) 28 S.C.R. 422.

On the other hand actions for assessments upon property for improvements are within the section; *Reburn v. Ste. Anne* (1887) 15 S.C.R. 92; *Les Ecclesiastiques de St. Sulpice de Montreal v. Montreal* (1889) 16 S.C.R. 399; and so is a petition to set aside an assessment for expropriations for widening streets, *Stevenson v. Montreal* (1897) 27 S.C.R. 187.

An action for damages for interfering with an exclusive statutory privilege for a toll bridge affects future rights; *Galarneau v. Guilbault* (1889) 16 S.C.R. 579.

Special Leave. A question of construction of the rules of a benefit society and the rights of parties to insurance money under a benefit certificate was held not to be of sufficient importance to warrant leave to appeal; *Fisher v. Fisher* (1898) 28 S.C.R. 494.

PART VI.

Contracts.

CHAPTER 72.

An Act respecting the Limitation of certain actions.

LIMITATION OF ACTIONS—

For rent upon a demise, s. 1 (a).
 On specialties, s. 1 (b).
 On recognizances, s. 1 (c).
 On awards, s. 1 (d).
 For escape, s. 1 (e).
 For money levied under execution,
 s. 1 (f).
 For penalties, etc., s. 1 (g).

Upon covenants in mortgages, s.
 1 (h).
 Of account or between merchants,
 s. 2.
 DISABILITIES, s. 3.
 NO DISTINCTION BETWEEN RESIDENTS
 AND NON-RESIDENTS, ss. 4, 5.
 CASES OF ACTIONS AGAINST JOINT
 DEBTORS, ss. 6, 7.
 EFFECT OF ACKNOWLEDGMENTS, s. 8.
 LIMITATION IN TESTACY, s. 9.

HER MAJESTY, by and with the advice and consent of the
 Legislative Assembly of the Province of Ontario, enacts
 as follows:—

Limitation of
 time for com-
 mencing par-
 ticular actions

1.—(1) The actions hereinafter mentioned shall be com-
 menced within and not after the times respectively herein-
 after mentioned, that is to say:

- (a) Actions for rent, upon an indenture of demise,
 R. S. O. 1887, c. 60, s. 1 (1a).
- (b) Actions upon a bond, or other specialty, except upon
 the covenants contained in any indenture of mort-
 gage made on or after the 1st day of July, 1894.
 R. S. O. 1887, c. 60, s. 1 (1b); 56 V. c. 17, s. 1, part;
 60 V. c. 3, s. 3.
- (c) Actions upon a recognizance,
 within twenty years after the cause of such actions arose;
- (d) Actions upon an award where the submission is not
 by specialty,
- (e) Actions for an escape,
- (f) Actions for money levied on execution,
 within six years after the cause of such actions arose;
- (g) Actions for penalties, damages, or sums of money
 given to the party aggrieved, by any statute,

within two years after the cause of such actions arose;
R. S. O. 1887, c. 60, s. 1. (1, c—g).

(h) Actions upon any covenant contained in any indenture of mortgage, made on or after the 1st day of July, 1894, within ten years after the cause of such actions arose. 56 V. c. 17, s. 1, part.

(2) But nothing herein contained shall extend to any action given by any statute, when the time for bringing the action is by the statute specially limited. R. S. O. 1887, c. 60, s. 1 (2). Where time specially limited.

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of the action. R. S. O. 1887, c. 60, s. 2. Actions of account, etc., to be commenced within six years.

3. In case a person entitled to such action, as aforesaid, is at the time of the cause of action accruing within the age of twenty-one years, or *non compos mentis*, then such person may bring the action, within such time after coming to or being of full age, or of sound memory, as other persons having no such impediment should, according to the provisions of this Act, have done. R. S. O. 1887, c. 60 s. 3. In case of disability of plaintiff.

4. A plaintiff who is resident out of Ontario shall have no longer period of time to commence an action than if he were resident in Ontario when the cause of action or proceeding first accrued. R. S. O. 1887, c. 60, s. 4. Non-resident Plaintiffs.

5. If a person against whom any such cause of action accrues, is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario. R. S. O. 1887, c. 60, s. 5. Non-resident defendants.

6. Where a cause of action, with respect to which the period of limitation is fixed by the Imperial Act of the 21st year of the Reign of King James the First, chapter 16, section 3, or by any Act now in force in Ontario, lies against joint debtors, the person entitled to the same shall not be entitled to any time within which to commence such action against any one of the joint debtors who was within Ontario at the time the cause of action accrued, by reason only that some other of the joint debtors was, at the time the cause of action accrued, out of Ontario. R. S. O. 1887, c. 60, s. 6. As to cases where some joint debtors have been within and some without Ontario.

Recovery
against one
joint debtor no
bar to action
against
another who is
absent.

7. The person so entitled shall not be barred from commencing an action against the joint debtor who was out of Ontario at the time the cause of action accrued, after his return to Ontario, by reason only that judgment has been already recovered against the joint debtor who was within Ontario at the time aforesaid. R. S. O. 1887, c. 60, s. 7.

Effect of writ-
ten acknow-
ledgment or
part payment.

8. In case an acknowledgment in writing, signed by the principal party or his agent, is made by a person liable upon an indenture, specialty or recognizance, or in case an acknowledgment is made by such person by part payment, or part satisfaction, on account of any principal or interest due on such indenture, specialty or recognizance, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, within twenty years, or in the cases mentioned in clause (h) of subsection 1 of section 1 within ten years, after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid; or in case the person entitled is at the time of the acknowledgment under disability, as aforesaid, or the party making the acknowledgment is, at the time of making the same out of Ontario, then within twenty years, or in the cases aforesaid within ten years, after the disability has ceased, as aforesaid, or the party has returned, as the case may be. R. S. O. 1887, c. 60, s. 8; 60 V. c. 3, s. 3.

An action to
recover per-
sonal estate
of an intestate
or any part
thereof, must
be brought
within twenty
years.
Imp. Act, 23
and 24 V. c.
38, s. 13.

9. No action or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of a person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the estate or share, or some interest in respect thereof has been accounted for or paid, or some acknowledgment of the right thereto has been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case, no action shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one, was made or given. R. S. O. 1887, c. 60, s. 9.

NOTES.

Rent and Specialties. Section 1 was originally taken from Imperial Statute 3 & 4 Will. 4, c. 42, s. 3. The exception as to covenants in mortgages was introduced in 1894.

Where a foreclosure or redemption suit is between the mortgagee and mortgagor who is liable on the covenant, or his heirs full arrears of interest to the statutory limit on the speciality (20 years or now 10 years) may be allowed; *Du Vigier v. Lee* (1843) 2 Ha. 326; *Elvy v. Norwood* (1852) 5 DeG. & Sm. 240; *Howereen v. Bradburn* (1875) 22 Gr. 96; *Airey v. Mitchell* (1874) 21 Gr. 512; *MacDonald v. MacDonald* (1886) 11 O. R. 187; but see these cases discussed in *McMicking v. Gibbons* (1897) 24 A.R. 586, in which it was decided that only six years arrears could be allowed against a subsequent encumbrancer coming to redeem, see R.S.O. c. 133, s. 17.

Penalties. An action by an informer suing *qui tam*, must be brought within one year; 31 Eliz. c. 5; s. 5.

Mortgages. Where the covenant is to pay the principal on demand and interest in the meantime, time does not commence to run until a demand is made, *Re Brown's estate, Brown v. Brown* (1893) 2 Ch. 300. The point has not arisen whether a covenant implied in a mortgage under R.S.O. c. 121, s. 5, is "contained" therein. The English decisions as to the effect of the Real Property Limitation Act on covenants in mortgages, and actions on judgments are not applicable in Ontario; *Allan v. McTavish* (1878) 2 A.R. 278; *Boice v. O'Loane* (1878) 3 A.R. 167; *McCullough v. Sykes* (1885) 11 P.R. 337; *Chard v. Rae* (1889) 18 O.R. 571. A foreign judgment is not a specialty; *North v. Fisher* (1884) 6 O.R. 206; *Duplex v. De Roven* (1705) 2 Vern. 540.

Actions of Account. The Statute of Limitations, 21 James I. c. 16 excepted "such accounts as concern the trade of merchandise between merchant and merchant their factors or servants." S. 2 is taken from 19 & 20 V. c. 97, s. 9. The exception from the Statute of James did not apply to an action of indebitatus assumpsit, but only to the action of account or to an action on the case for not accounting; *Inglis v. Haigh* (1841) 8 M. & W. 769; *Russell v. Robertson* (1844) 1 U.C.R. 235. The phrase "comprised in the same account" means "that would have been comprehended in"; *Knox v. Gye* (1872) L.R. 5 H.L. 656. Where partnership dealings were closed more than six years before action, an action for an account was held to be barred, notwithstanding a payment to plaintiff's solicitor, without his knowledge, within six years, paid as the full amount due him; *Cotton v. Mitchell* (1883) 3 O.R. 421.

Disabilities. Where the Statute begins to run it continues notwithstanding any subsequent disability; *Doe d. Dixon v. Grant* (1834) 3 O.S. 511; *Wigle v. Stewart* (1869) 28 U.C.R. 427. The fact that the cause of action is one as to which service out of the jurisdiction may be allowed will not prevent the disability attaching; *Musurus Bey v. Gadban* (1894) 2 Q.B. 352. Merely touching Ontario for a temporary purpose would not be a "return"; *Gregory v. Hurrill* (1823) 1 Bing. 324; but a temporary sojourn even by a foreigner would be a "return"; *Pardo v. Bingham* (1869) L.R. 4 Ch. 785.

Payment or Acknowledgement. The Statute 21 James I. c. 16 contained no provision respecting payments or acknowledgements, but by numerous cases thereon, reference to which is made in the notes to R.S.O. c. 146, a new promise was inferred from a payment, and also from an acknowledgment when the terms of such acknowledgment were such that a promise could be inferred. The cases under the Statute of James as modified by R.S.O. c. 146, are not therefore strictly applicable to acknowledgments or payments made with respect to specialty debts. Sec. 9 of the Statute under discussion makes express provision for acknowledgments and payments, and gives a new starting point for the limitation provided for in the earlier sections. The Section is taken from 3 & 4 Will. IV c. 42, s. 5. The principal point of difference from actions on simple contract debts is that though an acknowledgment of a specialty debt be made under circumstances which preclude a promise to pay from being implied, it will, nevertheless be sufficient to give a new starting point to the period of limitation; *Moodie v. Bannister* (1859) 4 Dr. 432, and

it will be equally good if not made to the creditor, but to a third party, or in an answer to a suit against the debtor to which the creditor is not a party, ib.

It would appear also that an acknowledgment by one joint debtor may keep alive the specialty debt against the others. S. 2 of R.S.O. c. 146, merely applies to cases within the Statute 21 James I. In England under 19 & 20 V. c. 97 (The Mercantile Amendment Act) s. 14, it is expressly provided that no joint debtor, &c., in cases coming under 3 & 4 Will. IV. c. 42, shall lose the benefit of that Statute by an acknowledgment given by another joint debtor. A payment by any person liable or his agent will keep the debt alive as against all persons liable; *Re Frisby*, *Allison v. Frisby* (1889) 43 Ch. D. 106; *Barnes v. Glenton* (1898) 2 Q.B. 223.

A tenant for life of land under a devise by the obligor in a specialty, in which the heirs were bound is a "party liable"; *Roddam v. Morley* (1856) 1 DeG. & J. 1, and so is an assignee of an equity of redemption; *Forsyth v. Bristowe* (1853) 8 Ex. 716, and so is a tenant for life of an equity of redemption; *Dibb v. Walker* (1893) 2 Ch. 429, and a payment by them will be sufficient to keep alive an action on the covenant. The surety on a joint and several covenant made by him and his principal remains liable although no payment or acknowledgment may have been made by him within the statutory period if the principal has paid interest within such period; *Re Frisby*, *Allison v. Frisby* (1889) 43 Ch. D. 106.

But where the liability of the party making the payment stands upon totally different grounds from that of the person sought to be affected thereby the payment will be ineffective as to the latter; *Coope v. Cresswell* (1866) L.R. 2 Ch. 112.

Distributive Share on Intestacy. An action for a legacy must be brought within 10 years, and an action for a share on an intestacy within 20 years, see R.S.O. c. 133, s. 23. A similar discrepancy occurs in England; see *Williams on Executors*; 9th Ed. 1925. The "present right" to receive the share does not arise before the assets are actually received by the administrator and therefore where some assets had been received more than 20 years and others within 20 the action was held to be barred as to the former but not as to the latter; *Re Johnson*, *Sly v. Johnson* (1885) 29 Ch. D. 964.

CHAPTER 116.

An Act respecting Powers of Attorney.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. In case a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes, according to the tenor and effect thereof, and subject to such conditions and restrictions, if any, as may be therein contained. R. S. O. 1887, c. 97, s. 1.

As to a power of attorney provided expressly to be exercised after decease of constituent.

2. Independently of such special provision in a power of attorney, every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act, to whom the fact of the death, or of the doing of such act as last aforesaid, was not known at the time of such payment or act *bona fide* done as aforesaid, and as respects all claiming under such last mentioned person. R. S. O. 1887, c. 97, s. 2.

Where things done after the decease, etc., of constituents to be valid.

NOTES.

Law Before the Act. A power of attorney, even to a creditor to receive a debt, not accompanied by an assignment of it was revoked by the death of the principal. *Lepard v. Vernon* (1813) 2 Ves. & B. 51.

The estate of a principal was not liable for goods supplied to his agent after his death. *Blades v. Free* (1829) 9 B. & C. 167; 32 R.R. 620.

A payment under a power of attorney made after the death of the principal was illegal, *Wallace v. Cook* (1804) 5 Esp. 117, but Equity gave effect to *bona fide* dealings before the death became known to the attorney. *Baily v. Collett* (1854) 18 Beav. 179. On the insanity of a principal the authority of the agent is revoked. *Drew v. Nunn* (1879) 4 Q.B.D. 661.

Where a person has held out another as his agent either by express communication, course of dealing or by a power of attorney, his estate continued liable until the person acting upon the representation had notice of the revocation, except in cases of revocation by death. *Drew v. Nunn* (1879) 4 Q.B.D. 668, and *Brett, L.J.* in the latter case said, at p. 668, "Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened; in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation."

By the present Act, every person acting under a power of attorney in good faith is protected, notwithstanding that the agency may have been revoked.

Representatives of Principal. At common law, a person by contract could make himself or his estate liable for goods supplied or acts done after his death. See *Blades v. Free* (1829) 9 B. & C. 167; 32 R.R. 620. The present Act enables him to give power to an agent to make a contract after his death in the name of his representatives. The editors have been unable to find any case in which an authority under s. 1 of the Statute has been in question. It is submitted that unless the power is one which the principal could not have revoked, his representatives may put an end to it at pleasure.

Irrevocable Powers. Where a power of attorney was given for value, equity would not allow revocation. *Bromley v. Holland* (1802) 7 Ves. 3, 28.

A power of attorney given as part of a security, *Walsh v. Whitcomb* (1797) 2 Esp. 565, or coupled with an interest, *Gaussen v. Morton* (1830) 10 B. & C. 731, 34 R. R. 558; *Smart v. Sandars* (1848) 5 C. B. 895; *Sinclair v. Dewar* (1872) 19 Gr. 59; *Clerk v. Laurie* (1858) 2 H. & N. 199; *Carmichael's case* (1896) 2 Ch. 643; or operating as a charge, *Spooner v. Sandilands* (1842) 1 Y. & C. C. C. 390 is irrevocable.

CHAPTER 146.

An Act respecting Written Promises and Acknowledgments of Liability.

<p>WRITTEN ACKNOWLEDGMENT, ETC., REQUIRED TO TAKE CASE OUT OF STATUTE OF LIMITATIONS IN CERTAIN CASES, s. 1.</p> <p>ACKNOWLEDGMENT, ETC., BY ONE OF SEVERAL JOINT CONTRACTORS, s. 2.</p> <p>RECOVERY AGAINST JOINT CONTRACTORS, s. 3.</p> <p>ENDORSEMENTS BY PAYEE ON A BILL OR NOTE, s. 4.</p> <p>SET OFF WITHIN STATUTES OF LIMITATIONS, s. 5.</p>	<p>RATIFICATION OF PROMISE MADE DURING INFANCY, TO BE IN WRITING, s. 6.</p> <p>REPRESENTATION AS TO CREDIT OR CHARACTER, s. 7.</p> <p>CONSIDERATION FOR A GUARANTY NEED NOT APPEAR IN WRITING, s. 8.</p> <p>SECTION 17 OF THE STATUTE OF FRAUDS, EXTENDED TO GOODS TO BE DELIVERED AT A FUTURE TIME, s. 9.</p>
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:—

1. No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of the Act, passed in England in the twenty-first year of the Reign of King James the First, any case falling within the provisions of the said Act respecting actions

Promise by words only not sufficient to take the case out of the Statute of Limitations. 21 Jac. i, c. 16.

- (a) Of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;
- (b) On simple contract or of debt grounded upon any lending or contract without specialty and
- (c) Of debt for arrears of rent;

or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise. R. S. O. 1887, c. 123, s. 1.

2. Where there are two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the

Case of two or more joint contractors or executors.

said Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them, or by reason of any payment of any principal or interest made by any other or others of them R. S. O. 1887, c. 123, s. 2.

Judgment where plaintiff is barred as to one or more defendants but not as to all.

3. In actions commenced against two or more such joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by the said Act of King James the First or by this Act, as to one or more of such joint contractors, or executors or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment as aforesaid, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff. R. S. O. 1887, c. 123, s. 3.

Endorsement, etc., made by the payee not to take a note, etc., out of the statute.

4. No endorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom the payment has been made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the said Act of King James. R. S. O. 1887, c. 123, s. 4.

Statute to apply to set-off.

5. The said Act of King James and this Act, shall apply to the case of any claim of the nature hereinbefore mentioned alleged by way of set-off on the part of any defendant R. S. O. 1887, c. 123, s. 5.

As to ratification of promise made during non-age.

6. No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless the promise or ratification is made by some writing signed by the party to be charged therewith, or by his agent duly authorized to make the promise or ratification. R. S. O. 1887, c. 123, s. 6.

As to representation regarding the character, credit, etc., of a third party.

7. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain money, goods or credit thereupon, unless the representation or assurance is made in writing signed by the party to be charged therewith. R. S. O. 1887, c. 123, s. 7.

Consideration for promise to answer for another need not be in writing.

8. No special promise made by any person to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized,

shall be deemed invalid to support an action, or other proceeding to charge the person by whom the promise has been made, by reason only that the consideration for the promise does not appear in writing, or by necessary inference from a written document. R. S. O. 1887, c. 123, s. 8.

9. Section 17 of the Act passed in England in the 29th year of the Reign of King Charles the Second, entitled, "*An Act for the prevention of Frauds and Perjuries*," shall extend to all contracts for the sale of goods of the value of \$40 and upwards, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. R. S. O. 1887, c. 123, s. 9.

Statute of
Frauds, 29 Car.
ii, c. 3, extend-
ed to contracts
for goods to be
delivered at a
future time.

NOTES.

Acknowledgment. Section 1 is from 9 Geo. IV. c. 14, s. 1 and 19 & 20 V. c. 97, s. 13. The Statute 21 James I. c. 16 made no provision for extending the period of limitation because of an acknowledgment or part payment. The Statute was said to be founded upon the presumption of payment, and that presumption was rebutted by an admission that the debt was still owing; *Lloyd v. Maund* (1788) 2 T.R. 760, 762; *Frost v. Bengough* (1823) 1 Bing. 266; 25 R.R. 621; but this theory seems to be untenable; see 2 Wm. Saund. 183, 184. The effect of the acknowledgment was that a new promise was inferred based upon the consideration of the old debt; *Phillips v. Phillips* (1844) 3 Hare, 299; *Earle v. Oliver* (1848) 2 Ex. 90; but this view seems to be based upon the exploded doctrine of past consideration and is therefore unstable ground. Sir Frederick Pollock's view is that the Statute was one of procedure only and that the debtor might waive the benefit thereby conferred; see *Pollock on Contracts*, 5th Ed., pp. 170, 624. There are, however, many decisions which can be reconciled only with the theory of a new promise.

To What Causes of Action Acknowledgments Extend. The Statute of James prescribes among others, periods of limitation for actions upon the case (which includes actions for breach of contract) and of trespass, detinue, trover, assault, menace, battery, wounding, imprisonment and replevin. The doctrine of acknowledgments extends only to actions in which debts are sought to be recovered. "To revive a debt by promise and take a case out of the Statute there must be an antecedent debt." An acknowledgment of negligence in making an investment on insufficient security will not take a case out of the Statute; *Whitehead v. Howard* (1820) 2 Brod. & Bing. 372; 23 R.R. 471. An acknowledgment is inapplicable to an action of trespass; *Hurst v. Parker* (1817) 1 B. & Ald. 92; 18 R.R. 440, or an action of negligence by an attorney; *Short v. McCarthy* (1820) 3 B. & Ald. 626, 22 R.R. 503. In such cases the action if maintainable at all must be on the new promise.

There are no statutory provisions respecting acknowledgments in actions for penalties or such as concern the trade of merchandise between merchant and merchant, their factors and servants.

Sufficient Acknowledgments. There must be one of three things to take a case out of the Statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or secondly, there must be an unconditional promise to pay the debt, or thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed; per *Mellish L. J.*; *Mitchell's claim* (1871) L.R. 6 Ch. 828. From a simple acknowledgment a promise to pay may be implied, but if there be an express promise, no promise can be implied from the acknowledgment, *Meyerohoff v. Froehlick* (1878) 4 C.P.D. 63.

The following are instances of sufficient acknowledgments:—

Depositions in another action signed by the debtor; *Roblin v. McMahon* (1889) 18 O.R. 219; *Smith v. Poole* (1841) 12 Sim. 17.

A promise to have the amount placed to the plaintiff's credit; *Jones v. Brown* (1859) 9 C.P. 201.

"I will try to pay you a little at a time if you will let me. I am sure I am anxious to get out of your debt. I will endeavour to send you a little next week." *Lee v. Wilmot* (1866) L.R. 1 Ex. 364.

"I shall be obliged to you to send in your account made up to Xmas last. I shall have much work to be done this spring; but cannot give further orders until this be done." Again, "You have not answered my note. I again beg you to send in your account as I particularly require it in the course of this week." *Quincey v. Sharpe* (1876) 1 Ex. D. 72.

"I return . . . about Easter. If you send me the particulars of your account with vouchers I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim." *Skeet v. Lindsey* (1877) 2 Ex. D. 314.

"The old account between us which has been standing over so long has not escaped our memory, and so soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send in an account of how it stands." *Chasmore v. Turner* (1875) L.R. 10 Q.B. 500.

"Send in your account," *Curwen v. Milburn* (1889) 42 Ch. D. 424.

"At present it is utterly out of my power to do anything; I am willing to pay you any reasonable interest to let the matter remain for the present," *Wilby v. Elgee* (1875) L.R. 10 C.P. 497.

A request for delay; *Collis v. Stack* (1857) 1 H. & N. 605; *Cornforth v. Smithard* (1859) 5 H. & N. 13.

"The best way would be for you to draw for the balance of your money," *Dabbs v. Humphries* (1834) 10 Bing. 446.

A promise to remit; *Lang v. MacKenzie* (1830) 4 C. & P. 463.

"I don't see how it is possible for me to be indifferent on the matter of this debt. If I were able in any way to reduce it further you may be quite sure I should do so." *Re Buskin* (1894) 15 R. 117.

"I shall go to my attorneys and pay the debt and settle it." *Triggs v. Newnham* (1825) 1 C. & P. 631.

Letters expressing present inability but a desire to pay. *Grant v. Cameron* (1891) 18 S.C.R. 716; *Lee v. Wilmot* (1866) 4 H. & C. 469; *Dodson v. Mackey* (1835) 4 N. & M. 327. *Bird v. Gammon* (1837) 3 Bing., N.C. 883; *Morrell v. Frith* (1838) 3 M. & W. 402.

A letter saying the demand is not a just one, and disputing the amount, but, "I am ready to settle the account whenever" the plaintiff "thinks proper to meet on the business." *Colledge v. Horn* (1825) 3 Bing. 119; 28 R.R. 606.

An admission of a debt coupled with a claim that it was discharged by a written instrument which proved not to amount to a legal discharge; *Partington v. Butcher* (1806) 6 Esp. 66.

Asking an explanation of the items of the account; *Sidwill v. Mason* (1858) 2 H. & N. 306.

Crediting the amount in a contra account; *Waller v. Lacy* (1840) 1 M. & G. 54.

A promise to pay interest on the amount claimed; *Taylor v. Steele* (1847) 16 M. & W. 665.

Inserting the amount of the creditor's claim in a statement of the debtor's affairs given by him to the creditor; *Holmes v. Mackrell* (1858) 3 C.B.N.S. 789.

Referring a creditor to an assignee for the benefit of creditors; *Baillie v. Inchiquin* (1746) 1 Esp. 435, but see, re *Mitchell's claim* (1870) L.R. 6 Ch. 828.

A letter from a surety asking the creditor to sue the principal debtor; *Fisk v. Mitchell* (1871) 24 L.T. 272; *Humphreys v. Jones* (1845) 14 M. & W. 1.

A debtor endorsing a barred note with his initials and the date; *Bourdin v. Greenwood* (1871) L.R. 13 Eq. 281.

Giving a bill of exchange to the creditor, *Ex parte Wilson* (1841) 1 Mont. D. & D. 586.

An account stated although the items are all on one side; *House v. House* (1875) 24 C.P. 526.

An acknowledgment assuming a debt as to which there was a contention that it should be charged against a younger sister and brother is sufficient also for the purpose of the Statute; *Lyon v. Tiffany* (1865) 16 C.P. 197.

An acknowledgment of an unsettled account on which something is or may be due; *Banner v. Berridge* (1881) 18 Ch. D. 254; *Prance v. Sympton* (1854) Kay 678; *Curwen v. Milburn* (1889) 42 Ch. D. 424, or by recital in a reference of accounts to arbitration; *Cheslyn v. Dalby* (1840) 4 Y. & C. 238; but see *Hales v. Stevenson* (1802) 7 L.T. 317, 8 L.T. 798.

Conditional Promises. If the promise to pay is conditional it must be shown that the condition has been performed; *Tanner v. Smart* (1827) 6 B. & C. 603; 30 R.R. 461. The following are instances of conditional promises requiring proof of the happening of the specified event.

"I will pay as soon as I am able," *Scales v. Jacobs* (1826) 3 Bing. 638; *Tanner v. Smart* (1827) 6 B. & C. 603; 30 R.R. 461;

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"As soon as my power," *Haydon v. Williams* (1830) 7 Bing. 163; *Hammond v. Smith* (1864) 33 Beav. 452;

"Shall remember you as soon as possible"; *Gemmell v. Cotton* (1856) 6 C. P. 57;

"When I may be able to pay you, I cannot now say"; *Woodham v. Hollis* (1833) 3 L.J. (K.B.) 70;

"I shall be happy to pay as soon as convenient"; *Edmunds v. Downes* (1834) 2 C. & M. 459;

"If you can recover from G., you can pay yourself thereout"; *Ayton v. Bowles* (1827) 4 Bing. 105;

"If in funds I would immediately pay the money"; *Richardson v. Barry* (1861) 29 Beav. 22.

"I will send you a cheque as soon as I can"; *Re Bethell* (1887) 34 Ch. D. 561.

"I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments"; *Meyerhoff v. Froelich* (1878) 3 C. P.D. 333; 4 C.P.D. 63;

"It will be impossible for me to pay you anything until my son's estate is wound up"; *Roblin v. McMahon* (1889) 18 O.R. 219;

A recognition of a debt in a submission to arbitration is ineffective if the arbitration proves abortive; *Hales v. Stevenson* (1862) 7 L.T. 317; 8 L.T. 793.

A statement by an executor that if there were assets the debt should be paid is conditional; *Lampman v. Davis* (1844) 1 U.C.R. 179.

When the condition is performed, time immediately commences again to run although the creditor is not aware of its performance; *Waters v. Thanet* (1842) 2 Q.B. 757; *Bateman v. Brider* (1842) 3 Q.B. 574.

New Time of Payment. Where the acknowledgment specifies a new time for payment, no promise can be implied to pay at an earlier date, e.g., a promise to pay in two years; *Wheatley v. Williams* (1836) 1 M. & W. 533; or after taxation of costs; *Nichols v. Regent's Canal Co.* (1894) 63 L.J.Q.B. 641; 71 L.T. 249, 836; *Archer v. Leonard* (1863) 15 Ir. Ch. R. 267.

But coupling an acknowledgment with a suggestion as to a particular mode of payment will not of itself prevent an absolute promise being inferred; *Evans v. Simon* (1853) 9 Ex. 282.

To Whom to be Made. The acknowledgment must be made to the creditor or to some person on his behalf; *Goodman v. Boyes* (1890) 17 A.R. 528; *Tanner v. Smart* (1828) 6 B. & C. 603, 30 R.R. 461; *Rogers v. Quinn* (1880) 26 L.R., Ir. 136; *Grenfell v. Girdlestone* (1837) 2 Y. & C. 662; *Fuller v. Redman* (1859) 26 Beav. 614; *Green v. Humphreys* (1884) 26 Ch. D. 474.

A letter to the debtor's partner undertaking to give him an assignment on his satisfying plaintiff's debt and doing other things is sufficient; *Re Hindmarsh* (1860) 1 Dr. & Sm. 129.

An acknowledgment after the creditor's decease to the person who is entitled to and afterwards does take out Letters of Administration is sufficient; *Robertson v. Burrill* (1895) 22 A.R. 356; see *Beard v. Ketchum* (1848) 5 U.C.R. 114.

By Whom to be Made. The acknowledgment must be made by the debtor or his agent.

An acknowledgment by a wife who has been accustomed to act as the husband's agent in purchasing the goods and managing the business is sufficient; *Anderson v. Sanderson* (1817) 2 Stark. 204; 17 R.R. 681; 19 R.R. 703; *Gregory v. Parker* (1808) 1 Camp. 394, 10 R.R. 712.

An acknowledgment of a debt by an infant is sufficient; *Willins v. Smith* (1854) 4 E. & B. 180.

An acknowledgment by an executor or administrator is sufficient; *Smith v. Poole* (1841) 12 Sim. 17; *Fordam v. Wallis* (1852) 10 Hare 217, and an acknowledgment by one of several executors is good; *Re MacDonald, Dick & Fraser* (1897) 2 Ch. 181; *Fordham v. Wallis* (1852) 10 Hare 217; but see *Tullock v. Dunn* (1826) Ry. & Mood. 416, 27 R.R. 765; *Scholey v. Walton* (1843) 12 M. & W. 510.

After judgment for administration the personal representative has no right to give an acknowledgment; *Philips v. Beal* (1862) 32 Beav. 27; see *Midgley v. Midgley* (1893) 3 Ch. 282.

A mere advertisement for creditors by a personal representative is insufficient, but if the advertisement states he will pay all debts justly due it may be sufficient; *Scott v. Jones* (1830) 1 Russ. & Myl. 235, 4 Cl. & F. 382.

An executor *de son tort* cannot make an acknowledgment binding on the rightful administrator; *Grant v. McDonald* (1860) 8 Gr. 468.

Signature. The acknowledgment must be signed. But it may be at the top of an account in the debtor's handwriting; *Holmes v. Mackrell* (1858) 3 C.B.N.S. 789.

An unsigned acknowledgment enclosed in a letter written by the debtor's wife was held to be insufficient; *Ingram v. Little* (1883) 1 Qab. & F. 186.

Must be Made Before Suit. The acknowledgment must be made before action; *Bateman v. Pinder* (1842) 3 Q.B. 574; see *Lucas v. Dixon* (1889) 22 Q.B.D. 357.

Parol Evidence. Where no amount is specified parol evidence may be given to identify the debt referred to and the amount thereof; *Lechmere v. Fletcher* (1833) 1 C. & M. 623, 3 Tyr. 450; *Dickenson v. Hatfield* (1831) 5 C. & P. 46; *Hartley v. Wharton* (1840) 11 A. & E. 934; *Cheslyn v. Dalby* (1840) 4 Y. & C. 238; *Spickernell v. Hotham* (1854) Kay 669; *Barwick v. Barwick* (1874) 21 Gr. 39.

If the acknowledgment is without date parol evidence may be given to show when it was made; *Edmunds v. Downs* (1834) 2 C. & M. 459, and if it has been lost, parol evidence may be given of its contents; *Haydon v. Williams* (1830) 7 Bing. 163.

Parol evidence may be given to show that the facts attending the acknowledgment were such as to negative a promise to pay, as where the parties agreed to a set-off; *Cripps v. Davis* (1843) 12 M. & W. 159.

The question should be left to the jury as to whether the acknowledgment refers to the debt; *Frost v. Bengough* (1823) 1 Bing. 267, but if there was only one debt it will be presumed to do so; *Barwick v. Barwick* (1874) 21 Gr. 39; *Evans v. Davies* (1836) 4 A. & E. 840.

If the acknowledgment is, owing to extrinsic facts, ambiguous, it may be left to the jury to say whether a promise can be implied therefrom; *Lloyd v. Llandudno* (1788) 2 T.R. 760; *Linsell v. Bonsor* (1835) 2 Bing. N.C. 241; *Morrell v. Frith* (1838) 3 M. & W. 402; but ordinarily the construction and effect of the acknowledgment is for the judge; *Sidwell v. Mason* (1858) 2 H. & N. 306; *Morrell v. Frith* (1838) 3 M. & W. 402.

Insufficient Acknowledgments. Two tests must be applied to an acknowledgment; First, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference; Secondly, supposing that it is an acknowledgment of a debt which would, if it stood by itself be clear enough, still if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words something that expresses less than a promise to pay; but because the words express the lesser in such a way as to exclude the greater; *Green v. Humphreys* (1884) 26 Ch. D. 474.

The following are instances of insufficient acknowledgments:—

"I cannot afford to pay my new debts, much less my old ones"; *Knott v. Farren* (1824) 4 D. & Ry. 179.

"I will see my attorney and tell him to do what is right"; *Miller v. Caldwell* (1823) 3 D. & Ry. 267.

"I know that I owe the money, but the bill I gave was on a 3d receipt stamp, and I will never pay it"; *A'Court v. Cross* (1825) 3 Bing 329.

"Send me your bill, and if just I will not give you the trouble of going to law"; *Spong v. Wright* (1842) 9 M. & W. 629.

"I thank you for your very kind intention to give up the rent of T.B." (an estate of his wife, the rent of which was being applied on the debt) "But I am happy to say at that time, both principal and interest will have been paid in full"; *Green v. Humphreys* (1884) 26 Ch. D. 474.

"I have a receipt in full of all demands. I shall search for it and let you know in the event of my not being able to find it." *Brydges v. Plumptre* (1827) 9 D. & Ry. 746; *Birk v. Guy* (1803) Esp. 184.

Where a debtor disputed the earlier items in the account, but admitted the subsequent ones, and enclosed a cheque therefor, no implication of a promise to pay the earlier items could be raised; *Brigstocke v. Smith* (1833) 1 C. & M. 483; 3 Tyr. 445; 38 R. R. 676.

An unaccepted offer to pay in goods; *Cawley v. Furnell* (1852) 12 C. B., 291; or land; *Young v. Moore* (1863) 23 U. C. R. 151, or shares; *Lowndes v. Gennett & Moseley Gold Mining Company* (1863) 10 L. T. 329.

The insertion of a debt in a bankrupt's statement of affairs; *Everett v. Robertson* (1858) 1 E. & E. 16; *Courtney v. Williams* (1844) 3 Hare 539; *Ex parte Topping* (1866) 4 DeG., J. & S. 551; *Pott v. Clogg* (1847) 16 M. & W. 321.

An offer "without prejudice" if unaccepted; *Mitchell's case* (1871) L. R. 6 Ch. 822.

"I acknowledge the receipt of the money, but the testatrix gave it to me." *Owen v. Wolley* (1751) B. N. P. 148.

An admission made to a person who at the same time purports to sign a discharge of the debt; *Goate v. Goate* (1856) 1 H. & N. 29.

Where the fair effect of a letter is that the writer is not certain whether the debt is owing; *Collinson v. Margesson* (1858) 27 L. J., Ex. 305; *McCormack v. Bervey* (1845) 1 U. C. R. 388.

An unaccepted proposal offering to set-off a claim of the debtor; *Francis v. Hawkesley* (1859) 1 E. & E. 1052; see *Williams v. Griffith* (1849) 3 Ex. 335.

An account stated between the debtor and others though including the creditor's account; *Nash v. Hill* (1858) 1 F. & F., 198.

Entries made in debtor's books; *Jackson v. Ogg* (1859) 1 Johns. 397.

A qualified acknowledgment with a threat to do nothing if the creditor proceeds; *Fearn v. Lewis* (1830) 6 Bing. 349; 31 R. R. 434.

A statement that he owed nothing, but offering \$50 rather than have trouble; *Spalding v. Parker* (1846) 3 U. C. R. 66.

"The notes are genuine, but I am under the impression they were paid." *Grantham v. Powell* (1850) 6 U. C. R. 494.

The debtor's attorney wrote that "the debt has not been paid, but the defendant has no property, and I cannot help the debt being unpaid"; *Dougall v. Cline* (1850) 6 U. C. R. 546.

An unaccepted offer of a composition; *Barnes v. Metcalf* (1859) 17 U. C. R., 388; *Gibbon v. Ragshott* (1832) 5 C. & P. 211.

For further instances see, *Jupp v. Powell* (1884) 1 C. & E. 349; *Robarts v. Robarts* (1828) 3 C. & P., 296; *Re Wolmershausen* (1860) 62 L. T. 541; *Cassidy v. Firman* (1867) 15 W. R. 432; *Routledge v. Ramsay* (1838) 8 A. & E. 221; *Crawford v. Crawford* (1867) Ir. R., 2 Eq. 166.

Acknowledgement of Payment by Joint Contractor. An acknowledgment or part-payment by a partner of a partnership debt during the partnership would take the debt out of the Statute; *Goodwin v. Parton* (1879) 41 L. T. 91; 42 L. T. 568; *Watson v. Woodman* (1875) L. R., 20 Eq. 730; but not after dissolution; *Thompson v. Waithman* (1856) 3 Dr. 628.

The provisions of Section 2 as to the executors being chargeable on an acknowledgment or payment made by one, mean "personally chargeable"; *Re MacDonald* (1897) 2 Ch. 181, 188; *Re Hollingshead* (1888) 37 Ch. D. 651.

Endorsements. Sec. 4 is similar to Lord Tenderden's Act (9 Geo. IV. c. 14) s. 3.

An endorsement was formerly admissible as evidence of payment as being a statement made by a deceased person against his pecuniary interest; *Briggs v. Wilson* (1854) 5 D. M. & G. 12.

An entry or declaration in writing against the pecuniary interest of the deceased in his books or in any other document than that containing the contract is still admissible; *Bradley v. James* (1853) 13 C. B. 825, but not if made after the debt was barred, *ib.*; *Newbould v. Smith* (1885) 29 Ch. D. 882.

Infants. S. 3 is similar to 9 Geo. IV. c. 14, s. 5, except that the latter Statute does not authorize ratification by an agent.

Ratification of Contracts Made by Infants. A ratification which by the Statute is required to be in writing is a ratification of a promise or contract which if enforceable would result in a personal liability. An obligation entered into during infancy, if incident to property retained or benefits received after majority, may be ratified by acquiescence or inaction without writing, e. g. a contract to take shares in a Company may be ratified by retention of the shares after majority and executing a transfer thereof; *Re Constantinople and Alexandria Hotels Co.* (1870) L. R. 5 Ch., 302; a covenant made by an infant on entering the service of an employer not to carry on the same business is ratified in equity by his continuing in the service for 18 months after he became of age, and a new promise may be inferred; *Brown v. Harper* (1893) 68 L. T. 488; *Cornwall v. Hawkins* (1872) 26 L. T. 607, but giving written notice of intention to leave shortly after majority is not a ratification in writing within the Statute; *Birkin v. Forth* (1875) 33 L. T. 532.

A confirmation after majority of part of a marriage settlement is confirmation of the whole; *Davies v. Davies* (1870) L. R., 9 Eq. 468; *Milner v. Harewood* (1811) 18 Ves. 277; *Edwards v. Carter* (1893) A. C. 360. Acceptance of rent after majority is confirmation of a lease made during infancy; *Smith v. Low* (1739) 1 Atk. 489; and so would be a mortgage of the property referring to the lease; *Story v. Johnston* (1837) 2 Y. & C. 586. Remaining after majority in possession of lands taken in exchange during infancy and afterwards disposing thereof is sufficient confirmation of the exchange; *Miller v. Ostrander* (1866) 12 Gr. 349; see also *Pollock on Contracts* 5th Ed., 52-73.

Care must be taken also to distinguish the cases where it has been said the infant is liable in equity for falsely representing himself to be of full age. The expression is only a compendious one which must be interpreted with reference to what were the functions of a Court of Equity. An infant who had induced trustees to pay money to him on his false representation as to age would not be allowed to plead his infancy as a bar to a release executed by him. *Overton v. Banister* (1844) 3 Ha. 503, and if he had obtained property on such representation, he might be ordered to redeliver it; *Clarke v. Cobley* (1789) 2 Cox. 173. But the representation does not amount to a contract, nor make the infant liable as on a contract, or for a debt, therefore an infant who obtains a lease by falsely representing himself of age is liable neither on the lease nor for use and occupation; *Lempriere v. Lange* (1879) 12 Ch. D. 675.

Merely executing a contract, e. g. a mortgage, does not amount to a misrepresentation of age; *Confederation Life Assn. v. Kinnear* (1896) 23 A. R. 497.

CHAPTER 157.

An Act respecting Master and Servant.

Sections 3-5.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

MASTER AND SERVANT.

Agreements
by which
workmen, etc.,
may share in
the profits of
the business.

3. It shall be lawful in any trade, calling, business, or employment, for an agreement to be entered into between the workman, servant, or other person employed, and the master or employer, by which agreement a defined share in the annual or other net profits or proceeds of the trade or business carried on by such master or employer, may be allotted and paid to such workman, servant or person employed, in lieu of or in addition to his salary, wages, or other remuneration; and such agreement shall not create any relation in the nature of partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favor such agreement is made, shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling, or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer, of the net profits or proceeds of the said trade, calling, business, or employment, on which he declares and appropriates the share of profits payable under the said agreement, shall be final and conclusive between the parties thereto and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever. R.S.O. 1887, c. 139, s. 1.

Certain agree-
ments within
this Act

4. Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act, unless it purports to be excepted therefrom, or this may otherwise be inferred. R.S.O. 1887, c. 139, s. 4.

Verbal as well
as written
agreements
between mas-
ter and ser-
vant to be
binding.

5. All agreements or bargains, verbal or written, between masters and journeymen, or skilled labourers, in any trade, calling or craft, or between masters and servants or labourers, for the performance of any duties or service of whatever nature, shall, whether the performance has been entered upon or not, be binding on each party for the due fulfilment thereof; but a verbal agreement shall not exceed the term of one year. R.S.O. 1887, c. 139, s. 5.

NOTES.

Agreements to Share Profits. The only provision in English Legislation at all *in pari materia* with ss. 3 and 4 is s. 2 (3) (b) of The Partnership Act 1890 which is as follows:—"A contract for the remuneration of a servant or agent of any person engaged in a business by a share of the profits of the business shall not of itself make the servant or agent a partner in the business or liable as such."

The sharing of profits and losses was always cogent evidence of a partnership, and if it stood alone might be considered evidence of a partnership, but those facts might always be outweighed by other circumstances.

As between the parties themselves an agreement in the terms authorized by s. 3 would probably never have been held to constitute a partnership, see *Hesketh v. Blanchard* (1803) 4 East 144; *Harrington v. Churchward* (1860) 29 L.J. Ch. 521; *Geddes v. Wallace* (1820) 2 Bligh 270; *Ross v. Parkyns* (1875) L.R. 20 Eq. 331; *Ex parte Tennant* (1877) 6 Ch. D. 303; *Walker v. Hirsch* (1884) 27 Ch. D. 461. But as against third parties where a servant took a share of the net profits, there was authority for the position that he was a partner so as to be liable for the debts of the business to its creditors; *Dry v. Boswell* (1808) 1 Camp. 329; *Heyhoe v. Burge* (1850) 9 C.B. 431.

All these questions are now set at rest by the enactment.

The agreement must be bona fide, as if the Court should come to the conclusion that it was a device, and that the parties were in reality partners, the so-called servant would not escape liability; *Badeley v. Consolidated Bank* (1886) 34 Ch. D. 536.

Before the Statute a servant would have been entitled to an account; *Harrington v. Churchward* (1860) 29 L.J. Ch. 521, but the Act now takes away that right. A servant if dismissed would have had no right to an injunction interfering with the carrying on of the business by his employers; *Walker v. Hirsch* (1884) 27 Ch. D. 461. Where a merchant acted as agent for a foreigner in buying furs with an agreement for a share in the profits, but there was a provision for his sharing the losses to the extent of \$3,000, the agreement was held to be excepted from the Statute within the meaning of s. 4; *Rogers v. Ullman* (1879) 27 Gr. 137. An agreement by a solicitor to share profits of a solicitor's business with an unqualified person would be illegal and unenforceable; *Tench v. Roberts* (1819) 6 Madd. 145; *Re Jackson* (1823) 1 B. & C. 270, R.S.O. c. 174 s. 28.

Account Not Impeschable. The Statute throws upon the servant the onus of trusting the master absolutely and perhaps his accounts could not be impeached even for fraud; *Tullis v. Jackson* (1892) 3 Ch. 441. An action for damages for the fraud might possibly be maintained.

Agreements for Service. S. 5 has come down from 10 & 11 Vict. c. 23, s. 1 and 18 Vict. c. 136 ss. 1, 2. These provisions were introductory to sections giving rights against the workman for deserting the employment which were repealed by 40 V. c. 35 (D). A verbal agreement for more than 1 year is within the 4th section of the Statute of Frauds; *Britain v. Rossiter* (1879) 11 Q.B.D. 123. If the engagement is for a year there is no presumption that if the service continues after the year that it is to continue for another year absolutely; *Harnwell v. Parry Sound Lumber Co.* (1897) 24 A. R. 116, see this case discussed and the authorities collected, 34 C.L.J. 587.

CHAPTER 8.

60-61 VICTORIA. (DOMINION)

An Act respecting Interest.

(Assented to 29th June, 1897.)

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

Short title.

1. This Act may be cited as The Interest Act, 1897.

When rate of interest not per annum more than 6 per cent, not recoverable unless contract states the equivalent rate per annum.

2. Whenever any interest is, by the terms of any written or printed contract and whether under seal or not, made payable at a rate or percentage per day, week, month or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.

Recovery of sums paid otherwise

3. If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract.

Not to apply to mortgages.

4. This Act shall not apply to mortgages on real estate.

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NOTES.

This is in the nature of paternal legislation and interferences with the freedom of contract. In *Linfoot v. Pockett* (1895) 2 Ch. 835, a money lender had advertised, "Money lent at 5% per cent. From 5% to 2000%. Why pay more when a private gentleman desires to grant advances to male or female upon their note of hand alone &c." A bill of sale was given by a borrower "by way of security for the payment of the sum of 100% and interest thereon at the rate of 1s in the pound per month". The borrower sought to set aside the bill of sale for fraud but failed. Lindley L. J. said "The advertisement was that money could be had for '5 per cent' but 5 per cent in a money-lender's mind means 5 per cent per month, and 5 per cent in a borrower's mind means 5 per cent per annum until he finds out what it really means: and, of course, when this plaintiff found out what it really meant he did not like it. However that is immaterial, because it was in fact 60 per cent. . . . Although the plaintiff was foolish enough to be attracted by this advertisement he was a man of some intelligence and quite capable of reading what he signed and as he chose to sign this document which is perfectly clear and intelligible, his case fails."

Except in a mortgage of real estate, no written or printed contract for a greater percentage than 6 per cent per annum will now be good, unless the percentage per annum is stated.

A contract for the payment of any stipulated yearly percentage will, however, still be good, R. S. C. c. 127 s. 1, except,

- (1) A pawnbroker may take 2 per cent per month for any amount up to \$20, and 5 cents for every \$4 per month when the sum lent exceeds \$20. R. S. C. c. 128 ss. 2, 3.
- (2) A chartered bank may take, reserve or exact any rate of interest or discount not exceeding 7 per cent per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank. 53 Vict. c. 31 s. 80 (D). "The Bank Act."
- (3) Principal money or interest in arrear upon a mortgage of real estate may bear interest at the same rate as principal money not in arrear, but not at any greater rate, R. S. C. c. 127 s. 5.
- (4) Where by a mortgage of real estate the principal money or interest are payable on the sinking fund plan, or any plan under which the payment of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever is chargeable unless the mortgage shews the real rate calculated yearly or half-yearly not in advance. R. S. C. c. 127 s. 3.
- (5) Corporations incorporated before 16th August, 1858, authorized to lend or borrow money are, with certain exceptions, limited to 6 per cent per annum. R. S. C. c. 127 s. 10.

Interest post diem. After the due date for payment of money if there is no contract relating to the payment of interest after that date, interest will be allowed as damages only; *R. v. Grand Trunk Ry. Co.* (1896) 2 Ex. C. R. 132; and the rate will be 6 per cent per annum, R. S. C. c. 127 s. 2. *Peoples Loan and Deposit Co. v. Grant* (1890) 18 S. C. R. 262; see also *St. John v. Rykert* (1884) 10 S. C. R. 278; *Peck v. Powell* (1888) 15 A. R. 138; *Wilson v. Campbell* (1879) 8 P. R. 154.

Recovery back of over-payments. But for the provisions of s. 3 a payment of interest at the contract rate would be voluntary and could not be recovered back or set off against the other moneys payable under the contract. *Kaines v. Stacey* (1860) 9 C. P. 355; *Jarvis v. Clark* (1861) 10 C. P. 480; *Quinlan v. Gordon* (1861) 20 Gr. Appendix 1; *Hutton v. Federal Bank* (1883) 9 P. R. 568.

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PART VII.

Personal Property.

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CHAPTER 77.

As amended by 62 V. c. 7.

An Act respecting Execution.

SHORT TITLE, s. 1.	Money and securities, ss. 18-20.
GOODS EXEMPT FROM SEIZURE, ss. 2-7.	Security to sheriff, ss. 21, 22.
WRITS AGAINST LANDS AND GOODS, ss. 8, 9.	Mortgages, ss. 18, 23-28.
Renewal of, s. 9.	WHAT MAY BE SOLD UNDER EXECU- TION AGAINST LANDS—
WHAT MAY BE SEIZED UNDER EX- ECUTION AGAINST GOODS—	Equity of redemption of lands, ss. 29-32.
Stocks in certain companies, ss. 10-16.	Contingent interests, s. 33.
Equity of redemption of chattels mortgaged, s. 17.	CHURCH PEWS AND SITTINGS, s. 34.
	SALES AGAINST EXECUTORS, s. 35.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts
as follows:—

1. This Act may be cited as "*The Execution Act.*" R. S. O. Short title.
1887, c. 64, s. 1.

EXEMPTION.

2. The following chattels shall be exempt from seizure Chattels ex-
empt from
seizure.
under any writ, in respect of which this Province has legis-
lative authority, issued out of any Court whatever in this
Province, namely:

1. The bed, bedding and bedsteads (including a cradle), in Bedding.
ordinary use by the debtor and his family;

2. The necessary and ordinary wearing apparel of the debtor Apparel.
and his family;

3. One cooking stove with pipes and furnishings, one other Furniture.
heating stove with pipes, one crane and its appendages, one
pair of andirons, one set of cooking utensils, one pair of tongs
and shovel, one coal scuttle, one lamp, one table, six chairs,
one washstand with furnishings, six towels, one looking glass,
one hair brush, one comb, one bureau, one clothes press, one
clock, one carpet, one cupboard, one broom, twelve knives,
twelve forks, twelve plates, twelve tea cups, twelve saucers, one
sugar basin, one milk jug, one tea pot, twelve spoons, two pails,
one wash tub, one scrubbing brush, one blacking brush, one
wash board, three smoothing irons, all spinning wheels and

weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated, not exceeding in value the sum of \$150 ;

Fuel and provisions.

4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of \$40 ;

Animals.

5. One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of \$75, and food therefor for thirty days, and one dog ;

Tools.

6. Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100 ; but if a specific article claimed as exempt be of a value greater than \$100, and there are not other goods sufficient to satisfy the execution, such article may be sold by the sheriff who shall pay \$100 to the debtor out of the net proceeds, but no sale of such article shall take place unless the amount bid therefor shall exceed the said sum of \$100 and the cost of sale in addition thereto. 62 V. c. 7, s. 1.

Bees.

7. Bees reared and kept in hives to the extent of fifteen hives. R. S. O. 1887, c. 64, s. 2.

Debtor may take proceeds of sale of implements, etc., in money.

3. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in clause 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to \$100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same do not exceed \$100, or, if the same exceed \$100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor. R. S. O. 1887, c. 64, s. 3.

Goods exempted from seizure after death of the debtor to go to widow and family.

4. The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the exempted goods. R. S. O. 1887, c. 64, s. 4, part.

Right of selection.

5. The debtor, his widow or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure. R. S. O. 1887, c. 64, s. 5.

6. Nothing herein contained shall exempt any article enumerated in subdivisions 3, 4, 5, 6 and 7 of section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article. R. S. O. 1887, c. 64, s. 6.

7. Notwithstanding anything contained in the preceding sections, the various goods and chattels which were prior to the first day of October, 1887, liable to seizure in execution for debt shall, as respects debts which were contracted prior to the said day, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized has endorsed upon it a certificate signed by the Judge of the Court out of which the writ issues, if a Court of Record, or where the execution issues out of a Division Court, by the Clerk of the Court, certifying that it is for the recovery of a debt contracted before the date hereinbefore mentioned. R. S. O. 1887, c. 64, s. 7; 51 V. c. 11, s. 6.

Goods liable to seizure to continue so liable for debts contracted before Oct. 1, 1887.

WRITS AGAINST LANDS AND GOODS.

8. Subject to Rules every writ of execution issuing under any judgment or order of a Court or Judge for the payment of money, except a writ of execution issued from a Division Court, shall be issued against both the lands and tenements and the goods and chattels of the execution debtor. 57 V. c. 26, s. 1; 58 V. c. 14, s. 1.

Lands and goods to be included in one writ.

9. It shall not be necessary to renew from year to year any writ of execution now in the hands of a sheriff or hereafter issued, but all such writs of execution shall remain in force for a period of three years, or until satisfied in the meantime by payment or withdrawal by the party prosecuting the same, and every such writ may be renewed from time to time for periods of three years in the same manner as a writ of execution was formerly renewed from year to year. 57 V. c. 26, s. 2; 58 V. c. 13, s. 31, part.

Writs may be renewed every three years.

WHAT MAY BE SEIZED UNDER EXECUTION AGAINST GOODS.

Stocks in certain Companies.

10. All shares and dividends or any equitable or other right, property, interest or equity of redemption in or in respect of any shares or dividends in any incorporated bank or other incorporated company in Ontario, having transferable joint stock, shall be held to be personal property, and shall be liable to *bona fide* creditors for debts, and may be attached, seized and sold under execution in like manner as other personal property. 62 V. c. 7, s. 8 (1).

Shares and dividends and equitable interests therein.

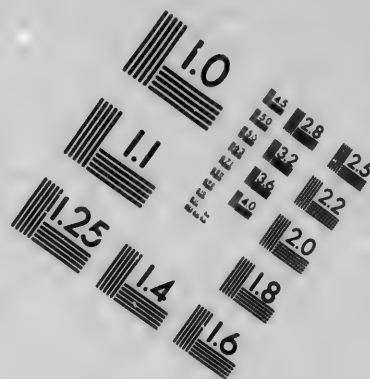
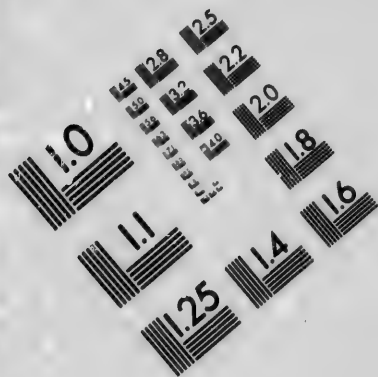
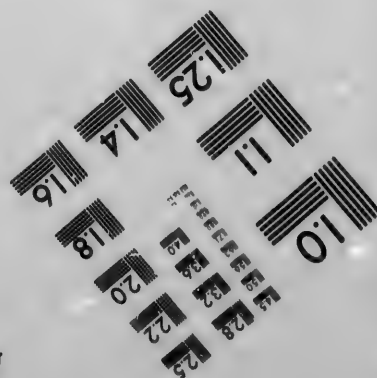
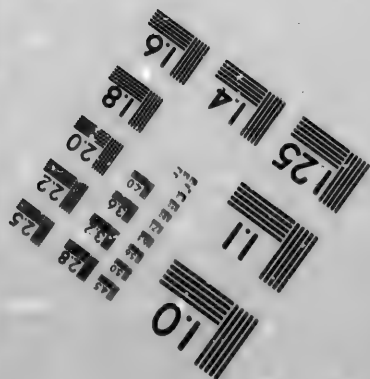
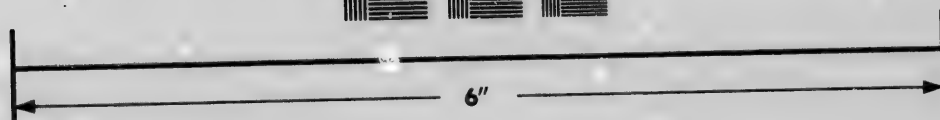
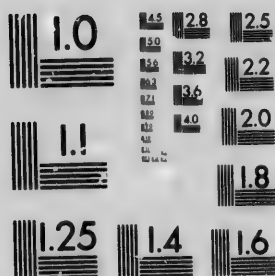


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Copy of execution to be served on the company with notice of seizure.

Stock not to be transferred while under seizure; and sale under seizure to include all dividends, etc.

Provisions for the case of the company having more than one place where service of process may be legally made upon them or transfers notified.

Shares to be personal property at the place where notice of seizure served. Mode of proceeding after sale.

Saving of all other remedies.

11. The sheriff or other officer to whom an execution is directed, on being informed on behalf of the plaintiff that the defendant has such stock, and on being required to seize the same, shall forthwith serve a copy of the execution on the company with a notice that all the shares which the defendant has in the stock of the company are seized accordingly; and from the time of service no transfer of the stock by the defendant shall be valid, unless and until the seizure has been discharged; and every seizure, and sale made under the same, shall include all dividends, premiums, bonuses, or other pecuniary profits upon the shares seized, and the same shall not after notice as aforesaid, be paid by the company to any one, except the person to whom the shares have been sold by the officer, unless and until the seizure is discharged, on pain of paying the same twice. R. S. O. 1887, c. 54, s. 10.

12. If the company has more than one place where service of process may be made upon them, and there is some place where transfers of stock may be notified to and entered by the company so as to be valid as regards the company, or where dividends or profits as aforesaid on stock may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the company to pay twice, or to affect the rights of any *bona fide* purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice it shall be the duty of the company to transmit by post. R. S. O. 1887, c. 64, s. 11.

13. The shares in the said stock shall be held to be personal property, found in the place where notice of the seizure thereof is served as aforesaid. R. S. O. 1887, c. 64, s. 12.

14. Where any such share is sold under an execution, the officer shall, within ten days after sale, serve upon the company at some place where service of process may be made, an attested copy of the writ of execution, with his certificate endorsed thereon, certifying the name of the purchaser who shall thereafter be the holder of the share, and who shall have the same rights, and be under the same obligations as if he had duly purchased the share from the proprietor thereof; and the proper officer of the company shall enter such sale as a transfer in the manner by law provided. R. S. O. 1887, c. 64, s. 13.

15. Nothing in this Act shall be construed to impair the effect of any remedy which the plaintiff might, without this Act, have had against any shares of such stock as aforesaid, by attachment or otherwise, and the provisions of the next preceding four sections shall apply to such remedy in so far as they can be applied thereto. R. S. O. 1887, c. 64, s. 14.

16. All corporations, established for the purpose of trade or profit, or for the construction of any work, or for any purpose from which revenue is intended to be derived, shall be deemed incorporated companies for the purpose of the next preceding six sections of this Act, though they are not called companies in the Act or charter incorporating them. R. S. O. 1887, c. 64, s. 15.

Equity of redemption in chattels saleable.

17.—(1) Under an execution against goods, the sheriff or other officer to whom the same is directed may seize any equitable or other property right, interest or equity of redemption in or in respect of any goods or chattels, including leasehold interests in any lands of the party against whom the writ has issued, and such sale shall convey whatever equitable or other right, property, interest or equity of redemption the last mentioned party had or was entitled to in or in respect of the goods and chattels at the time of the seizure. 62 V. c. 7, s. 8 (2).

(2) The words "goods and chattels" in this section shall include shares and dividends of stockholders in any incorporated bank or other incorporated company in Ontario having transferable joint stock. And in the case of an equitable or other right, property interest or equity of redemption in or in respect of any shares the procedure for seizure and sale shall be the same as hereinbefore provided in the case of shares and dividends, and the same shall be held to be personal property found in the place where notice of the seizure thereof is served as aforesaid. 58 V. c. 13, s. 32 part; 62 V. c. 7, s. 8 (3).

Money and Securities.

18. The sheriff or other officer having the execution of a writ against goods sued out of the High Court, or out of a County Court, shall seize any money or bank-notes (including any surplus of a former execution against the debtor), and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money, belonging to the person against whose effects the writ of execution has issued, and subject to the provisions of *The Creditors' Relief Act*, shall pay or deliver to the party who sued out the execution, the money or bank-notes so seized, or a sufficient part thereof, and shall hold such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as security for the amount by the writ and endorsement thereon directed to be levied, or so much thereof as has not been otherwise levied or raised, and the sheriff or other officer may sue in his own name for the recovery of the sums secured thereby, when the time of payment thereof has arrived. R. S. O. 1887, c. 64, s. 17.

[As to proceedings under Division Court Executions, see also Chap. 60, secs. 218-241.]

Payment
to sheriff
to be valid.

19. The payment to the sheriff or other officer by the party liable on such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution (as the case may be), from his liability thereon. R. S. O. 1887, c. 64, s. 18.

Sheriff to pay
over proceeds.

Rev. Stat.
c. 78.

Surplus to be
paid to the
execution
debtor.

20. Subject to the provisions of *The Creditors' Relief Act*, the sheriff or other officer shall pay over to the party who sued out the writ the money so recovered, or a sufficient sum to discharge the amount by the writ directed to be levied, and if, after satisfaction of the amount together with sheriff's poundage and expenses, a surplus remains in the hands of the sheriff or other officer, the same shall be paid to the party against whom the writ issued. R. S. O. 1887, c. 64, s. 19.

Security to Sheriffs, etc.

Sheriff not
bound to sue
until indemni-
fied.

21. No sheriff or other officer shall be bound to sue any party liable upon such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party who sued out the execution enters into a bond with two sufficient sureties to indemnify the sheriff or officer from all costs and expenses to be incurred in the prosecution of the action, or to which he may become liable in consequence thereof; and the expenses of the bond may be deducted out of any money recovered in the action. R. S. O. 1887, c. 64, s. 20.

Instructions
and indemnity
to sheriff on
seizing goods
claimed by
third parties.

22.—(1) A sheriff shall not without written instructions and a bond, as hereinafter mentioned, be obliged to seize property which is in the possession of a third party claiming the same, and not in the possession of the debtor against whose property the writ or other process was issued.

(2) The written instructions to be delivered to the sheriff shall specify the goods and chattels in such a way as to enable the sheriff to identify the same as the goods and chattels intended.

(3) The bond is to be a bond of indemnity to the sheriff and his assigns, with two sufficient sureties, who are to justify in double the supposed value of the property, such supposed value to be stated in an affidavit by the creditor or his solicitor or agent and attached to the bond.

(4) The bond is to be assignable to the claimant, and is to be conditioned that the parties executing the same will be liable for the costs and expenses which the sheriff or claimant may be put to by the seizure or subsequent dealings with the property, including the interpleader suit (if any), and which he does not recover from other persons who ought to pay the same.

(5) In case the sheriff is not satisfied with the bond offered the matter in difference is to be determined and disposed of by a Judge.

(6) Damages claimable shall be the same as before the passing of this Act. Damages.

(7) Nothing in this section shall be construed to limit the right of the sheriff to apply for relief by Interpleader under the present law and the practice of the Courts. 56 V. c. 5, s. 11. Right of sheriff to interpleader not affected.

23.—(1) The word "plaintiff" or the word "creditor" in this section includes any person named in a writ of execution as the person for whom the levy is to be made. The word "defendant" or the word "debtor" includes any person of whose property the money is directed to be levied. 56 V. c. 5, s. 1. Interpretation "plaintiff" "creditor" "defendant" "debtor."

(2) In case a sheriff to whom a writ of execution is addressed is informed on behalf of the plaintiff, that the defendant is a mortgagee of land and that the mortgage is registered, or that the defendant is entitled to receive a sum of money charged upon lands by virtue of any registered instrument, and in case the sheriff is required on behalf of the plaintiff to seize the mortgage or charge, and is furnished in writing with the information necessary to enable him to give the notice hereinafter mentioned, he shall, upon payment of the proper fees, forthwith deliver or transmit to the Registrar or Master of Titles in whose office the mortgage or other instrument is registered, a notice in the form or to the effect following :

To the Registrar of

(or as the case may be)

Form of sheriff's notice to registrar.

By virtue of a writ of *fiat facias* to me directed and issued out of the High Court of Justice at (or the County Court of the County of), whereby I am commanded to levy against the goods and chattels of *A. B.* the sum of \$, for debt, and \$ for costs lately adjudged to be paid by the said *A. B.* to *C. D.*, besides the costs of executions, I have this day seized and taken in execution all the estate, right, title and interest of the said *A. B.* in a certain mortgage made by *X. Y.* to the said *A. B.*, and which bears date on the day of , and was registered in the registry office for the County of , on the day of A D., as number (or the said mortgage or other instrument may be described in any other manner by reference to dates, parties and the land covered as will enable the notice to be recorded upon the lands therein described) and in the moneys secured thereby, and this notice is given for the purpose of binding the interests of the said *A. B.* under sections 23 to 28 of *The Execution Act*.

Dated this day of

(Signed) *M. N.*

Sheriff of the County of

56 V. c. 5, s. 2; 60 V. c. 14, s. 90.

(3) Upon registration of the said notice, the interest of the execution debtor in the mortgage or other instrument, and in the lands therein described, and in the moneys thereby secured and in all covenants and stipulations for the securing of payment thereof, shall be bound by the execution, and such registration shall be deemed to be notice of the said execution and Effect of registration of sheriff's notice to registrar.

seizure to all persons who may thereafter in any way acquire any interest in the mortgage, lands, moneys, or covenants; and the rights of the sheriff and execution creditor shall have priority over the rights of all such persons, subject, as regards the mortgagor or person liable to pay the money secured by the mortgage or charge, to the next section of this Act. 56 V. c. 5, s. 3.

Notice to
mortgagor.

24.—(1) A notice similar to the notice mentioned in the next preceding section or containing the like information shall also be served upon the mortgagor or upon the person who is liable to pay the moneys secured by the registered instrument; and upon such service the person served shall pay to the sheriff all moneys payable or which may become payable to the execution debtor.

Mode of
effecting
service.

(2) Service of such notice may be made personally, or by leaving the same at the dwelling-house of the person to be served with a grown up person dwelling there, or by registered letter to the proper address of the person to be served.

Payments
made after
notice.

(3) Any payment made after service of the notice or after actual knowledge of the seizure shall be void as against the sheriff and execution creditor. 56 V. c. 5, s. 4.

Sheriff enforce-
ing mortgage.

25. In addition to the remedies herein provided, the sheriff may bring an action on such mortgage or other instrument for the sale or foreclosure of the lands covered by the mortgage or other instrument, and shall be entitled to a bond of indemnity as in the cases provided for in section 21. 56 V. c. 5, s. 5.

Expiry or
setting aside
of execution
after registra-
tion of notice.

26. Upon a writ of execution, notice whereof is registered under section 23, expiring or being satisfied, set aside or withdrawn, a certificate of such fact by the sheriff or the execution creditor, or the order to set aside, as the case may be, may be registered and thereupon such seizure shall be vacated and deemed at an end. 56 V. c. 5, s. 6.

Verification of
order and
certificates.

27. The order of Court or the certificate of the sheriff shall not require verification. The certificate of the execution creditor shall be verified by the oath of a subscribing witness as in the case of other instruments affecting lands. 56 V. c. 5, s. 7.

Fees of regis-
trar and
sheriff.

28. For the registration of any notice under section 23, or of a certificate under section 26, the registrar or master shall be entitled to a fee of 50 cents; and for every notice of seizure under section 23 of this Act, the sheriff shall be entitled to a fee of \$1. 56 V. c. 5, s. 8.

WHAT MAY BE SOLD UNDER EXECUTION AGAINST LANDS.

Equity of Redemption.

29. Wherever the word "mortgagor" occurs in the next succeeding three sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after the word "mortgagor." R. S. O. 1887, c. 64, s. 21.

30.—(1) The sheriff or other officer to whom a writ of execution against the lands and tenements of a mortgagor of real estate is directed, may seize, sell and convey all the interest of the mortgagor in the mortgaged lands and tenements. The interest of a mortgagor in lands mortgaged may be sold on execution.

(2) The equity of redemption in a freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements can now be sold under an execution. R. S. O. 1887, c. 64, s. 22.

31. The effect of the seizure or taking in execution, sale and conveyance, of mortgaged lands and tenements, shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed, as well as at the time of the sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place; and the purchaser, his heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien which at the time of the sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done; and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor; and on payment of the mortgage money to the mortgagee by the purchaser, his heirs or assigns, the mortgagee, his heirs or assigns, shall, if required, give to the purchaser, his heirs or assigns, at his or their charge, a certificate of payment or satisfaction of the mortgage, which certificate may be in the following form, that is to say:

To the Registrar of the County of

I, A. B., of _____, do certify that C. D., of _____, who has become the purchaser of the interest of E. F., of _____, has satisfied all money due upon a certain mortgage made by the said E. F. to me, bearing date the _____ day of _____ 18____ and registered at _____ of the clock in the forenoon (as the case

may be) of the day of , in the same year (or as the case may be), and that such mortgage is therefore discharged.

As witness my hand, this day of , 18
(Signed) A. B.

E. H., of
G. H., of , } Witnesses.

And such certificate shall be of the like effect, and shall be acted upon by registrars and others to the same extent as if the same had been given to the mortgagor. R. S. O. 1887, c. 64, s. 23.

Mortgagee
may become
purchaser at
sheriffs' sale

32. A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place has issued), may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser: but in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged lands. R. S. O. 1887, c. 64, s. 24.

Contingent Interests.

Any interest
which may be
conveyed, etc.
under Rev.
Stat. c. 119,
s. 8, to be
liable to
execution.

33.—(1) Any estate, right, title or interest in lands which, under section 8 of *The Act respecting the Transfer of Real Property*, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the person might himself have done.

Except incho-
ate right of
dower

(2) The right of a married woman to dower shall not be deemed seizable or saleable under execution before the death of her husband. R. S. O. 1887, c. 64, s. 25.

CHURCH PEWS AND SITTINGS.

Interest in
pew or sitting
may be taken
in execution
and sold.

34.—(1) The interest of any person lawfully derived by deed, lease or license in writing from the wardens or other authorities of any church in a pew or sitting in such church, if such interest is lawfully assignable by the holder thereof, may be sold under judgment and execution at the suit of the

said churchwardens or trustees of such church for arrears of any rent or other charge to which such sitting or pew is subject, or which the holder thereof may have agreed to pay or for which he may be lawfully liable, or at the suit of any creditor of such holder, and the churchwardens or other trustees of any such church may become purchasers at such sale on behalf of the church, and may relet or sell the right so acquired.

(2) The sheriff may execute a deed to the purchaser of the interest so sold under execution, and such deed shall be effectual to the purchaser; and the churchwardens or trustees shall, on production of such deed, give effect to the same to the extent of the interest so sold, upon payment of any arrears of rent or charges then due.

(3) Such sale shall be subject to any continuing rent or charge on such pew or sitting previously stipulated or imposed, and shall not prejudice the right of the vestry or churchwardens or congregation or trustees to impose increased rent or charges on such pew or sitting pursuant to *The Church Temporalities Act*, or any other law or custom. 60 V. c. 18, s. 1.

SALES AGAINST EXECUTORS.

35. The title and interest of a testator or intestate in real estate may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate, against his executor or administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased, if living. R. S. O. 1887, c. 64, s. 26; c. 110, s. 14.

Interest in real estate to be seizable on a judgment against an executor.

NOTES.

Exemptions. Exemptions may be dealt with by a debtor as he pleases; he may mortgage or sell them and a purchaser will obtain a good title as against an execution creditor; *Field v. Hart* (1895) 22 A.R. 449. If they are destroyed by fire any insurance money payable in respect thereof would be exempt from garnishment; *Osler v. Mutter* (1892) 19 A.R. 94. It is not a fraudulent preference for the debtor to hand over exemptions to a creditor; *Temperance Insurance Co. v. Coombe* (1892) 28 C.L.J. 88. If the sheriff sells exemptions the proceeds may be recovered from him by the debtor or other person entitled; *Michie v. Reynolds* (1865) 24 U.C.R. 303.

Wearing Apparel. Wearing apparel consists of that which is worn or made to be worn. Cloth actually appropriated for the purpose of being made into wearing apparel has been held to fall within the exemption; *Richardson v. Buswell* (1845) 10 Metc. (Mass.) 507; see *Astor v. Merrett* (1883) 111 U.S. 202, where "wearing apparel owned by the passenger in a condition to be worn at once without further manufacture," was held to be wearing apparel within the custom laws.

Implements of Trade. A music teacher's piano is an implement of trade; *Amend v. Murphy* (1873) 69 Ill. 338, so is a horse; *Davidson v. Reynolds* (1865) 16 C.P. 140; *McMartin v. Hurlbert* (1877) 2 A.R. 146. When the debtor changes his occupation for another in which his tools or implements are not ordinarily used they cease to be exempt; *Wright v. Hollingshead* (1896) 23 A.R. 1. If a specific article is worth more than \$100 the debtor must receive \$100 in cash under the amendment of 1899.

Interpleader. When the exemptions are claimed by the party against whom the process issued, the sheriff acts at his own peril in granting or refusing the exemption. The Court has no jurisdiction to protect the sheriff by interpleader; *Re Gould v. Hope* (1893) 20 A.R. 347; C.R. 1103 (b). Materials brought upon lands for any of the purposes enumerated in s. 4 of The Mechanics' and Wage Earners' Lien Act, R.S.O. c. 153, are not subject to execution to enforce any debt (other than for the purchase thereof) due by the person furnishing the same; see R.S.O. c. 153, s. 16 (3).

Seizure of Stock. The requirements of the Statute as to service of a copy of the writ on the Company must be strictly observed, otherwise a mandamus to register a purchaser as a shareholder will be refused; *Goodwin v. Ottawa and Prescott Ry. Co.* (1862) 22 U.C.R. 186; but a demand for transfer served upon the secretary and treasurer of the Company will be sufficient without service upon the President; *Re Goodwin v. Ottawa and Prescott Ry. Co.* (1863) 13 C.P. 254.

Shares in a Building Society; *Robinson v. Grange* (1859) 18 U.C.R. 260, or a Harbour Company; *Brock v. Ruttan* (1850), 1 C.P. 218, are subject to seizure under the Act. Shares standing in the name of the debtor in a representative capacity are not such as a sheriff is bound to seize on an execution against him personally, although alleged to belong to the debtor beneficially; *Robinson v. Grange* (1859) 18 U.C.R. 260.

In the absence of fraud or collusion a purchaser at sheriff's sale who pays the purchase money acquires a good title to all the shares sold, although more may have been sold than would have been necessary to satisfy the execution; *Connecticut and Passumpsic R. Ry. Co. v. Morris* (1887) 14 S.C.R. 318.

It is only stock of an "incorporated bank or other incorporated company in Ontario" which is subject to seizure. It is unsettled whether this includes all corporations doing business or upon whom process may be served in Ontario, or only such as have their head office here, or such as have an office in Ontario where stock may be transferred. Where stock in a bank having its head office in Toronto was sold under an execution in Montreal, the sale was held, although the point under discussion was not argued, to vest the property in the purchaser, notice of the seizure having been validly served on the agency of the bank in Montreal; *Re Ontario Bank* (1879) 44 U.C.R. 247. In *Nickle v. Douglas* (1874) 35 U.C.R. 126, 37 U.C.R. 51, it was questioned whether

stock in the Merchants' Bank of Canada, having its head office in Montreal, could be sold under an execution issued in Ontario against a resident of Kingston "merely because it might, if the directors chose, be made transferable at a branch office in Ontario."

The procedure to be adopted on a purchase under execution, of shares in a chartered bank is prescribed by the Bank Act (53 Vict. c. 31), s. 38.

Equitable Interests in Chattels. The words "including leasehold interests in any lands" were introduced in 1877 to remove the doubts suggested in argument in *Goold v. Rich* (1872) 4 Ch. Chamb. 87. An equity of redemption must be sold as a whole—an equity of redemption in part of the property covered by the mortgage can neither be seized or sold; *Goold v. Rich* (1872) 4 Ch. Chamb. 87. The equity of redemption could not be sold under an execution against the personal representatives of a mortgagor; *Lowell v. Bank of Upper Canada* (1863) 10 Gr. 57.

Upon a sale of the equity of redemption the sheriff cannot sell the goods themselves, but can give the purchaser only the right to stand in the position of the mortgagor; *Squair v. Fortune* (1859) 18 U. C. R. 547. It was said in *Smith v. Cobourg and Peterborough Railway Co.* (1859) 3 P. R. 113, that the sheriff might take the goods out of the possession of the mortgagee for the purpose of exhibiting them upon the sale, but in *Watson v. Henderson* (1876) 25 C. P. 562, Adam Wilson, J., said: "The equity of redemption in goods may be seized while the debtor is in possession by an actual taking of the goods. Where the debtor is not in possession, but the mortgagee is so, by virtue of his title, the sheriff may do what is equivalent to a seizure just as he proceeds when he seizes bank or other stocks of the debtor." In *May v. Standard Fire Ins. Co.* (1879) 30 C. P. 51, 54, the same learned Judge, then, Wilson C.J. said: "The mortgagor and execution debtor was in actual possession at the time of the seizure, and I see no objection to the sheriff seizing them *in corpore* and taking them out of the debtor's possession, if need be, so long as he is not forbidden doing so by the mortgagee, if the mortgagee is entitled to immediate possession of the goods."

If the goods should be in different counties the equity of redemption could not be sold; *Heward v. Wolfenden* (1868) 14 Gr. 188.

Sub-sec. 2 of s. 17, was introduced to authorize the sale of an equity of redemption in shares of stock, it having been said in *Morton v. Cowan* (1894) 25 O. R. 529, that such an equity of redemption could not be sold under execution. It had previously been held in *Ross v. Simpson* (1876) 23 Gr. 552, that such an equity of redemption was saleable.

The provisions of s. 22 have been held to limit the right to sell an equity of redemption in freehold lands to cases where there was only one mortgage. But there being no similar provisions as to sales of an equity of redemption in chattels it has been held that s. 17 is wide enough to cover the sale of the mortgagor's interest in chattels, though subject to more than one mortgage; *Ross v. Simpson* (1876) 23 Gr. 552; and in *McDonald v. Reynolds* (1868) 14 Gr. 691, it was held that a purchaser of the equity of redemption in a leasehold subject to two mortgages could not on paying off the first mortgage keep it alive as against a second mortgagee.

It will be noticed that the sheriff can sell only the mortgagor's interest "at the time of the seizure." It may be that a *bona fide* sale of the equity of redemption after the delivery of the writ to the sheriff, but before seizure, would defeat the execution; see *Pegge v. Metcalfe* (1857) 3 U. C. L. J. 148; 5 Gr. 628; *Harrison's C.L.P. Act*, 1870, p. 366.

Money. The origin of s. 18 is English Act 1 & 2 Vict. c. 110 s. 12. When money is seized it is in the same position as the proceeds of goods sold; *Collingridge v. Paxton* (1852) 11 C. B. 683. Under the English Section moneys in the sheriff's hands, the surplus of a former execution, could not be seized; *Harrison v. Paynter* (1840) 6 M. & W. 387.

Money in the sheriff's hands, the proceeds of an execution issued at the suit of the debtor, cannot be seized where it has not been set apart and earmarked specifically as the property of the debtor; *Wood v. Wood* (1843) 4 Q. B. 397; *Collingridge v. Paxton* (1852) 11 C. B. 683. Money in Court cannot be seized; *France v. Campbell* (1842) 6 Jur. 105; nor money in the hands of an auctioneer; *Brown v. Perrott* (1841) 4 Beav., 585; nor other money held to the use of the debtor; *Robinson v. Peace* (1838) 7 Dowl. P. C. 93. Money deposited by a party privileged from arrest to secure his release

by the sheriff who had taken him on a ca. sa., cannot be retained by the sheriff on an execution after a judge's order to refund has been made; *Masters v. Stanley* (1840) 8 D.P.C. 169.

Securities for Money. Bills, notes and securities could not be seized at common law; *Wood v. Wood* (1843) 4 Q.B. 401. A policy of insurance on the debtor's own life cannot be seized; *Re Sargent's Policy* (1879) 7 L.R. Ir. 66; but a fire policy after loss may be seized; *Bank of Montreal v. McTavish* (1867) 13 Gr. 395. (See on this point; *Stokoe v. Cowan* (1861) 29 Beav. 637).

A cheque for money in Court drawn by the accountant but not delivered, cannot be seized; *Courtoy v. Vincent* (1852) 15 Beav. 486; but a stop order might be obtained; *Ex parte Chaplin* (1839) 3 Y. & C. 397; *Steele v. Byers* (1890) 10 C.L.T. 41; *Watts v. Jefferyes* (1851) 3 Mac. & G. 422.

A security which has been assigned by the debtor as collateral security cannot be seized; *Rumohr v. Marx* (1882) 2 C.L.T. 501, 3 O.R. 167.

Books of account are not securities for money; see *McNaughton v. Webster* (1860) 6 U.C.L.J. 17. A money bond for the conveyance of land may be seized; *R. v. Potter* (1860) 10 C.P. 39.

Property held by way of lien cannot be seized. *Legg v. Evans* (1840) 6 M. & W. 36; but a pawnbroker's interest in redeemable pledges may be taken in execution, and the sheriff will be entitled to receive the money payable in redemption of the pledges, and to sell the pledges when the pawnbroker might have done; *Re Rollason, Rollason v. Rollason* (1887) 34 Ch. D. 495.

Securities are only bound from the time of seizure; *McDowell v. McDowell* (1863) 10 U.C.L.J. 48.

Subject to Creditors Relief Act. See notes to R.S.O. c. 78.

Securities to be Collected. The Sheriff has no power to realize upon securities by sale. He must collect after maturity by suit, if necessary. *Rumohr v. Marx* (1882) 2 C.L.T. 501; 3 O.R. 167. Under the Absconding Debtor's Act (R.S.O. c. 79) s. 16 the sheriff may sell debts seized under an order for attachment.

Seizure of Goods in Possession of Third Party. Prior to 1893 a Sheriff was bound at his peril to find all the goods of the debtor in his bailiwick or be subject to an action for damages for false return. He is now bound only to seize goods of the debtor in his own possession or in the possession of a third party who makes no claim thereto unless (1) he has written instructions from the creditor and (2) the creditor gives him a bond of indemnity.

The written instructions will make the creditor liable for the Sheriff's and claimant's costs of an interpleader application if the creditor declines to take an issue. *Vanstaden v. Vanstaden* (1884) 10 P.R. 428.

It was formerly held that a person who took a bond of indemnity thereby disentitled himself to relief by interpleader; *Tucker v. Morris* (1832) 1 C. & M. 73; *Belcher v. Smith* (1832) 9 Bing. 82; and see *Murieta v. South American Co.* (1893) 62 L.J.Q.B. 396; but such an objection could not be raised by the party who gave the indemnity; *Thompson v. Wright* (1884) 13 Q.B.D. 632, S. 22 (7) provides "that nothing in this section shall limit the right of the Sheriff to apply for relief by Interpleader, etc." The language will probably be construed as sufficient to preserve the right of the Sheriff to interpleader, even though he may take a bond of indemnity. Where an interpleader order is granted, the Sheriff may be protected against an action for trespass to land as well as against an action for the seizure of the goods, if no substantial grievance has been done to the person whose premises have been wrongfully entered; *Smith v. Critchfield* (1885) 14 Q.B.D. 873; *Winter v. Bartholomew* (1856) 11 Ex. 704. If the goods had been seized by special instructions from the execution creditor, he would be liable for the trespass up to the time of making the interpleader order; *Walker v. Olding* (1862) 1 H. & C. 621; *Lister v. Northern Ry. Co.* (1869) 19 C.P. 408, and where the order directs the sale of goods, and a sale takes place pursuant thereto, the sale is the act of the Court, and no damages can be recovered against any person therefor; *Walker v. Olding* (1862) 1 H. & C. 621; *Abbott v. Richards* (1846) 15 M. & W. 194; *Clark v. Farrell* (1881) 31 C.P. 584, 596; *Kennedy v. Patterson* (1863) 22 U.C.R. 556; *Park v. Taylor* (1852) 1 C.P. 414; *Henderson v. Wilde* (1849) 5 U.C.R. 585; *Lister v. Northern Ry. Co.* (1869) 19 C.P. 408; *Reid v. Gowans* (1866) 13 A. R. 531, and a good title will be conferred on the purchaser; *Goodlock v. Cousins* (1897) 1 Q.B. 348, 558.

The result of s. 22 would seem to be :—

- (1) The Sheriff may seize goods in the possession of a third party, and claimed by him, without special directions from the creditor.
- (2) Or with such special directions.
- (3) But he is not bound to seize such without written instructions specifying the identical property and a sufficient bond of indemnity.
- (4) The Sheriff may waive the written instructions or the bond, or either of them, and he would not be liable to the claimant for an insufficient bond.
- (5) The Sheriff may require the bond to indemnify him against his own costs and expenses, and also to secure the costs and expenses of the claimant in connection with his claim, and any interpleader issue which may be directed in respect of the same.
- (6) If the Sheriff obtains an interpleader order, he will be protected from liability for the seizure and also for the sale of the goods, if the same should be sold pursuant to the interpleader order.
- (7) If the Sheriff does not take a bond, or if the bond taken does not secure the claimant's costs, the claimant will not in the event of an interpleader order being obtained have any rights against the Sheriff.
- (8) If an interpleader order is not obtained, the claimant will not be bound to accept an assignment of the bond; but may sue the sheriff, who in such case would have to rely solely on the bond for his protection.
- (9) The condition of the bond is not required in terms to cover damages, but merely the costs and expenses of the sheriff or claimant and it would appear to be doubtful whether the bondsmen would be liable to the claimant for any damages, the claimant might be entitled to recover for the seizure.
- (10) If the goods are sold pursuant to an interpleader order, no one is liable for any damages occasioned thereby.
- (11) It has not been decided whether a sheriff who has been indemnified is entitled under (7) to protection by an interpleader order.

Seizure of Mortgage Debts, Annuities, &c. Under s. 18 a mortgage may be seized and the sheriff may enforce the personal remedies for the recovery of the debt. Under ss. 23-28 without seizing a mortgage and without garnishment proceedings the interest of the debtor in lands under a mortgage or other registered instrument securing a sum of money may be seized and the rights of the debtor enforced for the satisfaction of the execution. This is done by virtue of the execution as against goods. A rent charge could not formerly be seized on an execution against goods; *Smith v. Turnbull* (1849) 5 U.C.R. 585, but might on an execution against lands; *Dougall v. Turnbull* (1852) 8 U.C.R. 622; 10 U.C.R., 121. The provisions would seem not to be applicable to an execution from a Division Court against lands only; *Parke v. Riley* (1866) 3 E. & A. 215, 231. The right of action given to the sheriff seems to be exercisable in his own name as under s. 18. The right seems to be confined to actions for sale and foreclosure. If the instrument itself is seized a personal action upon the covenants therein may be maintained under s. 18. The interest of the debtor in the covenants is bound by the execution under s. 28 (3).

Equity of Redemption in Lands. Sales of Equities of Redemption are governed by the same rules as sales of land; C.R. 877-882. An Equity of Redemption to be saleable under execution must be such as arises under the terms of the instrument creating the security. Where a deed is absolute in form, any right of redemption or re-purchase is not bound by or saleable under an execution; *McCabe v. Thompson* (1857) 6 Gr. 175; *McDonald v. McDonell* (1864) 2 E. & A. 393; *Fitzgibbon v. Duggan* (1865) 11 Gr. 188. An equity of redemption is saleable only where there is but one mortgage, or at most, when it is an equity existing between one mortgagor and one mortgagee; *Wood v. Wood* (1869) 16 Gr. 471; *Donovan v. Bacon* (1869) 16 Gr. 472 n.; *Re Keenan* (1871) 3 Ch. Chamb. 285; *Kerr v. Styles* (1879) 26 Gr., 309. See *Parr v. Montgomery* (1880) 27 Gr. 521, where three mortgages were held by one mortgagee. An equity of redemption is an entire whole; *Faulds v. Harper* (1882) 2 O.R. 405; 11 S.C.R. 639, and therefore the interest of the

debtor in a part of the lands comprised in the mortgage is not saleable; *Shaw v. Tims* (1872) 19 Gr. 496; *Vannorman v. McCarty* (1869) 20 C. P. 42, and if two tenants in common mortgage land, the interest of one of them is not bound by and cannot be sold under execution; *Crown v. Chamberlin* (1880) 27 Gr. 551, and if lands comprised in a mortgage are in different counties, an execution will not affect the equity of redemption; *Heward v. Wolfenden* (1868) 14 Gr. 188.

If a person entitled to an undivided interest in land has mortgaged the same, his equity of redemption therein is exigible; *Rathbun v. Culbertson* (1875) 22 Gr. 465. The correctness of the decisions that the equity of redemption under two mortgages upon the same lands is not exigible, is open to doubt. In *Samis v. Ireland* (1879) 4 A.R. 118, both *Moss C.J.O.* and *Patterson J.A.* who alone gave judgments thought the statute wide enough to authorize the sale of such an equity. It had been held that a purchaser of a leasehold interest which was subject to two mortgages could not keep the first mortgage alive as against the second mortgagee being bound by the effect of his purchase to pay off both mortgages; *McDonald v. Reynolds* (1868) 14 Gr. 691. It would seem that unencumbered property may be put up for sale with an equity of redemption in one parcel; *Samis v. Ireland* (1879) 4 A.R. 118.

It has been questioned whether a mortgagee who recovers judgment upon the covenant contained in the mortgage can sell the equity of redemption under an execution upon such judgment. The purchaser is bound to satisfy the mortgage. The amount, it has been said, therefore, which is realized by the sheriff, should, of right, be paid over to the mortgagor as the value of his estate in excess of the mortgage; *Vannorman v. McCarty* (1869) 20 C. P. 47. "There has always," said *Gwynne J.*, "appeared to me to be something so inconsistent, as to be impracticable, in the law permitting money to be levied under an execution issued upon a judgment, which money is not payable to the judgment creditor; while the operation of the sale, by means of which it was levied, is to nullify the judgment without satisfying it, leaving the judgment creditor a mortgagee still, but stripped by his own act of the benefit of the covenant contained in his mortgage and of the judgment which he had recovered thereon" *ib.*, see also *Samis v. Ireland* (1878) 28 C. P. 478, 484. It was pointed out by *Patterson J.A.* in *Samis v. Ireland* (1879) 4 A.R. at p. 136 that a judgment upon a covenant in a mortgage is almost necessarily for more than the mortgage debt, and the view of *Gwynne J.* has not been adopted in any reported case. A purchaser of the equity of redemption even though he be the mortgagee will take precedence of an intermediate fraudulent conveyance. *Parr v. Montgomery* (1880) 27 Gr. 521.

The equity of redemption of a deceased mortgagor may since 27 Vict. c. 13, be sold on an execution against his personal representatives; *McEvoy v. Clune* (1874) 21 Gr. 515. Sales by devisees will not prevent the sheriff selling; *Johnston v. Sowden* (1872) 19 Gr. 224. A sale cannot be made for a debt not contracted by the deceased; *Samis v. Ireland* (1879) 4 A.R. 118; *Freed v. Orr* (1881) 6 A.R. 600.

Payment of Mortgage by Purchaser. If the purchaser pays off the mortgage he becomes entitled to the legal estate, and if the sale by the Sheriff should be void, the remedy of the mortgagor would be redemption of the mortgage, not ejectment, *Hoves v. Lee* (1870) 17 Gr. 459. Care should be taken in obtaining the discharge to have it in the form given in s. 31, otherwise the legal estate may not become vested in the purchaser; *Lee v. Hoves* (1870) 30 U.C.R. 292.

Contingent Interests. The interest which a husband formerly had in the real estate of his wife might be sold under execution; *Moffat v. Grover* (1855) 4 C. P. 402. Where the real estate is the separate property of a married woman it is submitted that the husband has no exigible interest during her life. A right to dower consummate, is saleable under execution as a possibility coupled with an interest, and but for s. 32 (2) an inchoate right of dower would be exigible; *Rose v. Zimmerman* (1852) 3 Gr. 598; *Miller v. Wiley* (1866) 16 C. P. 529; *Allen v. Edinburgh Life Assce. Co.* (1877) 25 Gr. 300.

An interest is contingent where a right of enjoyment is to accrue on an event which is dubious and uncertain, *Fearne Contingent Remainder*, 2. An executory interest is an interest which is limited by a will or conveyance to uses, and which would not be valid at common law as a contingent remainder; *Challis Real Property*, 58.

Possibilities coupled with an interest include gifts to the survivors of several persons—to children who may be living at the death of their surviving parents. *Roe v. Jones* (1789) 3 T. R. 88; per *Proudfott J. Allen v. Edinburgh Life Assoc. Co.* (1877) 25 Gr. 313; *Hyden v. Williamson* (1731) 3 P. Wms. 132.

Property over which a person has a disposing power would include all property which under a deed or will, the debtor might appoint to his own use; *London Chartered Bank of Australia v. Lempriere* (1873) L.R. 4 P.C. 572.

Church Pew. The absolute purchase of a pew creates in the purchaser a fee simple; *Tully v. Farrell* (1876) 23 Gr. 49.

Sales Against Executors. To support a sale under a judgment against an executor or administrator, the judgment creditor must have been a creditor of the deceased; *Freed v. Orr* (1831) 6 A.R. 690.

Lands are assets in the hands of a personal representative and to a defence of *plene administravit*, the plaintiff may reply lands; *Gardiner v. Gardiner* (1832) 2 O.S. 520; *Seaton v. Taylor* (1847) 3 U.C.R. 302; *Sickles v. Asseltine* (1857) 10 U.C.R. 203, but such a replication would seem to be unnecessary; *Mein v. Short* (1859) 9 C.P. 244. 11 C.P. 430; *Holton v. McDonald* (1862) 12 C.P. 246. Heirs and devisees are, in the absence or fraud or collusion, bound by a judgment against personal representatives; *Lovell v. Gibson* (1872) 19 Gr. 280; *Willis v. Willis* (1872) 19 Gr. 573, and if persons appointed executors by a will defend an action against them as executors they will without probate be held to have accepted the office and a good title to the testator's lands may be conveyed by the Sheriff under an execution on a judgment recovered in such action; *McDonald v. McDonald* (1890) 17 A.R. 192.

A judgment against an executor *de son tort* will not authorize a sale of the lands of the deceased; *O'Connor v. Dafoe* (1858) 15 U.C.R. 386; *Wrathwell v. Bates* (1858) 15 U.C.R. 391; *Graham v. Nelson* (1857) 6 C.P. 280.

If the estate is insolvent the creditors must be paid ratably and the personal representative on being sued should either set up the insolvency or obtain an order for administration; see "An Executor's Defence at Law," 10 C.L.T. 277. See notes to R.S.O. c. 129.

CHAPTER 148.

An Act respecting Mortgages and Sales of Personal Property.

As amended by 62 V. c. 11.

SHORT TITLE, s. 1.

CHattel Mortgages Where Possession of Goods Unchanged :
Affidavits as to indebtedness, ss. 2, 3.

To be registered or void as against creditors, ss. 2, 5.

To operate from execution, s. 4.

SALES OF GOODS WHERE POSSESSION UNCHANGED :

To be registered or void as against creditors, s. 6.

MORTGAGES OF GOODS TO SECURE ADVANCES OR SURETIES, ss. 7, 8.

AUTHORITY TO BE FILED, s. 9.

AFFIDAVIT OF BONA FIDES MAY BE MADE BY ONE OR TWO OR MORE MORTGAGEES, etc., s. 10.

CONTRACTS TO GIVE MORTGAGES OR MAKE SALES, ss. 11-14.

PLACE OF REGISTRATION, ss. 15, 16.

WHEN MORTGAGED GOODS REMOVED TO ANOTHER COUNTY OR DISTRICT, s. 17.

RENEWAL OF MORTGAGES, ss. 18-23.

CERTIFICATE OF CLERK TO BE EVIDENCE OF REGISTRATION, s. 24.

DISCHARGE OF MORTGAGES, ss. 25-28

FEES, s. 29.

MISCELLANEOUS :

Registration where time expires on a day on which offices are closed, s. 30.

Authority to take or renew mortgages may be general, s. 31.

Description in instrument, s. 32.

Affidavits, s. 33.

Act not to apply to vessels, s. 34.

Where new county formed, s. 35.

Inspection of books, s. 36.

Act to extend to goods not ready for delivery, s. 37.

"Creditor," meaning of, s. 38.

"Actual and continued change of possession," meaning of, s. 39.

Taking possession not to validate, s. 40.

AGREEMENTS WHERE POSSESSION PASSES WITHOUT OWNERSHIP, s. 41.

STATISTICAL RETURNS, s. 42.

HER MAJESTY by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Short title.

1. This Act may be cited as "*The Bills of Sale and Chattel Mortgage Act.*" 57 V. c. 37, s. 1.

EFFECT OF REGISTERING OR OMITTING TO REGISTER.

Mortgages of goods not attended with change of possession, to be registered.

2. Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall, within five days from the execution thereof, except as hereinafter otherwise provided, be registered as hereinafter provided, together with the affidavit of an attesting witness thereto, of the due execution of such mortgage or

conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, which affidavit shall also contain the date of the execution of the mortgage, and also with the affidavit of the mortgagee or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and is properly authorized in writing to take such mortgage, in which case the affidavit of the agent shall state that he is aware of all the circumstances connected therewith, and a copy of such authority or the authority itself shall be registered therewith. 57 V. c. 37, s. 2.

3. Such last mentioned affidavit, whether of the mortgagee or his agent, or one of several mortgagees or the agent of the mortgagee or mortgagees shall state in addition to what is required by section 2 of this Act that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him. 57 V. c. 37, s. 3.

Contents of
affidavit of
bona fides.

4. Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time of the execution thereof. 57 V. c. 37, s. 4.

When mort-
gage to take
effect.

5. In case such mortgage or conveyance and affidavits are not registered as by this Act provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration. 57 V. c. 37, s. 5.

Effect of non-
registration.

6. Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of an attesting witness thereto of the due execution thereof, and an affidavit of the bargainee, or his agent (if such agent is aware of all the circumstances connected therewith) duly authorized in writing to take the conveyance (a copy of which authority or the authority itself shall be attached to and filed with the conveyance) that the sale is *bona fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and the conveyance and affidavits shall be registered, as by this Act provided, within five days from the executing thereof, otherwise the sale shall be absolutely void as against the credi-

Sale of goods
not attended
with delivery
to be regis-
tered.

tors of the bargainor and as against subsequent purchasers or mortgagees in good faith. 57 V. c. 37, s. 6.

Mortgages to secure future advances to be registered.

7. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of repayment thereof not being longer than one year from the making of the agreement, and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances, the time of repayment thereof not being longer than one year from the making of the agreement, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise, the terms, nature and effect of the agreement, and in case the mortgage is accompanied by the affidavit of an attesting witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into and the mortgage taken by an agent duly authorized in writing to make such agreement and to take such mortgage and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto and truly states the extent of the liability intended to be created by the agreement and covered by such mortgage, and that the mortgage is executed in good faith, and for the express purpose of securing the mortgagee repayment of his advances, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the mortgagor, and in case the mortgage is registered as by this Act provided, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act. 57 V. c. 37, s. 7.

Mortgages given to secure indorsers and sureties to be registered.

8. In case of a mortgage of goods and chattels for securing the mortgagee against the indorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise, the terms, nature and effect of the agreement, and the amount of liability intended to be created, and in case such mortgage is accompanied by the affidavit of an attesting witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the mortgage has been taken by an agent duly authorized in writing to take such mortgage and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly states the extent of the liability intended to be created and covered by such mortgage, and that such mortgage is executed in good faith and for the express purpose of secur-

ing the mortgagee against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against such mortgagor, and in case such mortgage is registered as by this Act provided, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act. 57 V. c. 37, s. 8.

9. The authority in writing referred to in the two next preceding sections, or a copy of such authority shall be attached to and filed with the mortgage. 57 V. c. 37, s. 9.

Agents' authority to be attached to mortgage.

10. The affidavit of *bona fides* required by sections 6, 7 and 8 may be made by one of two or more bargainees or mortgagees and if made by an agent as herein provided the same shall state that he is aware of all the circumstances connected with the sale or mortgage, as the case may be. 57 V. c. 37, s. 10.

Affidavits of *bona fides*.

CONTRACTS TO GIVE MORTGAGES, ETC.

11. Every covenant, promise or agreement entered into on or after the 7th day of April, 1896, to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels in whatever words the same may be expressed shall be deemed to be a mortgage or conveyance within the meaning of this Act, and unless accompanied by an immediate delivery and an actual and continued change of possession of the goods and chattels mortgaged, the same or a true copy thereof together with affidavits of execution and *bona fides* shall be registered within the time and in the manner hereby prescribed in respect of bills of sale and mortgages, otherwise such covenant, promise or agreement shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration. 59 V. c. 34, s. 1.

Contract to give a chattel mortgage to be deemed a mortgage.

12. Every covenant, promise or agreement to make a sale of goods and chattels, in whatever words the same may be expressed, shall be deemed to be a sale of goods and chattels within the meaning of this Act, and unless accompanied by an immediate delivery, and followed by an actual and continued change of possession of the said goods and chattels shall be in writing, and such writing accompanied by affidavits of execution and *bona fides* shall be registered within the time and in the manner prescribed as respects bills of sale by this Act, otherwise the said covenant, promise or agreement shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith. 59 V. c. 34, s. 2.

Contract to make a sale to be deemed a sale.

Contracts
made prior to
7th April,
1896.

13. In the case of covenants, promises or agreements made before the 7th day of April, 1896, the provisions of this Act with regard to registration may be deemed to be complied with if such registration was effected within three calendar months after the said date and subject thereto this Act shall extend and apply to every such covenant, promise and agreement made before as well as after the said date. 59 V. c. 34, s. 3.

Verbal
agreements.

14. Every verbal agreement to the effect mentioned in the three next preceding sections and not reduced to writing shall be absolutely null and void to all intents and purposes whatever, as against creditors or subsequent purchasers or mortgagees mentioned in such sections. 59 V. c. 34, s. 4.

PLACE OF REGISTRATION.

Instruments
to be register-
ed in the
county court
office.

15.—(1) The instruments mentioned in the preceding sections shall in counties be registered in the office of the Clerk of the County Court of the county or union of counties where the property so mortgaged or sold is at the time of the execution of such instrument; and every such Clerk shall file all such instruments presented to him for that purpose, and shall indorse thereon the time of receiving the same in his office. 57 V. c. 37, s. 11

Registration
in Algoma,
Thunder Bay,
Nipissing.

(2) Where the goods and chattels mortgaged or sold are situate within the Districts of Algoma, Muskoka, Thunder Bay or Nipissing, the said instruments shall be filed within ten days from the execution thereof in the office of the District Court Clerk in the district in which the goods are situate. 62 V. c. 11, s. 30.

Registration
in Parry
Sound, Mus-
koka and
Rainy River.

(3) Where the goods or chattels mortgaged or sold are situate within the Districts of Parry Sound or Rainy River, the said instruments shall be filed within ten days from the execution thereof in the office of the Clerk of the First Division Court of the district in which the goods are situate. When and so soon as a vacancy shall hereafter occur in the office of the Clerk of the First Division Court in the said District of Parry Sound, the said instruments shall thereafter be filed within ten days from the execution thereof in the office of the District Court Clerk in the said District of Parry Sound. 62 V. c. 11, ss. 31 and 32.

Registration
in Haliburton.

(4) Where the goods and chattels mortgaged or sold are situate within the Provisional County of Haliburton, the said instruments shall be filed within seven days from the execution thereof in the office of the Clerk of the First Division Court of the said provisional county. 59 V. c. 32, s. 1.

Registration
in Manitoulin.

(5) Where the goods and chattels mortgaged or sold are situate within the District of Manitoulin the said instruments shall be filed within ten days from the execution thereof in the office of the Deputy Clerk for Manitoulin.

Instruments
filed with De-
puty Clerk
prior to 4th
May, 1891.

(6) Any bill of sale or chattel mortgage filed with the said Deputy Clerk for Manitoulin prior to the 4th day of May, 1891, shall be as valid as if the same had been filed with the Clerk of the County Court.

(7) Nothing in the two next preceding subsections contained shall be construed to affect any action or other proceeding pending on the 4th day of May, 1891, in which the validity of any instrument required to be filed under chapter 125 of the Revised Statutes of Ontario, 1887, and amending Acts is called in question by reason of the place of filing such instrument. 57 V. c. 37, s. 28.

Proceedings
pending on
4th May, 1891
not affected.

(8) "Clerk of the County Court" or "Clerk" when used in this Act shall unless where inconsistent with the context, include the officers mentioned in this section. 60 V. c. 3, s. 3.

Meaning of
"Clerk of
the County
Court."

16. The said Clerks respectively shall number every such instrument or copy filed in their offices, and shall enter in alphabetical order in books to be provided by them, the names of all the parties to such instruments, with the numbers indorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto. 57 V. c. 37, s. 12.

Manner of
registration.

17. In the event of the permanent removal of goods and chattels mortgaged as aforesaid from the county or union of counties or territorial district in which the goods and chattels were at the time of the execution of the mortgage, to another county or union of counties or territorial district, or to the said provisional county of Haliburton, or from the said provisional county to another county or union of counties or territorial district, before the payment and discharge of the mortgage, a certified copy of the mortgage, under the hand of the Clerk in whose office it was first registered, and under the seal of the Court, and of the affidavits and documents and instruments relating thereto filed in such office, shall be filed with the Clerk of the County Court of the county or union of counties to which the goods and chattels are removed, or in the proper office as mentioned in section 15, in case such goods and chattels are removed to a territorial district or to the said provisional county, within two months from such removal, otherwise the said goods and chattels shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith for valuable consideration, as if never executed. 57 V. c. 37, s. 13; 60 V. c. 3, s. 3.

Procedure
when mort-
gaged goods
are removed.

RENEWAL OF MORTGAGES.

18. Subject to the provisions hereinafter contained as to mortgages to companies, every mortgage, or copy thereof, filed in pursuance of this Act shall cease to be valid, as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the filing thereof, unless, within thirty days next preceding

Statement of
amount due to
be filed yearly.

the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee, his executors, administrators or other assigns in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof, is filed in the office of the Clerk of the County Court of the county or union of counties wherein the goods and chattels are then situate, with an affidavit of the mortgagee, or one of several mortgagees, or of the assignee or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees (as the case may be), duly authorized in writing, for that purpose (a copy of which authority or the authority itself shall be filed therewith), that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose. 57 V. c. 37, s. 14.

Form of statement and affidavit.

Proviso.

19. The statement and affidavit mentioned in the next preceding section may be in the form given in the Schedule B to this Act, or to the like effect: Provided, that if any *bona fide* error or mistake shall be made in the said statement, either by the omission to give any credit or credits or by any miscalculation in the computation of interest or otherwise, the said statement and the mortgage therein referred to shall not be invalidated, provided that the mortgagee, his executors, administrators or other assigns shall, within two weeks after the discovery of any such error or mistake, file an amended statement and affidavit in the form given in Schedule B or to the like effect, and referring to the former statement and clearly pointing out the error or mistake therein and correcting the same; but if, prior to the filing of such amended statement and affidavit, any creditor or purchaser or mortgagee in good faith for valuable consideration shall have made any *bona fide* advance of money or given any valuable consideration to the mortgagor, or shall have incurred any costs in proceedings taken on the faith of the amount due on any mortgage being as stated in the renewal statement and affidavit filed, then the said mortgage as to the amount so advanced or the valuable consideration given or costs incurred as aforesaid by such creditor, purchaser or mortgagee, shall, as against such creditor, purchaser or mortgagee, stand good only for the amount mentioned in the renewal statement and affidavit first filed. 57 V. c. 37, s. 15.

Manner of filing and entering affidavit and statement.

20. The statement and affidavit shall be deemed one instrument, and be filed and entered in like manner as the instruments in this Act mentioned are, by section 16, required to be filed and entered, and the like fees shall be payable for filing and entering the same as are now payable for filing and entering such instruments. 57 V. c. 37, s. 16.

Statement to be filed annually.

21. Another statement in accordance with the provisions of section 18 of this Act, duly verified as required by that section, shall be filed in the office of the Clerk of the County Court of

the county wherein the goods and chattels described in the mortgage are then situate, within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said section 18, or such mortgage, or copy thereof, shall cease to be valid as against the creditors of the persons making the same, and as against purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another statement as aforesaid, duly verified, shall be filed within thirty days next preceding the expiration of one year from the day of the filing of the former statement, or such mortgage or copy thereof shall cease to be valid as aforesaid. 57 V. c. 37, s. 17.

22. The affidavit required by section 18 may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee, or any next of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee, the assignment or the several assignments through which the assignee claims shall be filed in the proper office of the county in which the goods are, at or before the time of such refiling by the assignee, next of kin, executor or administrator of the assignee; Provided that an assignment for the benefit of creditors under chapter 147 of the Revised Statutes of Ontario, 1897, or any other Act of the Province of Ontario or the Dominion of Canada relating to assignments for the benefit of creditors or to insolvency or bankruptcy, need not be filed as aforesaid, provided such assignment be referred to in such statement, and notice thereof (when required), shall have been given in manner required by law. 57 V. c. 37, s. 18.

By whom affidavits on renewals may be made.

Providio.

MORTGAGES TO SECURE BONDS, ETC., OF CORPORATIONS.

23.—(1) In the case of a mortgage or conveyance of goods and chattels of any company incorporated by or under any Imperial Act or charter, or by or under any Act or charter of the Dominion of Canada, or by or under any Act or charter of the Province of Ontario, made to a bondholder or bondholders, or to a trustee or trustees, for the purpose of securing the bonds or debentures of such company, instead of the affidavit of *bona fides* required by the sections 2 and 3 of this Act, it shall be sufficient for the purposes of this Act if an affidavit be filed as thereby required, made by the mortgagee or one of the mortgagees, to the effect that the said mortgage or conveyance was executed in good faith and for the express purpose of securing the payment of the bonds or debentures referred to therein, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagors, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them.

Affidavits of bona fides where mortgage given by company to secure bonds or debentures.

Time for filing mortgage where head office of company not in Ontario.

(2) In the case of any such conveyance or mortgage made by an incorporated company, the head office whereof is not within the Province of Ontario, such mortgage or conveyance may be filed within thirty days instead of five days, as provided in section 2 of this Act, and the same shall be of the like force, effect and priority as if the same had been filed within such five days.

Renewal of mortgages.

(3) Any such mortgage may be renewed in the manner and with the effect provided by section 18 and subsequent sections of this Act upon the filing of a statement by the mortgagee or one of the mortgagees exhibiting the interest of the mortgagee or mortgagees in the property claimed by virtue of the said mortgage, and showing the amount of the bond or debenture debt which the same was made to secure, and showing all payments on account thereof which, to the best of the information and belief of the person making such statement, have been made, or of which he is aware or has been informed, together with an affidavit of the person making such statement, that the statement is true to the best of his knowledge, information and belief, and that the mortgage has not been kept on foot for any fraudulent purpose, and such statement shall be filed instead of the statement required by said section 18 of this Act.

Affidavits and statements on behalf of companies.

(4) If any mortgage as aforesaid be made to an incorporated company, the several affidavits and statements herein mentioned may be made by the president, vice-president, manager or assistant manager of such mortgagee company, or any other officer of the company authorized for such purpose. 57 V. c. 37, s. 19.

Renewal of mortgages given to secure debentures of companies.

(5) Where such mortgage or conveyance is made as a security for debentures and the by-law authorizing the issue of the debentures, as a security for which the mortgage or conveyance was made, or a copy thereof, certified under the hand of the president or vice-president and secretary of the company and verified by an affidavit of the secretary thereto attached or endorsed thereon, and having the corporate seal attached thereto, is registered with the mortgage or conveyance, it shall not be necessary to renew the said mortgage or conveyance, but the same shall in such case continue to be as valid as if the same had been duly renewed as in this Act provided.

(6) The preceding subsection shall apply to every such mortgage or conveyance made and registered after the 5th day of May, 1894, but nothing herein contained shall affect any accrued rights or any litigation pending on the 13th day of April, 1897. 60 V. c. 14, s. 86.

PROOF OF REGISTRATION.

The clerk's certificate to be evidence of registration.

24. A copy of any original instrument, or of a copy thereof so filed as aforesaid, including any statement made in pursuance of this Act, certified by the Clerk in whose office the same has been filed under the seal of the Court, shall be re-

ceived in evidence in all Courts, but only of the fact that the instruments or copy and statement were received and filed according to the indorsement of the Clerk thereon, and of no other fact; and in all cases the original endorsement by the Clerk, made in pursuance of this Act, upon any such instrument or copy, shall be received in evidence only of the fact stated in the endorsement. 57 V. c. 37, s. 20.

DISCHARGE OF MORTGAGES.

25. Where any mortgage of goods and chattels is registered under the provisions of this Act, such mortgage may be discharged by the filing, in the office in which the same is registered, of a certificate signed by the mortgagee, his executors or administrators, in the form given in the Schedule A hereto, or to the like effect. 57 V. c. 37, s. 21.

Certificates
of discharge of
chattel
mortgages.

26. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall, at each place where the number of the mortgage has been entered, with the name of any of the parties thereto, in the book kept by him under section 16 of this Act, or wherever otherwise in the said book the said mortgage has been entered, write the words "Discharged by Certificate Number (*stating the number of the certificate*)," and to the said entry the officer shall affix his name, and he shall also indorse the fact of the discharge upon the instrument discharged, and shall affix his name to the indorsement. 57 V. c. 37, s. 22.

Entering
certificates of
discharge.

27. Where a mortgage has been renewed under section 18 of this Act, the indorsement or entries required by the preceding section to be made need only be made upon the statement and affidavit filed on the last renewal, and at the entries of the statement and affidavit in the said book. 57 V. c. 37, s. 23.

Entries of
renewal.

28. In case a registered chattel mortgage has been assigned the assignment shall, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage, and the proceedings authorized by the next preceding three sections of this Act, may and shall be had, upon a certificate of the assignee, proved in manner aforesaid. 57 V. c. 37, s. 24.

Entry as-
signment of
mortgages.

FEES.

29. For services under this Act the Clerks aforesaid shall be entitled to receive the following fees:

1. For filing each instrument and affidavit, and entering the same in a book as aforesaid, fifty cents.

2. For filing an assignment of any instrument, and making all proper indorsements in connection therewith, twenty-five cents.
3. For filing a certificate of discharge of any instrument, and making all proper entries and indorsements connected therewith, twenty-five cents.
4. For a general search, twenty-five cents.
5. For production and inspection of any instrument filed under this Act, ten cents.
6. For copies of any document with certificate prepared, filed under this Act, ten cents for every hundred words.
7. For extracts, whether made by the person who made the search, or by the officer, ten cents for every hundred words. 57 V. c. 37, s. 29.

MISCELLANEOUS PROVISIONS.

Registration where time limited expires on a day on which office is closed.

30. Where, under any of the provisions of this Act, the time for registering or filing any mortgage, bill of sale, instrument, document, affidavit, or other paper expires on a Sunday or other day on which the office in which the registering or filing is to be made or done is closed, and by reason thereof the registering or filing cannot be made or done on that day, the registering or filing shall, so far as regards the time of doing or making the same, be held to be duly done or made if done or made on the day on which the office shall next be open. 57 V. c. 37, s. 30.

General authority to take or renew mortgages.

31. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of this Act may be a general one to take and renew all or any mortgages or conveyances to the mortgagee or bargainee. 57 V. c. 37, s. 31.

Manner of describing property in mortgages, etc.

32. All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished. 57 V. c. 37, s. 32.

Who to administer the affidavits.

33. All affidavits and affirmations required by this Act may be taken and administered by any Judge, Notary Public, or a Commissioner or other person in or out of the Province authorized to take affidavits in and for the High Court or by a Justice of the Peace; and the sum of twenty cents shall be payable for every oath thus administered. 57 V. c. 37, s. 33.

Act not to apply to mortgages of vessels registered.

34. This Act shall not apply to mortgages of vessels registered under the provisions of any Act in that behalf. 57 V. c. 37, s. 34.

35. All chattel mortgages relating to property within any township, city, town, or incorporated village forming part of a new county, at the date the proclamation forming the new county takes effect, shall, until their renewal becomes necessary to maintain their force against creditors, subsequent purchasers or mortgagees in good faith, continue to be as valid and effectual in all respects as they would have been if the new county had not been formed, but in the event of a renewal of any such chattel mortgage after the date the proclamation takes effect, the renewal shall be filed in the proper office in that behalf in the new county as if the mortgage had originally been filed therein, together with a certified copy under the hand of the Clerk and seal of the County Court, and no chattel mortgage in force at the said date shall lose its priority by reason of its not being filed in the new county prior to its renewal. 57 V. c. 37, s. 35.

Mortgages where new county is constituted.

36. Every person shall have access to and be entitled to inspect the several books of the County Courts, containing records or entries of the chattel mortgages and bills of sale filed; and no person desiring such access or inspection shall be required, as a condition to his right thereto, to furnish the names of the parties in respect of whom such access or inspection is sought; and all Clerks of the County Courts of the Province shall respectively, upon demand or request, produce for inspection any chattel mortgage, or bill of sale, filed in their respective offices, or of which records or entries are, by law, required to be kept in such several books of the County Courts. 57 V. c. 37, s. 36.

Inspection of books in County Court office.

37. The provisions of this Act shall extend to mortgages and sales of goods and chattels, notwithstanding that such goods and chattels may not be the property of, or may not be in the possession, custody or control of the mortgagor or bargain or or any one on his behalf at the time of the making of such mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of said mortgage or sale be actually procured or provided, or fit or ready for delivery, and notwithstanding that some act may be required for the making or completing of such goods and chattels, or rendering the same fit for delivery. 57 V. c. 37, s. 37.

Mortgage, etc. of goods not in possession of mortgagor.

38. In the application of this Act the word "creditors" where it occurs, shall extend to creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee in insolvency of the mortgagor, and to an assignee for the general benefit of creditors, within the meaning of *The Act respecting Assignments and Preferences by Insolvent Persons*, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the Sheriff or other officer. 57 V. c. 37, s. 38; 60 V. c. 3, s. 3.

"Creditors," meaning of.

Rev. Stat. c. 147.

"Actual and continued change of possession," meaning of.

39. The "actual and continued change of possession" mentioned in this Act shall be taken to be such change of possession as is open, and reasonably sufficient to afford public notice thereof. 57 V. c. 34, s. 39.

Subsequent possession not to validate sale otherwise void.

40. A mortgage or sale declared by this Act to be void or which, under the provisions of section 18 has ceased to be valid as against creditors and subsequent purchasers or mortgagees, shall not by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee be thereby made valid as against persons who become creditors, or purchasers, or mortgagees before such taking of possession. 57 V. c. 37, s. 40; 60 V. c. 3, s. 3.

AGREEMENTS WHERE POSSESSION PASSES WITHOUT OWNERSHIP.

Agreement on sale that property is not to pass until payment void unless filed, etc.

41.—(1) In case of an agreement for the sale or transfer or merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer shall be deemed to have been absolute, unless

(a) The agreement is in writing, signed by the parties to the agreement or their agents, and

Where to be filed in counties.

(b) Unless such writing or a duplicate or copy verified by oath is filed in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which the goods are situate at the time of making the agreement, and also in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be within five days of the delivery of possession of any of the goods under the agreement. 57 V. c. 37, s. 41 (1); 58 V. c. 24, s. 2.

Where to be filed in territorial districts.

(2) In the territorial districts of Muskoka, Nipissing, Algoma, Thunder Bay and Rainy River the agreement shall be filed in the office of the Clerk of the Peace in the district, and in the districts of Parry Sound and Manitoulin in the office of the registrar of deeds for the district; Provided that if a Clerk of the Peace shall be appointed for the district of Parry Sound or the district of Manitoulin then any agreement requiring thereafter to be filed in such district shall be filed in the office of such Clerk of the Peace.

Agreement not to affect ordinary purchases.

(3) Such an agreement, though signed and filed, shall not affect purchases from the trader or person aforesaid in the usual course of his business.

(4) The provisions of this and the four next preceding sections of this Act shall not affect the case of manufactured goods and chattels which at the time possession is given have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, nor any goods or chattels where the receipt-note, hire receipt, order or other instrument is filed and for which cases respectively provision is made by *The Act respecting Conditional Sales of Chattels*. 57 V. c. 37, s. 41 (2-4).

Sections 37-41 not to affect sales of certain marked goods.

Rev. Stat. c. 149.

STATISTICAL RETURNS.

42.—(1) Every Clerk with whom instruments are required to be registered under the provisions of this Act, shall on or before the 15th day of January in each year, transmit to the Minister of Agriculture returns which shall set out:

Returns of chattel mortgages, etc., to be made by clerks.

- (a) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors on record and undischarged in the office of such Clerk on the 1st day of January, in the year preceding that in which the return is made ;
- (b) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors registered in such office during the year following the said 1st day of January, and
- (c) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors on record and undischarged in the said office on the 31st day of December in said year.

(2) The returns shall not include instruments which have lapsed by reason of non-renewal.

(3) The chattel mortgages and renewals and discharges, and assignments for the benefit of creditors in the said returns shall be classified according to the several occupations or callings of the vendors or mortgagors or assignors as stated in the instruments, and shall show the aggregate sums purporting to be secured thereby respectively.

(4) The returns shall, where practicable, distinguish mortgages to secure future indorsations or future advances from mortgages to secure an existing debt or a present advance. 53 V. c. 12, s. 7.

SCHEDULE A.

(Section 25.)

FORM OF DISCHARGE OF MORTGAGE.

To the Clerk of the Court of the of
 I, A. B., of do certify that has satisfied all money
 due on, or to grow due on a certain chattel mortgage made by
 to , which mortgage bears date the day of A.D.
 , and was registered (or in case the mortgage has been renewed was
 re-registered), in the office of the Clerk of the Court of the
 of , on the day of A.D. , as No. (here mention
 the day and date of registration of each assignment thereof, and the names
 of the parties, or mention that such mortgage has not been assigned, as the
 fact may be); and that I am the person entitled by law to receive the
 money, and that such mortgage is therefore discharged.

Witness my hand, this day of A.D.

Signature of witness, and state residence }
 and occupation. } A.B.

57 V. c. 37, Sched. A.

SCHEDULE B.

(Section 19.)

Statement exhibiting the interest of C. D. in the property mentioned
 in a Chattel Mortgage dated the day of 18 ,
 made between A. B., of of the one part, and C. D., of ,
 of the other part, and filed in the office of the Clerk of the Court
 of the of , on the day of , 18 ,
 and of the amount due for principal and interest thereon, and of all pay-
 ments made on account thereof.

The said C. D., is still the mortgagee of the said property, and has not
 assigned the said mortgage (or the said E. F. is the assignee of the said
 Mortgage by virtue of an assignment thereof from the said C. D. to him,
 dated the day of , 18 ,) (or as the case may be).

No payments have been made on account of the said Mortgage (or The
 following payments, and no other, have been made on account of the said
 Mortgage :

1886, January 1, Cash received, \$100 00)

The amount still due for principal and interest on the said Mortgage is
 the sum of \$ computed as follows : (here give the computation).

C.D.
 County of } I, of the
 To wit, } of
 of the Mortgagee named in the Chattel Mortgage mentioned
 in the foregoing (or annexed) statement (or assignee of the mortgagee
 named in the Chattel Mortgage mentioned in the foregoing [or annexed]
 statement (as the case may be), make oath and say :

1. That the foregoing (or annexed) statement is true.
2. That the Chattel Mortgage mentioned in the said statement has not
 been kept on foot for any fraudulent purpose.

Sworn before me at the
 of in the
 County of , this
 day of 18 .

57 V. c. 37, Sched. B.

NOTES.

Object of the Act. The act is not intended to and does not in any way affect the validity of transactions as between the parties thereto. Possession is *prima facie* evidence of ownership; Pollock & Wright on Possession, p. 25. It may however often exist without ownership. The law has therefore provided safe guards for persons dealing with possessors to protect them against the subsequent assertion of title by the true owner. Examples of these safeguards are to be found in the Conditional Sales Act (R. S. O. c. 149) and The Factors' Act (R.S.O. c. 150). The present Act is intended to protect two classes of persons (1) purchasers and mortgagees, (2) creditors. Any person who acquires by purchase or mortgage a title to goods from a person who was at one time the owner thereof is entitled to rely upon the visible possession of the property by his vendor in the absence from the appropriate registries of any charge upon that property. The policy of the act requires a liberal construction of the word "creditors." Registration or possession is required manifestly for the protection not only of actual creditors, but of all who may become creditors and this extends not only to judgment creditors, but also those who have not had the opportunity of recovering judgment and to those whose claims are not yet due or who have not had time to get judgment; *Clarkson v. McMaster* (1895) 25 S. C. R. 96.

Property within the Act. The provisions of the act extend to all personal chattels in the possession of the vendor or mortgagor at the time of making the sale or mortgage and to goods of which he may afterwards acquire possession.

Exceptions—

- (1) A half interest in a chattel is not within the Act; *Gunn v. Burgess* (1884) 5 O. R. 685.
- (2) Goods in the possession of a wharfinger or warehouseman or in a bonded warehouse of the Customs' Department are not subject to the provisions of the act; *Harris v. Commercial Bank* (1858) 16 U. C. R. 437; *May v. Security Loan and Savings Co.* (1880) 45 U. C. R. 106; *Jones v. Henderson* (1885) 3 Man. L. R. 433; *Commercial National Bank of Chicago v. Corcoran* (1884) 6 O. R. 527. It would seem, however, that if the goods should subsequently be taken possession of by the vendor or mortgagor, they would fall within the provisions of the act under s. 37.
- (3) Book-debts are not within the act though assigned by a mortgage also covering goods as to which the act applied; *Kitching v. Hicks* (1884) 6 O. R. 739; *Thibaudeau v. Paul* (1895) 26 O. R. 385.
- (4) Growing timber is not within the act; *Steinhoff v. McRae* (1887) 13 O. R. 546.
- (5) A term of years is not within the act; *Fraser v. Lazier* (1853) 9 U.C.R. 679.
- (6) Chattels of the nature of plant or machinery not structurally affixed to the freehold as well as those of a like nature afterwards placed on the mortgaged premises may be comprised in a mortgage of the real estate and will then not be within the act; *Canada Permanent Loan and Savings Co. v. Traders Bank* (1898) 29 O. R. 479, unless, perhaps, a power is given to sell or take possession of the fixtures separately from the building. *Ex parte Barclay* (1876) L.R. 9. Ch. 576; *Johns v. Ware* (1899) 1 Ch. 359.
- (7) Goods to be made or purchased on joint account or under an agreement that as made or purchased they should become the property of parties advancing money to make or purchase them, e. g. staves to be made by A. from timber purchased with money supplied by B. under an agreement that as made the staves were to be B's property; *Kelsey v. Rogers* (1882) 30 C. P. 624, or bricks to be made by A. and burned with wood supplied by B. on the agreement that as made the bricks were to become B's property; *Burnett v. McBean* (1858) 16 U. C. R. 466. Whether these cases would now be brought within the act by virtue of s. 37 admits of some doubt.

- (8) Unfinished goods (engines) left in the possession of the vendor under an agreement that he should furnish them; *Burton v. Bellhouse* (1860) 20 U. C. R. 60.
- (9) Mortgages of vessels when registered under The Merchant Shipping Act, see sec. 38.
- (10) Assignments for the benefit of creditors. R. S. O. c. 147.

Persons entitled to the benefit of the Act. A conveyance or mortgage subject to the provisions of the act will be void if not registered as required thereby as against;—

- (1) Subsequent purchasers or mortgagees in good faith for valuable consideration. So long as the purchase or mortgage is real or bona fide, notice of the invalid sale or mortgage will not prevent the subsequent purchaser or mortgagee obtaining a good title; *Moffatt v. Coulson* (1860) 19 U. C. R. 341; *Marthinson v. Patterson* (1892) 19 A. R. 188, 192.
- (2) Creditors. This expression includes not only execution creditors but all creditors; *Clarkson v. McMaster* (1895) 25 S. C. R. 96. An execution creditor may test the validity of the mortgage by making a seizure of the goods. If there is no execution an action may be brought by a creditor on behalf of himself and all other creditors of the mortgagor.
- (3) An assignee for the benefit of creditors. Simple contract creditors and assignees for the benefit of creditors could formerly only take advantage of the act where the instrument was not in the first instance properly registered. Where a mortgage ceased to be valid for want of a proper renewal neither an assignee nor a simple contract creditor had any *locus standi* to have it declared invalid; *Tallman v. Smart* (1894) 25 O. R. 661; but the change on revising the Statutes of section 38 has changed the law on that point.

Only subsequent purchasers or mortgagees are entitled to the benefit of the act. A person who would be entitled as against the mortgagor to assert a lien upon goods is not entitled to set up the invalidity under the act of a mortgage made after his lien was acquired; *Hall v. Collins Bay Rafting Co.* (1884) 12 A. R. 65. A person who becomes a second mortgagee of goods during the year while a chattel mortgage is in force derives no benefit from a failure to renew the first mortgage; *Hodgins v. Johnston* (1880) 5 A. R. 449; *Heaton v. Flood* (1897) 29 O. R. 87.

Taking Possession. Until some other person acquires rights in the goods comprised in an instrument declared to be void or to have ceased to be valid by the act the mortgagor may (subject to the provisions of the acts relating to fraudulent conveyances and preferences) confirm the title of the purchaser or mortgagee either by delivering possession or by executing a new mortgage or conveyance. As against the bargainor or mortgagor, possession may also be taken without his consent and such taking of possession will be effective to prevent the bargainor or mortgagor from conferring upon any subsequent purchaser or mortgagee any title to the property which would confer any right to take advantage of any of the provisions of the act. It was formerly held that such taking of possession *in invitum* would also be effective as against all creditors who had not, at the time of such taking of possession, executions in the hands of the proper sheriff; *Parkes v. St. George* (1884) 10 A. R. 496; *Banks v. Robinson* (1888) 15 O. R. 618; *Ross v. Dunn* (1889) 16 A. R. 552, and this notwithstanding the provisions of s. 40; *Gillard v. Bollert* (1893) 24 O. R. 147, but a different view now prevails; *Clarkson v. McMaster* (1895) 25 S. C. R. 96, and the taking of possession will not make the instrument valid as against any creditor of the bargainor or mortgagor who became such before the taking of possession; *Wood v. Brunt* (1896) 32 C. L. J. 775. A taking of possession to be effective must be actual and continued and not merely formal, otherwise subsequent purchasers, mortgagees or creditors may acquire the same rights as if possession had not been taken; *Heaton v. Flood* (1897) 29 O. R. 87. The taking of possession either with or without a new delivery by the bargainor or mortgagor will not defeat the rights of a purchaser or mortgagee to whom a conveyance or mortgage has been made between the time of the original transaction and the taking of possession; *Marthinson v. Patterson* (1892) 19 A. R. 188, and this even though the subsequent conveyance or mortgage may not have been validly registered; *ib. per Burton and MacLennan JJ. A.* Prior to the revision of the statutes in 1897 a mortgage which had

ceased to be valid for want of renewal was not declared not to be made valid by the subsequent taking of possession; *Heaton v. Flood* (1897) 29 O. R. 87; but in the revision s. 40 was amended by inserting the words "or which under the provisions of s. 18 has ceased to be valid", and creditors have therefore the same rights now as against every document within the act whether void *ab initio* or which has ceased to be valid for want of renewal, or it would seem which had become void after the permanent removal of the chattels by reason of non compliance with sec. 17.

Sale by Mortgagee under Invalid Mortgage. It was held in *Barker v. Leeson* (1882) 1 O. R. 114 that a sale by a mortgagee with the consent of the mortgagor under a mortgage which had ceased to be valid for want of renewal would not confer a good title as against creditors; In *Banks v. Robinson* (1888) 15 O. R. 618, 624 it was said that this decision should not be followed having regard to *Cookson v. Swire* (1884) 9 App. Cas. 653 and *McLean v. Bell* (1884) 5 Russ. & G. 130, and in *Meriden Britannia Co. v. Braden* (1894) 21 A. R. 352, it was held that a creditor could not assert any right to the goods as against such a purchaser. In *Clarkson v. McMaster* (1895) 25 S. C. R. 96, where the point did not, however, arise, *Strong C. J.* said, p. 103; "In the case of *Barker v. Leeson* the learned Chancellor of Ontario delivered a judgment which in my opinion contains not only a correct construction of the Statute, but also a sound exposition of the policy of the law, and the intent of the legislature in enacting it", and it would appear that such a sale can only be supported as against creditors, if the mortgagor were a consenting party, and it was made before an execution had been placed in the Sheriff's hands; see *Heaton v. Flood* (1897) 29 O. R. 87, 94.

Untruth of Affidavits. In many cases it has been said that an instrument was not within the act because the transaction was such that the affidavit of *bona fides* could not truly be made; *Baldwin v. Benjamin* (1858) 16 U. C. R. 52; *Walker v. Niles* (1871) 18 Gr. 210; *Taylor v. Ainslie* (1868) 19 C. R. 78; *Connell v. Hickock* (1888) 15 A. R. 518. The truth or untruth of the affidavit is however important only as bearing on the question of fraud or *mala fides*. The untruth of the affidavit if it is formally in conformity with the Statute gives no ground for avoiding the instrument; *Marthinson v. Patterson* (1892) 19 A. R. 188; *Martin v. Sampson* (1896) 24 A. R. 1; *Hamilton v. Harrison* (1881) 46 U. C. R. 127, unless the instrument is under ss. 7 and 8 relating to future advances or endorsements, when the affidavit must state the true consideration; *Barber v. McPherson* (1886) 13 A. R. 386.

Trustee. A person to whom a mortgagor is not indebted may take a mortgage for the debt or another person or corporation, although the trust for such other person or corporation is not disclosed on the instrument, and if he makes the necessary affidavit the mortgage will, in the absence of *mala fides*, be good; *Light v. Hawley* (1897) 29 O. R. 25; *Brodie v. Ruttan* (1858) 16 U. C. R. 207. One partner may take a mortgage for a firm debt; *Hobbs Hardware Co. v. Kitchen* (1889) 17 O. R. 363; *Ross v. Dunn* (1889) 16 A. R. 552.

Act to be Strictly Construed. The act is to be strictly construed. It deals with transactions which may be perfectly *bona fide* and honest, and imposes certain restrictions upon them. An Act which, however salutary, may have the effect of taking away rights of property honestly acquired, must be construed strictly; *Brantom v. Griffiths* (1876) 1 C. P. D. 349; *Gough v. Everard* (1863) 2 H. & C. 1; *Kraemer v. Glass* (1860) 10 C. P. 475.

Date of Filing. The instruments must be registered within five days from their execution, i. e., exclusive of the day of execution, but inclusive of the fifth day thereafter; *McLean v. Pinkerton* (1882) 7 A. R. 490. The actual day of execution, not the date the instrument bears is what is to be regarded, so that a mortgage dated March 16th, but not executed till 26th, may be filed at any time before the end of March 31st; *MacDonald v. Gaunt* (1899) 35 C. L. J. 172. If the last day should be a Sunday or holiday, the instrument may be filed the next day the office in which it is to be filed is open.

What documents require registration. Every document of the nature and effect of a mortgage by a party in possession of goods, by whatever name it may be called, must be registered. It may be under seal or it may not. The intention must be looked at and if it transfers the goods as security for payment of a debt, although it may be drawn up in the form of a promissory note or Memorandum of Agreement, the effect is the same; it is a Chattel Mortgage and is void unless filed in accordance with this Act; *Hall v. Collins Bay Rafting Co.* (1886) 12 A. R. 65.

Where it appears that the transaction is not within the mischief intended to be prevented by the Act, the Court will, if possible, uphold the transaction; *Scribner v. MacLaren* (1882) 2 O.R. 279, per Cameron, J.; *Gough v. Everard* (1863) 2 H. & C. 1; *Pollock C. B.* at p. 8.

An agreement to give at some future time a chattel mortgage must be registered, as though it were in fact a chattel mortgage already; see section 11.

A conditional sale to a trader or other person for re-sale falls under section 41.

A power of attorney to take possession as security is within the Act; *Beecher v. Austin* (1871), 21 C.P. 334.

But a power of attorney to sell at once, and out of proceeds to pay debts, is not within the Act; *Patterson v. Kingsley* (1878) 25 Gr. 425.

An agreement declaring the party advancing money the absolute owner of goods manufactured by the borrower, but allowing the manufacturer to keep possession and assume risks of fire or other loss is a mortgage and must be filed; *Howitt v. Gzowski* (1856) 5 Gr. 555.

A receipt for purchase money of goods not yet separated from a larger quantity comes within section 37, and must be filed; *Snell v. Heighton* (1883) 1 C. & E. 95.

A Real Estate Mortgage giving the mortgagee the right to seize chattels that are not fixtures on default in payment must be filed as a chattel mortgage in addition to the filing in the Land Registry Office, for it comes within section 11 of the Act. But as to chattels affixed to the soil, see *Sheffield v. Harrison* (1884) 15 Q.B.D. 358; *Bacon v. Rice Lewis & Co.* (1897) 33 C.L.J. 680; *Hobson v. Gorringe* (1897) 1 Ch. 182.

A bill of sale in form absolute, but the intention being to secure a debt must be registered; *McMahon v. McDougall* (1853) 10 U.C.R. 399.

The substance and not the form of the transaction must be observed. Where the transaction purported to be a sale followed by a hiring and purchase agreement whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums as for such time until a certain amount was paid when the chattels were to become again the property of the vendor and power was given to the purchaser to take possession in default of payment, it was held that the transaction was really a chattel mortgage and void. *Re Watson, Ex parte Official Receiver* (1890) 25 Q.B.D. 27; *Madell v. Thomas* (1891) 1 Q. B. 230.

Documents not requiring registration. If the possession of the goods is handed over at the time of the transaction, the Act will not apply.

The change of possession must, however, be the most open and complete change that the nature of the goods will admit of. If anything is done secretly, a fraudulent intent may very properly be suspected. If the nature of the goods is such that an open and complete and public change of possession is not feasible the only safe course is to register the document; *McMaster v. Garland* (1883) 8 A.R. 5.

Documents showing a sale where the property was not to pass until payment need not be filed as a Chattel Mortgage, but The Conditional Sales Act may apply; *R.S.O. c. 149*.

Pledges of goods where the goods are handed over as security as in cases of pawn tickets or letters of hypothecation are not within the Act and do not require registration; *Ex parte Hubbard* (1886) 17 Q.B.D. 690.

Goods situate in a foreign country. A person who gets a good title to goods in the country where they are situate gets a good title everywhere; *Cammell v. Sewell* (1860) 5 H. & N. 727; *Minna Craig Steamship Co. v. Chartered Mercantile Bank* (1897) 1 Q.B. 460, 468.

Goods owned by foreigners. Goods in Ontario were transferred by a person domiciled in Michigan to a person also domiciled there, and it was contended that the transfer being valid according to the laws of Michigan, it could not be affected by the Act, but the Court held otherwise; *River Stave Co. v. Sill* (1886) 12 O.R. 557. The Court adopted the following statement of law from the judgment of Foster J., in *Clark v. Torbell* (1877) 58 N.H. 88, "Every state has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the state regulate and control its sale

and transfer and all rights which may be affected thereby. If a foreigner or citizen of another state send his property within a jurisdiction different from that where he resides he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has the right to regulate. And if two persons in another state choose to bargain concerning property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country where the chattel is will be permitted to be affected by their contract; see also *Marthinson v. Patterson* (1891) 20 O.R. 720; 19 A.R. 183; *Commercial National Bank of Chicago v. Corcoran* (1884) 6 O.R. 527.

Change of Possession. Immediate delivery of the goods followed by actual and continued change of possession takes the case out of the operation of the Act. The delivery must take place at the time of the completion of the instrument of transfer, and the transferor must thereafter have no possession or control over the goods. The change must be actual and not merely constructive, and it is not sufficient if the vendor next day comes back to his own apparently as owner, but really as clerk or agent for the purchaser; *Scribner v. Kinlock* (1885) 12 A.R. 367. The intention is to give notice to the general public of the transfer, and any change of possession noticeable by a reasonably observant member of the public will comply with the requirements of the Act. What is sufficient is a question of fact to be determined according to the circumstances of each particular case; *Waldie v. Grange* (1859) 8 C.P. 431; *Heaton v. Flood* (1897) 29 O.R. 87. The jury should find whether or not the change was public and open, and then the Judge should decide as a matter of law whether that was sufficient to dispense with registration.

The law is reasonable and looks at all the circumstances and what may be insufficient in one case may be sufficient in another; *Spragge C. J. O. in McMaster v. Garland* (1882) 8 A.R. 5 said "We must look at the nature of the goods and their locality and the place at which the mortgagee or purchaser is to receive them and of what kind of delivery the goods are capable." But if there is any question as to the delivery and change of possession, the instrument must be registered although no further change was under the particular circumstances possible; *Snarr v. Smith* (1881) 45 U.C.R. at p. 159.

A sale by a husband to his wife living and continuing to live with him of the household furniture in their residence is void under the Act unless there is a duly registered Bill of Sale; *Hogaboom v. Graydon* (1894) 26 O.R. 298.

What is a Sale. In *Connell v. Hickock* (1888) 15 A.R. 518, *Hagarty C.J.O.* and *Oster J. A.* were of opinion that a marriage settlement of goods was not a sale within the Act, and that the intended husband and wife were not a bargainer and bargainee respectively of the goods; *Patterson J. A.* was of a contrary opinion and *Burton J.A.* expressed no opinion.

Description. The description must be such that the goods thereby may be readily known and distinguished, s. 32. It need not be such that a stranger might only with the instrument go and place his hand upon the goods, but there should be such material on the face of the instrument to indicate how the property may be identified if proper enquiries are instituted, as for instance "all the property now in a certain shop, &c.," *McCall v. Wolff* (1885) 13 S.C.R. 130, 133.

It has been usual to describe a stock of goods as in the store of the mortgagor on a certain street, but though this has been generally adopted as a usual and safe description, Chief Justice *Burton* in *Horsfall v. Boisseau* (1894) 21 A. R. 663, 771, said "I do not at all concede that a transfer of 'all my stock in trade' would not be sufficient," but see *Whiting v. Hovey* (1886) 13 A.R. 7; 14 S.C.R. 515; *Williams v. Leonard* (1896) 26 S.C.R. 406.

A transfer of goods in a certain shop which described the goods as "22 doz. Spanish net; 250 yards ribbon" without stating that they were all the goods of that class in the shop and there being no evidence to show that fact, was held to be void, *McCall v. Wolff* (1885) 13 S. C. R. 130; "21 milch cows or '450 oil paintings" is also insufficient if it does not appear there were no more; *Carpenter v. Deen* (1880) 23 Q.B.D. 566; *Witt v. Banner* (1888) 20 Q. B.D. 614. "One single buggy" is insufficient unless identified by locality; *Holt v. Carmichael* (1878) 2 A.R. 639, or in some other way, as "two horses which the mortgagor uses for his omnibus," *Fitzgerald v. Johnston* (1877) 41 U. C.R. 440. "One piano, Dominion make No. 2773" is sufficient; *Field v. Hart* (1895) 22 A. R. 449. The addition of the locality has in many cases

saved what would otherwise be a bad description, but reliance cannot be placed upon the older cases unless it is shewn that the goods described by locality are the only ones of the kind at the particular place. If the goods are otherwise sufficiently described an error in the description as to their locality will be rejected as *falsa demonstratio*; Accountant Supreme Court v. Maroon (1899) 30 O.R. 135.

But in all cases where the goods are described in a general way such as all the stock-in-trade of the mortgagor, the class of stock and its locality should be given with such definiteness that doubt will not exist as to what is really comprised; Wilson v. Kerr (1858) 17 U.C.R. 168; Nolan v. Donnelly (1883) 4 O.R. 440; Mathers v. Lynch (1869) 28 U.C.R. 354; Whiting v. Hovey (1886) 13 A.R. 7; 14 S.C.R. 515; Thomson v. Quirk (1889) 18 S.C.R. 695; Williams v. Leonard (1896) 26 S.C.R. 406. If the class of stock is not mentioned but the business of the mortgagor is described as e.g. druggist, it will be presumed that the stock is of the class usual in that business; Wilson v. Kerr (1858) 17 U.C.R. 168.

A complete collection of the cases on description will be found in Barron & O'Brien on Chattel Mortgages, 359-378.

Description of After Acquired Goods. "Goods in any store in which the mortgagor may afterwards carry on business" is sufficient; Horsfall v. Boisseau (1894) 21 A.R. 663; see Milligan v. Sutherland (1896) 27 O.R. 235.

Fixtures. A fixture may be defined as an article which, though naturally a chattel and moveable, has become part of the freehold by being annexed actually or constructively to the soil as part thereof, and thus incapable of transfer apart from the freehold itself.

The general rule of law is that every article affixed to the soil, either directly by being permanently let into, or indirectly by nails or screws to something so permanently let into it is to be considered a fixture or part of the freehold itself, passing with a grant of the land to the grantee unless specifically excepted in the grant itself. In the same way every article not so affixed to the soil is *prima facie* a chattel, and does not pass with a grant of the land unless the grant specifically provides for it. Minihinnick v. Jolly (1897) 29 O.R. 238, affirmed on appeal; 35 C.L.J. 168; Carroll v. Provincial Natural Gas Co. (1896) 26 S.C.R. 181.

It is often stated that the question whether an article is or is not a fixture depends altogether on the intention of the parties at the time of the annexation. To gather the intention we must consider:—

- (a) The nature of the article annexed.
- (b) The relation of the party making the annexation.
- (c) The structure and mode of annexation.
- (d) The purpose or use for which the annexation has been made; Haggart v. Town of Brampton (1897) 28 S.C.R. 174; Holland v. Hodgson (1872) L.R. 7 C.P. 328.

Where machinery or other chattels are sold subject to a lien for the purchase money under the Conditional Sales Act, it was held in Hobson v. Gorringe (1897), 1 Chy. 182, that the mortgagee of the land without notice of a lien could hold the machinery against the vendor; but our legislature in 1897, by cap. 14 sec. 80, appear to have intended to provide that the mortgagee must first pay off the lien of the manufacturer, bailor or vendor. This section has not yet been discussed in the Courts.

Where a mortgage of land includes also the machinery or other fixtures it is not necessary to register the instrument as a Chattel Mortgage, because the fixtures are as much realty as the soil itself, Sheffield v. Harrison (1884), 15 Q.B. 358, unless, perhaps, power is given to seize or sell them separately. Ex parte Barclay (1874) L.R. 9 Ch. 576; Jones v. Ware (1899) 1 Ch. 359.

But a mortgagee who, to make himself doubly secure, takes a chattel mortgage on the fixtures is not precluded from contending that they also passed to him under his land mortgage; Stevens v. Barfoot (1886) 13 A.R. 366, at p. 369.

A chattel mortgage on fixtures given prior to a land mortgage gives the chattel mortgagee a good title as against the subsequent mortgagee of the land only when the latter has actual notice of the chattel mortgage; Bacon v. Rice Lewis & Co. (1897) 33 C.L.J. 680; Rose v. Hope (1872) 22 C.P. 482; Stevens v. Barfoot, *supra*.

If the owner of chattels annexes them to another person's land on which he is a trespasser, he cannot afterwards remove them against the will of the owner or mortgagee of the land, but if chattels are annexed to land by a stranger and wrongdoer without the consent of the owner, the latter does not lose his title to them, nor can the owner or mortgagee of the land retain possession of them; *Stevens v. Barfoot* (1886) 13 A. R. 366.

Affidavits. For registration two affidavits are required, the affidavit of execution and the affidavit of bona fides. The affidavit of execution must be made by an attesting witness, that is, by one who has himself signed the document as a witness to its execution. In case of chattel mortgages the common form of such affidavits is not sufficient, for the actual date of execution must be inserted, but it is otherwise as to a Bill of Sale. A party to the instrument cannot be a witness to it also; *Seal v. Claridge* (1881) 7 Q.B.D. 516; but should the mortgagee be authorized to take affidavits the fact that the affidavit is sworn before him will not invalidate the mortgage; *Inch v. Simon* (1898), 18 C.L.T. 34; 12 Man. L.R. 1.

The affidavit of bona fides is a more complicated and more dangerous one. It is usually the first part of a document investigated for flaws by a person wishing to avoid it. The affidavit may be made by the mortgagee if there is only one, or by one of them if there are two or more, or by a properly appointed agent who knows all the facts connected with the taking of the mortgage. Where there are two or more mortgagees this agent must be appointed by all and not only by one. The appointment must be in writing, giving authority either to take a particular mortgage or bill of sale or mortgages or conveyances generally, see s. 31.

Where the mortgagee is a corporation the affidavit must be made by either the president of the company or by an agent so appointed. All other officers of the company are merely executive, but the president stands on a higher footing and acts directly and not by delegation. The mortgagee being a corporation cannot make an affidavit in any other way than by its chief officer or president and therefore it must be accepted; *Bank of Toronto v. MacDougall* (1865) 15 C.P. 475.

The affidavit must state "(1) that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum of (naming the amount) mentioned in the mortgage; (2) that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him." This wording should be followed strictly word for word, and when an agent is making it must also state that he is aware of all the circumstances connected with the sale (or mortgage), s. 10.

To leave out one of the clauses or part of one would invalidate the whole instrument. The consideration, particularly, must be stated with great strictness and accuracy; *McIntyre v. Union Bank of Lower Canada* (1885), 2 Man. L. Rep. 305, and even qualifying the statement by saying \$1,000.00 or thereabouts would probably avoid the mortgage; *Knox v. Meldrum, Dean, Co. J.* (not reported). But the mere fact that the mortgage states a wrong consideration is not alone sufficient to avoid the instrument; it is only evidence for the jury to consider whether fraud or no fraud; *Marthinson v. Patterson* (1892) 19 A. R. 188; *McGee v. Smith* (1860) 9 C. P. 89; *Parkes v. St. George* (1884) 10 A. R. 496; *Hamilton v. Harrison* (1882) 46 U. C. R. 133; *Martin v. Sampson* (1896) 24 A. R. 1.

The words of the section "due or accruing due" should be used in all cases whether the money is already due or only comes due *in futuro*, as they are meant to cover all cases; *Squair v. Fortune* (1860), 18 U. C. R. 547.

Should the words "or accruing due" be left out and the affidavit state simply that it is to secure "a debt due" and the facts show that all the money is really past due, then the omission will not invalidate the instrument but the mortgage itself cannot be looked at to rectify a mistake; *Midland Loan Co. v. Cowieson* (1891) 20 O. R. 583; *Farlinger v. MacDonald* (1881) 45 U.C.R. 233.

The omission of the letter "s," leaving creditors in the singular, is fatal where the affidavit is required to state that it is not for the purpose of preventing the creditors of the mortgagor from obtaining payment; *Harding v. Knowlson* (1859) 17 U.C.R. 564; *Nisbet v. Cock* (1879) 4 A.R. 200. But the

singular mortgagor may be used instead of the plural mortgagors, and "him" may be used instead of "them," provided they have both been specially mentioned and described as mortgagors in the first part of the affidavit; Farlinger v. MacDonald (1881) 45 U.C.R. 233; Tyas v. MacMaster (1859) 8 C. P. 449; Bertram v. Pendry (1877) 27 C.P. 371.

Another apparently insignificant though fatal error is the omission of the last word "him" of the affidavit, and stating that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against——. The Courts cannot fill up the blank, and are compelled to avoid the whole instrument, although they may feel certain the omission was a mere clerical error; Nisbet v. Cock (1879) 4 A.R. 200; Re Andrews (1877) 2 A.R. 24; Morrow v. Rorke (1877) 39 U.C.R. 500.

Under sec. 6 in cases of Bills of Sale, if the affidavit is made by an agent, the authority or a copy must be attached to the instrument; in case of a Chattel Mortgage under sec. 3 actual attachment is unnecessary. All that is required is that they be filed together.

It has been held that where the words *bona fide* were translated and the affidavit read that the Bill of Sale was executed in good faith and for valuable consideration, &c., the instrument is void; Boynton v. Boyd (1863) 12 C. P. 337; Arnold v. Robertson (1859) 8 C.P. 147.

Where, however, an expression is exchanged for one more comprehensive, the affidavit is still good and the instrument safe; for example, "goods and chattels" may give place to "estate and effects," the latter clause including the former; Mason v. Thomas (1864) 23 U.C.R. 305. Sec. 6 does not give permission to file a copy of the Bill of Sale instead of the original as is done by sec. 2 in the case of Chattel mortgages, yet some judges have been of the opinion that the filing of a copy was sufficient; Harris v. Commercial Bank (1859) 16 U.C.R. 437; Perrin v. Davies (1860) 9 C.P. 147.

In affidavits in Mortgages given for future advances and to secure endorsements, the true nature of the transaction must be verified by swearing to it. In each case the wording of the affidavit should follow the wording of the section relating to it. But if a mortgage is partly to secure an existing or newly created debt and partly to secure future advances or an endorsement, the affidavit by the mortgagee may be a combination one putting in the special clauses required in addition to the usual ones mentioned in secs. 2 and 3; Hughes v. Little (1886) 17 Q.B.D. 207.

Where the words of the affidavit in a mortgage to secure endorsements were "for the express purpose of securing me the said mortgagee against his endorsement of a promissory note for or any renewal of the said recited promissory notes," the affidavit was held to be vague and incomplete and to aver and identify nothing certain in itself, or made so by reference to anything else; Boldrick v. Ryan (1890) 17 A.R. 253; but an affidavit that the mortgage is "for the express purpose of securing me the said mortgagee against the payment of the amount of such notes indorsing liability for the said mortgagor" does not render the mortgage void; Rogers v. Carroll (1899) 19 C.L.T. 110.

Future Advances. Chattel mortgages to secure the payment of money to be advanced or goods to be supplied at some future time to enable the mortgagor to enter into and carry on his business are required to set forth the terms, nature and effect of the agreement for the advances, which agreement must be in writing. The time allowed for repayment must not be longer than one year from the date of the agreement.

The mortgage is not invalid because it recites the purpose to be "to enable the mortgagor to carry on business." So long as the intention is sufficiently clearly shown in both agreement and mortgage to be the assistance of the mortgagor in his efforts to carry on his business, the Statute is satisfied. McLean v. Pinkerton (1882) 7 A.R. 490; Goulding v. Deeming (1887) 15 O.R. 207; Risk v. Sleeman (1875) 21 Gr. 251; Barber v. McPherson (1886) 13 A.R. 356, at p. 358.

An agreement to repay on demand is not "within one year"; see Hetherington v. Groome (1884) 13 Q.B.D. 789. The agreement need not follow any form so long as the intention is stated plainly and unambiguously, and it may be either under seal or not at the option of the parties; Flory v. Denny (1852) 7 Ex. 581, 21 L.J. Ex. 223; Patterson v. Maughan (1877) 39 U.C.R. 379;

Halfpenny v. Pennock (1874) 33 U.C.R. 220. An agreement to advance goods is within the act; Sutherland v. Nixon (1862) 21 U.C.R. 671; Goulding v. Deeming (1887) 15 O.R. 207, 213.

Securing Endorsements. A mortgagee to protect a surety or an endorser need only sufficiently identify the liability which is intended to be secured against; Embury v. West (1888) 15 A.R. 357; Barber v. McPherson (1836) 13 A.R., 356. Only such liabilities as mature within one year from making the mortgage can be secured against; May v. Security, Loan and Savings Co. (1881) 45 U.C.R. 106, and the fact of such maturity must be shewn on the face of the mortgage; Ontario Bank v. Wilcox (1878) '3 U.C.R. 460; Kough v. Price (1877) 27 C.P. 309, but the fact that renewals may appear to be contemplated by the mortgage which may extend the liability beyond a year will not invalidate the mortgage where they have not been agreed upon or which the parties are not bound to make; Embury v. West (1888) 15 A.R. 357. The mortgage may cover past or concurrent but not future endorsements; Mathers v. Lynch (1869) 28 U.C.R. 334. Where the mortgage covers only renewals which become payable within the year, a statement in the affidavit that it is made to secure the mortgagee against "his liability by reason of the promissory note . . . or any future note or notes which he may endorse for the accommodation of the mortgagor, whether as renewals of the said notes or otherwise," will not affect its validity as to all renewals which mature within the year; Driscoll v. Green (1883) 8 A.R. 366.

Authority of Agent. The authority to an agent must be in writing, but not necessarily under seal. Officers of incorporated Companies, except the President himself, require written authority to enable them to make the affidavit; Bank of Toronto v. McDougall (1865) 15 C.P. 475; Freehold Loan and Savings Co. v. Bank of Commerce (1880) 44 U.C.R. 284; Greene v. Castleman (1894) 25 O.R. 113.

The authority itself or a copy must be filed at the same time as the mortgage, and in case of a Bill of Sale under sec. 6 it is required to be attached to the instrument. Under sections 2, 7 and 8 attaching is not required.

Renewal. A mortgagee must disclose under oath once every year the state of the account with his mortgagor. If he fails to do, his rights are postponed to the rights of other creditors of the mortgagor and to subsequent purchasers or mortgagees in good faith for valuable consideration. The renewal must be filed prior to the expiration of one year from the date the mortgage was filed, and not earlier than thirty days before said year expires, so that if a mortgage is filed on 10th April, 1899, the renewal may be filed any time between 10th March and 9th April, 1900, or even on 10th April if the hour of filing the renewal is earlier than the hour of filing the original mortgage. As the Clerk is required to endorse on the mortgage the hour of filing, this can easily be proved; Thompson v. Quirk (1889) 18 S.C.R. 695, 1 N.W.T.R. 88; Beaty v. Fowler (1853) 10 U.C.R. 382; McMartin v. McDougall (1853) 10 U.C.R. 399.

The renewal must be filed in the county where the goods are at the time of renewal, so if they have been moved during the year from that county to another, filing a renewal in the old county will not suffice. The mortgagee to preserve his rights, must first, within two months of the removal file a certified copy of the mortgage and renewals to date as required by sec. 17, and thereafter file his renewals in the new county only.

The statement is required to exhibit the interest of the mortgagee in the property claimed by virtue of the mortgage, and to show the amount still due for principal and interest thereon, and all payments made on account thereof, and the affidavit merely verifies the truth of the statement and reaffirms the absence of fraud. The two are to be read together as one instrument (sec. 20) and if together they give the necessary information properly verified the statute is satisfied and the mortgage remains in force; Sloan v. Maughan (1878) 3 A.R. 222; Barber v. Maughan (1878) 42 U.C.R. 134. The affidavit must swear that the statement is "true" not that it is "correct" or "exact." "True" has a larger meaning and the narrower word will invalidate the renewal; Reynolds v. Williamson (1875) 25 C.P. 49.

The statement must be substantially correct and accurate, but a slight inaccuracy is not enough to vitiate it. A failure to give credit for a payment of \$2.00 has been overlooked; Beers v. Waterbury (1861) 8 Bosworth (N.Y.) 396; Patterson v. Gillies (1873) 64 Barb. (N.Y.) 563.

The affidavit to the renewal may be made by either mortgagee or agent, or if the mortgage has been assigned, then by the assignee or agent, in the same manner as the affidavit to the original mortgage, or if the mortgagee or assignee has died, his next of kin or executor or administrator may make the affidavit, sec. 22. If made by an assignee (other than under insolvency) all assignments to prove his title must be first filed. Mortgages under sections 7 and 8 must fall due within one year from date, but although they may fall due they may not be paid, and it is then necessary for the mortgagee to file a renewal. A renewal of a mortgage securing endorsements will be effective to continue it in force as to only such paper as matured within the year, and paper or renewals of paper maturing beyond the year will be excluded; *Turner v. Wills* (1862) 11 C.P. 366.

If security is taken in the form of an absolute bill of sale defeasible on payment, it must be renewed the same as if it were in form a mortgage, or the grantee's rights lapse; *McMartin v. McDougall* (1853) 10 U.C.R. 399.

Failure to renew has the effect of postponing the mortgagee's rights to the rights of all creditors of the mortgagor, whether they became creditors before or after the time for renewal and also to the rights of subsequent purchasers or mortgagees in good faith for valuable consideration.

By subsequent purchasers or mortgagees is meant those who become such after the time for the renewal had expired; *Hodgins v. Johnson* (1880) 5 A.R. 449, *Burton J.A.* p. 455.

Errors in the account may be corrected within two weeks of their discovery by filing an amended statement and affidavit under sec. 19.

The renewal for each year must be complete in itself, and not refer to former renewals to explain or supplement the account; *Kerr v. Roberts* (1897) 33 C.L.J. 695; the fact that after a renewal statement is made and sworn and before it is filed the mortgage is assigned, will not necessitate a new statement to be made and sworn by the assignor; *Daniels v. Daniels* (1898) 29 O.R. 493.

Seizure. Because at the best, chattel mortgages are a precarious kind of security, the form of chattel mortgage in general use differs radically from the usual form of mortgage of land. The land mortgage usually provides that the mortgagee shall not be disturbed in the possession until he makes default. This proviso is generally omitted from chattel mortgages, so as to give a mortgagee an opportunity to protect himself by seizing or taking possession of the goods at any time he thinks his security in danger; *Porter v. Flintoff* (1837) 6 C.P. 240; *Bingham v. Bettinson* (1879) 30 C.P. 438. It is usual in addition to omitting this re-demise clause to provide specifically that in case of default in payment or performance of other covenants or in case of any one of numerous events endangering the security, such as insolvency, issue of a writ, or of an execution or in case of an attempt to remove the goods and generally in case the mortgagee should at any time believe himself unsafe or insecure, or at any time he may deem it best for his safety so to do, he may at his option consider the total mortgage money due and payable and may seize and sell the mortgaged goods. The belief of the mortgagee whether reasonable or otherwise is all that is necessary to justify acting upon such a clause; *Francis v. Turner* (1895) 25 S.C.R. 110.

A mortgagee may discover shortly after taking his mortgage that by reason of some clerical error or neglect of some formality there is danger of his mortgage being void as against creditors. He may then invoke the aid of the above clause; *Parkes v. St. George* (1884) 10 A.R. 496; but a creditor who has become such before the mortgagee took possession does not lose any right he has in the goods merely by the mortgagee taking possession, sec. 40.

If there is a re-demise clause, giving the mortgagor the right to possession until default, the mortgagee cannot take possession without the mortgagor's consent or he will make himself liable to the mortgagor for trespass.

But where the re-demise clause is left out the property is in the mortgagee, and he can assert it at any time by taking possession either with or without the mortgagor's consent; *Smith v. Fair* (1885) 11 A.R. 763; *Whimcell v. Gifford* (1883) 3 O.R. 1; *McAuley v. Allen* (1870) 20 C.P. 417; *Samuel v. Coulter* (1874) 28 C.P. 240, and with such a mortgage the mortgagee is entitled to follow the goods and take them from a pledgee or any other transferee who has become such without his consent; *Bissett v. Pearce* (1863) 28 N.Y. 252. But he cannot destroy a lien implied from the necessities of the property, such as necessary repairs to articles in constant use by the mortgagor; *Williams v. Allsop* (1861) 10 C.B.N.S. 417.

If the mortgagee takes possession before default because he feels himself insecure, he must retain possession of the goods so as not to destroy the mortgagors possibility of redeeming them, unless there is a clause allowing him to sell before default if he deems himself insecure or unsafe; *Smith v. Fair* (1885) 11 A. R. 763; *Bingham v. Bettinson* (1880) 30 C. P. 438, nor can he allow the mortgagor to re-assume possession as his agent. The taking possession to be effective must be an actual and continued change of possession; *Heaton v. Flood* (1897) 29 O. R. 87.

When the mortgagee has authority to take possession if the mortgagor attempts to sell or dispose of or in any way part with the possession of the goods or remove them out of the limits provided, but power is reserved to sell in the ordinary course of business, if the mortgagor attempts to part with the goods to satisfy an existing debt, the mortgagee can at once proceed, although nothing is due under the terms of the mortgage; *Whimsell v. Gifford* (1883) 3 O. R. 1.

As regards the goods themselves, if they have been disposed of wrongfully by the mortgagor to an innocent purchaser, the mortgagee cannot proceed against the purchaser without first demanding the goods; but if the mortgagee has consented, even verbally, to any disposition of the goods, he is estopped from proceeding in respect of them although the mortgage calls for a written consent; *Loucks v. McGiloy* (1879) 29 C. P. 62.

A clause prohibiting sale will not prevent a trader or merchant selling in the usual course of business, and his doing so will not entitle the mortgagee to seize; *Dedrick v. Ashdown* (1887) 15 S. C. R. 227. Nor will it prevent a mortgagor disposing of his own interest, the purchaser taking subject to the mortgage.

Agreements to Give. An agreement to give a Chattel Mortgage or to sell and convey chattels at some future time might formerly be merely verbal, and by proving the agreement the parties negated the existence of any fraudulent intent in giving the mortgage or bill of sale when called for; *Robins v. Clarke* (1881) 45 U. C. R. 362; *Kerry v. James* (1894) 21 A. R. 333; *Clarkson v. Sterling* (1888) 15 A. R. 234, but these cases are of doubtful authority even as to the law before 1896; *Clarkson v. McMaster* (1895), 25 S. C. R. 96; *Hope v. May* (1897) 24 A. R. 16.

Sections 11 to 14 provide that all such agreements must be in writing and registered in the same manner as if they were actual mortgages or bills of sale, otherwise they are void as against creditors, &c.

The agreement will give only an equitable title to the goods, and any purchaser or mortgagee of the same, without notice of the agreement before the execution of an actual mortgage or the taking of possession by the mortgagee, will acquire a good title notwithstanding the agreement; *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Hallas v. Robinson* (1885), 15 Q. B. D. 288.

Removal of Goods. Where the goods covered by a mortgage are permanently removed out of the County where the mortgage is registered, it is necessary for the mortgagee to have copies of the mortgage, affidavits, renewal statements and renewal affidavits made and certified by the County Court Clerk and file these in the County to which the goods have been removed. This is to give public notice of the existence of the chattel mortgage in the County where the goods are; *Clark v. Bates* (1871), 21 C. P. 352.

If the mortgagor without his mortgagee's consent removes his goods to another County, and after two months mortgages to another party or sells, such purchaser or new mortgagee has probably a good title to the goods, notwithstanding that the first mortgagee had no notice of the removal; *Clark v. Bates*, *supra*.

But if the mortgagor sells the goods and the purchaser removes them to another County the lapse of two months will not perfect his title, for he never had one to start with; he was a wrongdoer when he removed the goods and the rights of the parties were determined then, and he is not a subsequent purchaser under the Act; *Hodgins v. Johnston* (1880), 5 A. R. 449.

Mere temporary removal is not affected by this section. Permanent removal would probably be held to mean removal for longer than two months.

CHAPTER 149.

An Act respecting Conditional Sales of Chattels.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Conditional sales of manufactured goods when to be valid.

1. Receipt notes, hire receipts and orders for chattels, given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent. 51 V. c. 19, s. 1.

Section 1 not to apply to certain household furniture.

Section 1 not to apply when copy of receipt filed with Clerk of County Court.

2. The preceding section shall not apply to household furniture, other than pianos, organs or other musical instruments; nor shall it apply to any chattels mentioned in any such receipt note, hire receipt, order or other instrument where the manufacturer, bailor or vendor within ten days from the execution of the receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof, shall file with the Clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale. 51 V. c. 19, s. 6.

Filing of instruments in unorganized districts.

3.—(1) When the bailee or conditional purchaser resides at the time of the bailment or conditional purchase in an unorganized district, all instruments may be filed with the Clerk of the Court with whom mortgages and sales of chattels are to be registered in such district, under the law at the time in force.

(2) This section shall apply to instruments filed with the said officer prior to the 7th day of April 1890. 53 V. c. 36, ss. 1, 2.

4. The Clerk of the Court, on receipt of such copy, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge ten cents for every such filing and five cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of the said copy so filed, shall not invalidate the said filing or destroy the effect thereof. 51 V. c. 19, s. 7.

Clerk to file
copy of
receipt note.

5. The manufacturer, bailor or vendor shall leave a copy of the receipt note, hire receipt, order or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument, or within twenty days thereafter. 51 V. c. 19, s. 8.

Copy of
receipt note
to be left with
vendee.

6.—(1) Every manufacturer, bailor or vendor shall, in answer to an inquiry made by any proposed purchaser or other interested person, within five days furnish full information respecting the amount or balance due or unpaid on any such manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of his refusal or neglect to furnish the information asked for, such manufacturer, bailor or vendor shall, on conviction before a Stipendiary or Police Magistrate or two Justices of the Peace, be liable to a fine not exceeding \$50.

Statement of
amount due to
be given on
request.

(2) Any person convicted under this Act shall have the right to appeal against such conviction to the Judge of the County Court without a jury. 51 V. c. 19, s. 2.

7. The person so inquiring shall, if such inquiry is by letter, give a name and post office address to which a reply may be sent, and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office within the said five days, addressed to the person inquiring at his proper post office address, or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given. 51 V. c. 19, s. 3.

Address to be
given by per-
son requiring
statement.

8. In case any manufacturer, bailor or vendor of any chattels in respect of which there has been a conditional sale or promise of sale, or his successor in interest takes possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee or his successor in interest may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred. 51 V. c. 19, s. 4.

Breach of
condition.

9. Where the goods or chattels have been sold or bailed originally for a greater sum than \$30, and the same have been

Notice of sale.

taken possession of, as in the preceding section mentioned, such goods or chattels shall not be sold without five days' notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in Ontario, or may be sent by registered letter, deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee or his successor in interest, at his last known post office address in Canada. The said five days or seven days may be part of the twenty days in section 8 mentioned. 51 V. c. 19, s. 5.

{ Chattels affixed
to realty to
remain sub-
ject to lien.

10.—(1) Where any goods or chattels subject to the provisions of this Act are affixed to any realty without the consent in writing of the owner of the goods or chattels, such goods and chattels shall notwithstanding remain so subject, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon.

(2) The provisions of this section are to be deemed retro-active and shall apply to past as well as to future transactions. 60 V. c. 3, s. 3; c. 14, s. 80.

NOTES.

Law Before the Act. There was formerly no restriction upon the right of an owner of goods to reserve the property in goods sold—the passing of the property being in every case a matter of intention which could be controlled by the contract of the parties; *Forristal v. McDonald* (1883) 9 S.C.R. 12; *La Banque de Hochelaga v. Waterous Engine Works Co.* (1897) 27 S.C.R. 406. A vendor of goods was not estopped, by painting the name of the purchaser upon the chattel, nor by giving up to him, on receiving a renewal, the note for the purchase money, from showing that the property had not passed from him; *Walker v. Hyman* (1877) 1 A. R. 345; *Mason v. Bickle* (1878) 2 A. R. 291. The discounting of the promissory notes received for the purchase money would not amount to a waiver of the vendor's right of property; *Mason v. Bickle* (1878) 2 A. R. 291; *Hall Manufacturing Co. v. Hazlitt* (1885) 11 A.R. 749, 754; nor would the recovery of a judgment thereon; *Arnold v. Playter* (1892) 22 O. R. 608. See *Burke v. Heney* (1898) 33 N. B. Rep. 607. The construction of the contract is for the Court, and the mere taking of a note for the purpose of closing the account will not be proof that it was taken in payment; *Nordheimer v. Robinson* (1878) 2 A.R. 305.

Effect of the Act. "The whole Act" said Oaler J.A., "is very loosely drawn, and will probably turn out to be a very ineffective piece of legislation." *Wettlaufer v. Scott* (1893) 20 A. R. 652, 658. The bailment covered by the Act is where "the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof." The Act extends only to manufactured goods or chattels except household furniture.

The bailment must be evidenced by writing. The writing, is not, however, required to be filed unless it is a receipt note, hire receipt, or order for chattels and the name and address of the manufacturer, bailee or vendor are at the time possession is given, painted, printed stamped or engraved on the chattel or otherwise plainly attached thereto. If the name is subsequently erased, the rights of the vendor are not affected; *Wettlaufer v. Scott* (1893) 20 A. R. 652. Failure to comply with the provisions of the Act will make the "receipt note, hire receipt or order for chattels" invalid as against subsequent purchasers and mortgagees in good faith for valuable consideration. As between the parties and as against creditors and as against a landlord; *Carroll v. Beard* (1895) 27 O.R. 349, the bailment will be good notwithstanding the Act, though the name be not upon the goods and the bailment is not evidenced by writing or registered. A simple contract of hiring is not within the Act; *Esnouf v. Gurney* (1896) 4 B.C.R., 144.

Under the English Factors' Act (52 & 53 Vict. c. 45) ss. 2 (1) and 9, a person having bought or agreed to buy goods who obtains with the consent of the seller the possession thereof can confer a good title on a purchaser having no notice of the lien or other right of the original seller; *Lee v. Butler* (1893) 1 Q. B. 318. Where a piano was delivered upon hire at a monthly rent with power to the bailee to terminate the hiring by delivering up the piano at any time, and it was agreed that "if the hirer shall punctually pay the sum of £18, 18s, by 10s 6d, at the date of signing and by 36 monthly instalments of 10s, 6d, in advance, the said instrument shall become the sole and absolute property of the hirer" it was held that the agreement was nothing more than a contract of hiring and as the hirer was under no obligation to buy there was no purchase or agreement for purchase until he actually exercised the option given him, and he could not therefore give a good title; *Helby v. Matthews* (1895) A. C. 471.

Appeal from Conviction. Should a manufacturer, bailee or vendor be convicted under s. 6, his appeal would not be to the General Sessions but would be governed by R.S.O. c. 92.

Taking Possession. Unless, under the terms of the bailment the proceeds of any sale of the goods by the bailor after retaking possession are to be applied *pro tanto* on what is due, and the purchaser is to remain liable for the

deficiency, the taking possession by the bailor is an election to put an end to the contract of purchase and no deficiency is recoverable; *Sawyer v. Pringle* (1891) 18 A. R. 218; 20 O.R. 111; *Arnold v. Playter* (1892) 22 O. R. 608.

Notice of Sale. The bailee may contract himself out of or waive the benefit of the provisions for retention of possession by the bailor after retaking and notice of sale. *Quilibet potest renunciare juri pro se introducto*; *Markham v. Stanford* (1863) 14 C.B.N.S. 376; *Graham v. Ingleby* (1847) 1 Ex. 651; *Girvin v. Burke* (1889) 19 O.R., 204.

Chattels affixed to realty. Where goods and chattels were, without the consent of the vendor affixed to the realty by a lessee who forfeited his lease, the landlord was held not to be entitled to retain them, the goods being readily removeable and not having been intended to become part of the realty: *Hall Manufacturing Company v. Hazlitt* (1885) 11 A.R. 749; *Polson v. Degeer* (1886) 12 O. R. 275.

Where the owner of property bought a gas engine under a hiring contract and annexed it to the realty and subsequently mortgaged the realty, the vendor, notwithstanding, the provisions of the bailment was held not to be entitled thereto as against the mortgagee; *Hobson v. Gorringe* (1897) 1 Ch., 182.

Under the provisions of s. 10 manufactured articles "subject to the provisions of the act" are notwithstanding annexation to the realty to remain subject to the act unless affixed with the consent in writing of the owner thereof. The intention of the section appears to have been to preserve the rights of the bailor as against the owner or mortgagee of the realty. It seems doubtful whether the language is sufficient for that purpose. The act does not give the bailment validity. The act merely declares the bailment "subject" to it, to be voidable by certain persons upon certain formalities not being observed. Literally section 10 merely declares that such bailments shall still continue so voidable, notwithstanding annexation to the realty.

Assignment of Hire Receipts. Securities by way of hire receipts are accessory to the debt of the purchaser, and a transfer of notes taken for the purchase money is in equity a transfer of the securities; *Central Bank v. Garland* (1890) 20 O. R. 142; 18 A. R. 438. A transfer of a hiring agreement is not a bill of sale; *Re Isaacson, Ex Parte Mason* (1895) 1 Q. B. 333, and a transfer of the goods themselves while in the possession of the bailee would seem not to be within the Bills of Sale Act; *May v. Security Loan and Savings Co.* (1880) 45 U.C.R. 106.

PART VIII.

Equity.

YORK UNIVERSITY LAW LIBRARY

CHAPTER 115.

An Act respecting Fraudulent and Voluntary Conveyances.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

VOLUNTARY CONVEYANCES.

1. Notwithstanding the provisions of the statute passed in the 27th year of the reign of Her late Majesty Queen Elizabeth, and chaptered four, no conveyance, grant, charge, lease, estate, incumbrance, limitation of use or uses which is executed in good faith, and duly registered in the proper registry office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to any subsequent purchaser for the same grantor of the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, shall be or be deemed or taken to be, merely by reason of the absence of a valuable consideration, void, frustrate, or of none effect as against such purchaser, or his heirs, executors, administrators or assigns, or any persons claiming by, from, or under any of them. R. S. O. 1887, c. 96, s. 1.

No voluntary conveyance, etc., executed in good faith and duly registered to be void merely for absence of valuable consideration.

2. Nothing in the preceding section contained shall have the effect of making valid any instrument which is for any reason other than or in addition to the absence of a valuable consideration void under the said statute or otherwise; nor shall anything in the preceding section contained have the effect of making valid any instrument as against a purchaser who had, before the 28th day of February, 1868, entered into a binding contract for, or received his conveyance upon such purchase. R. S. O. 1887, c. 96, s. 2.

Instruments otherwise void not to be valid under preceding section.

FRAUDULENT CONVEYANCES.

3. Whereas by the first and second clauses of the Act passed in the 13th year of the reign of Her late Majesty Queen Elizabeth, it is enacted as follows :—

Recital of ss. 1, 2 and 6 of 13 Eliz. c. 5, that certain conveyances, judgment, etc., to be void unless made to a

“ For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances,

bona fide purchaser for value

"bonds, suits, judgments and executions more commonly used and practised in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions have been and are devised or contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargain and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued; all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, writ, judgment and execution, at any time had or made since the beginning of the Queen's Majesty's reign, that now is or at any time hereafter to be had or made to or for any intent or purpose before declared or expressed, shall be from thenceforth deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous and fraudulent devices and practices as is aforesaid, are or shall or might be in any ways disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration expressing of use or any other matter or thing to the contrary notwithstanding."

And whereas it is also by the sixth clause of the said Act provided and enacted as follows:

"This Act or anything herein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid, anything before mentioned to the contrary thereof notwithstanding."

And whereas there are doubts as to the true construction of the said Act, and it is expedient to declare the true construction of the same;

Therefore it is further enacted as follows:—

1. The first and second clauses of the said Act apply to all instruments executed to the end, purpose and intent in the said clauses set forth, notwithstanding that the same may be executed upon a valuable consideration, and with the intention, as between the parties to the same, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless the same is protected under the sixth clause of the said Act by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

When
valuable
consideration
and intent to
pass interest
not to avail.

2. This section shall not apply to any instrument executed before the second day of March, 1872. R. S. O. 1887, c. 96, s. 3.

Instruments
not affected.

NOTES.

Voluntary Conveyance. A conveyance though registered is void as against a subsequent mortgage given to a creditor if the conveyance was not executed in good faith, but to protect the property in case the grantor should be unsuccessful in his affairs. *Richardson v. Armitage* (1871) 18 Gr. 512.

Object of s. 3. This section, though thought at the time it was passed to be an absolute necessity for the purpose of preventing the Statute 13 Eliz., c. 5, from being ineffective does not appear to have formed the basis of any decided case since that time. Two cases gave rise to the passing of the Act. In *Smith v. Morton* (1868) 27 U. C. R. 195, and in appeal, *Smith v. Moffatt* (1869) 28 U. C. R. 486, a debtor had in 1857 disposed of a contingent interest which he had in real estate which he had previously validly settled on his wife and children to his father-in-law for £50, which was a fair price. The debtor never considered these lands liable to his creditors. In his evidence he said: "There were many failures in 1857, and I said as times were getting hard I might as well secure the property for the family. No doubt I told Smith (the father-in-law) why I wished he should get a deed of the property." Subsequently the contingent estate became an absolute one, and the conveyance to the father-in-law was attacked. Morrison, J., told the jury the question for their consideration was whether the deed was a *bona fide* transaction, a deed made for valuable consideration or whether it was fraudulently made, a mere contrivance for the purpose of delaying or defrauding creditors, and if the latter, to find it invalid. The jury having found a verdict in favor of the deed, the direction was held by the Court of Queen's Bench and the Court of Error and Appeal to be right.

In *Dalglish v. McCarthy* (1872) 19 Gr. 578, it was found that a sale made by a debtor was made with intent to defeat creditors, but that the sale was *bona fide* and intended to pass the property and that full consideration actually passed and that it was really a sale, though made with intent to defeat creditors. The full Court of Chancery reluctantly and contrary to their own personal opinions held that under the English Authorities the deed was valid. Blake V.C. said: "As in the present case it has been established there was an actual sale, and a conveyance executed for the purpose of passing the property and not as a mere cloak for the purpose of retaining a benefit for the grantor, I must hold that the transaction is not within the Statute under which it is sought to be impeached, though the parties to it may have been aware of the claim of the plaintiff and desired to prevent his execution attaching upon the premises."

The chief English authority which caused the rule to be thus laid down was *Wood v. Dixie* (1845) 7 Q.B. 892, where a conveyance was made in consideration of money lent but to defeat a particular expected execution, the conveyance was held to be good. Lord Denman, C.J., said: "The jury were given to understand that although the conveyance was made *bona fide* and with a full intention that the property should be parted with, it would yet be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment. We are clearly safe in going so far as to say that a mere intent to defeat a particular creditor does not constitute a fraud." In *Dalglish v. McCarthy*, a statement of the law from Addison on Contracts, 6th Ed. pp. 150, 151, was quoted "what is meant by a bill of sale being fraudulent is that the parties never intended it to have operation as a real instrument according to its apparent character and effect."

Effect of the Act. Strong, V. C. said (19 Gr. p. 582): "I cannot forbear from adding that the true construction of the Statute, 13 Elizabeth, chapter 5, has always appeared to me to be that which Lord Mansfield attributed to it in the case of *Worseley v. Demattos* (1758), Burr. 467, where he says: "If a man knowing that a creditor has obtained judgment against his debtor buys the debtor's goods for a full price to enable him to defeat the creditor's execution it is fraudulent," and referring to the declaratory act, the subject of this note, he said: "This effect being now ascribed to the act by the Declaratory Statute, 35 Victoria, chapter 11, which has brought the law back to the state in which it was in the time of Lord Mansfield, such questions as the present

will seldom arise in future," and Blake V. C., said that the Declaratory Act "lays down that which should always have been declared to be the true construction of the act, and which in the future will prevent much of the dishonesty that might otherwise be practised upon creditors."

The Statute of Elizabeth has not been amended in England. It is nevertheless laid down there that a fraudulent intention to which the purchaser was a party will over-ride all enquiry into the consideration; *Bott v. Smith* (1856) 21 Beav. 511; *Acraman v. Corbett* (1861) 1 J. & Hem. 410; *Ex parte Chaplin* (1884) 26 Ch. D., 319, and no amendment has been made in Nova Scotia, yet it has been held that a conveyance by a debtor to a creditor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the amount by which the purchase money exceeded his debt was void, the other creditors not being parties to the deed, and no trust being declared for them. If the purchaser paid, good and well, if not the debtor was entitled to recover from them. That was a personal benefit for himself, a secret advantage for himself, the effect being to make the instrument void. *McDonald v. Cummings* (1895) 24 S. C. R. 321, 327.

The effect of the Statute was not discussed in *Hickerson v. Parrington* (1891) 18 A.R. 635, or *Campbell v. Roche* (1891) 18 A.R. 646, s.c. *sub-nom.* *Mader v. McKinnon* (1893) 21 S. C. R. 645, in which it was pointed out that though a deed made for valuable consideration may be affected by *mala fides* those who undertake to impeach such a transaction on that ground have a task of great difficulty to discharge.

The cases illustrating what is *mala fides* will be found in May on Fraudulent Conveyances, 2nd Ed. pp. 78 *et seq.* See also notes to R. S. O. c. 147.

CHAPTER 129.

An Act respecting Trustees and Executors and the Administration of Estates.

As amended by 62 V. c. 15.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2, 27.

RIGHTS AND LIABILITIES OF TRUSTEES:

Indemnity and reimbursement clause, s. 3.

Appointment of new trustees, s. 4.

Vesting of trust property in new or continuing trustees, s. 5.

Trustees buying and selling, s. 6.

Fee simple of bare trustees to vest in their personal representatives, s. 7.

Conveyances by married women as bare trustees, s. 8.

Receipts of trustees to be effectual discharges, s. 9.

Absence of trustee—payment into court, s. 9 (a).

RIGHTS AND LIABILITIES OF EXECUTORS:

Actions by and against in respect of torts, ss. 10-12.

Distress by, ss. 13, 14.

Liability of the executors of a joint contractor, s. 15.

Devisee in trust or executors empowered to raise money by sale or mortgage, to satisfy charges, ss. 16-20.

Exercise of powers of sale by executors, etc., when the will names no one to exercise, ss. 21-26.

Appointment of agents, s. 28.

Grounds upon which sales not impeachable, s. 29.

Breach of trust—request of beneficiary, s. 30.

Power to insure, s. 31.

Relief for technical breach, s. 31 (a).

WHEN STATUTES OF LIMITATIONS TO APPLY, s. 32.

ADMINISTRATION OF ESTATES:

Executors empowered to pay debts, compromise, submit to arbitration, etc., s. 33.

Debts payable *pari passu* when deficiency of assets, s. 34.

Limitation of actions for claims rejected by executors, s. 35.

Distribution of residuary personal estate after executor has satisfied claims in respect of rents, covenants, etc., and set apart a fund to meet ascertained future claims, ss. 36, 37.

Distribution of assets after notices given to creditors, s. 38.

Application to Court for advice, s. 39.

ALLOWANCES TO TRUSTEES AND EXECUTORS, ss. 40-44.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Trustee Act*."

Interpretation.

2. In the construction of this Act the words "Will," "Real Estate," and "Personal Estate," shall have the meaning assigned to them respectively by section 9, of *The Wills Act of Ontario*. R. S. O. 1887, c. 110, s. 1.

Rev. Stat. c. 128.

RIGHTS AND LIABILITIES OF TRUSTEES.

Every trust instrument to be deemed to contain clause

3. Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the

clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—"That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited; nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument." R. S. O. 1887, c. 110, s. 2.

for the indemnity and reimbursement of the trustees. Imp. Act 22-23 V. c. 35, s. 31.

4.—(1) Where a trustee, either original or substituted and whether appointed by the High Court or otherwise, dies, or desires to be discharged from, or refuses, or becomes unfit or incapable, to act in the trusts or powers in him reposed, before the same have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees, in place of the trustee or trustees dying, or desiring to be discharged, or refusing, or becoming unfit, or incapable to act as aforesaid; and so often as any new trustee or trustees is or are so appointed as aforesaid, all the trust property (if any), which for the time being is vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustees or trustee, shall, with all convenient speed be conveyed, assigned and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees, or a surviving or continuing trustee, as the case may require; and every new trustee to be appointed as aforesaid, as well before as after such conveyance, assignment or transfer as aforesaid, and also every trustee appointed by the High Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust.

Appointment of new trustees. Imp. Act 23-24 V. c. 145, s. 27.

(2) The power of appointing new trustees hereinbefore contained, may be exercised in cases where a trustee, nominated in a will, has died in the lifetime of the testator. R. S. O. 1887, c. 110, s. 3.

Vesting of trust property in new or continuing trustees without conveyance.

Imp. Act 44 and 45, V. c. 41, s. 34.

5.—(1) Where an instrument by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of such instrument become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest or right.

(2) Where an instrument by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any share, stock, annuity, or property only transferable in books kept by a company or other body, or in manner prescribed by or under an Act of Parliament or of this Legislature.

(4) For purposes of registration of an instrument in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to instruments executed after the 1st day of July, 1886. R. S. O. 1887, c. 110, s. 4.

Trustees buying or selling.
Rev. Stat. c. 134.

6. Trustees who are vendors or purchasers may sell or buy without excluding the application of section 2 of *The Vendors and Purchasers Act*. R. S. O. 1887, c. 110, s. 5.

Fee simple estates of bare trustees to vest in their personal representatives.

7. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditaments shall vest in the legal personal representative, from time to time, of such trustee. R. S. O. 1887, c. 110, s. 6.

Conveyances by married woman as bare trustee.

8. Where any freehold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*, and without her husband joining in the conveyance. R. S. O. 1887, c. 110, s. 7.

9. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivors or survivor of two or more mortgagees or holders or the executors or administrators of such survivor or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the trust or security. R. S. O. 1887, c. 110, s. 8. [See also Cap. 121, sec. 14.]

Receipts of trustees to be effectual discharges.

9a.—(1) Any person with whom trust moneys have been deposited or to whose hands trust moneys have come, may in case the trustee has been absent from the Province for a period of a year and is not likely to return at an early date or in the event of the trustee's death, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.

Payment into court by person holding trust moneys for trustee.

(2) This section shall extend to a case where there are more trustees than one and the trustee or trustees in the Province cannot give an acquittance of the money. 62 V. c. 15, s. 3.

RIGHTS AND LIABILITIES OF EXECUTORS, ETC.

10. The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner, and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease. R. S. O. 1887, c. 110, s. 9.

Actions by executors and administrators for torts.

11. In case any deceased person committed a wrong to another in respect of his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought at latest within one year after the decease. This section shall not apply to libel or slander. R. S. O. 1887, c. 110, s. 10.

Actions against executors and administrators for torts.

12. In estimating the damages in any action under either of the next preceding two sections, the benefit, gain, profit or advantage which, in consequence of or resulting from the wrong committed, may have accrued to the estate of the person who committed the wrong, shall be taken into consideration, and shall form part, or may constitute the whole, of the damages to be recovered, and whether or not any property, or the proceeds or value of property, belonging to the person bringing the

Damages in actions under two preceding sections.

action or to his estate, has or have been appropriated by or added to the estate or moneys of the person who committed the wrong. R. S. O. 1887, c. 110, s. 11.

Executors or administrators of a lessor may distrain for arrears.

13. The executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living. R. S. O. 1887, c. 110, s. 12.

Such arrears of rent may be distrained for within six months after determination of the lease.

14. Such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distresses for rent shall be applicable to the distresses so made as aforesaid. R. S. O. 1887, c. 110, s. 13.

Representatives of deceased joint contractors liable although the other joint contractors be living.

15. In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners, may proceed by action against the representatives of the deceased contractor, obligor or partner, in the same manner as if the contract, obligation or promise, had been joint and several, and this, notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person; but the property and effects of stockholders in chartered banks or the members of other incorporated companies, shall not be liable to a greater extent than they would have been if this section had not been passed. R. S. O. 1887, c. 110, s. 15.

[As to discharges of mortgages by executors, etc., see *The Act respecting Mortgages of Real Estate*, Cap. 121, secs. 11, 12 and 13.]

Devisee in trust may raise money by sale or mortgage to satisfy charges, notwithstanding want of express power in the will. Imp. Act 22-23 V. c. 35, s. 14.

16. Where, by any will coming into operation after the eighteenth day of September, 1865, or after the passing of this Act, a testator charges his real estate, or any specific portion thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such estate, the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said real estate or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the per-

son or persons executing the same think proper. R. S. O. 1887, c. 110, s. 18.

17. The powers conferred by the next preceding section shall extend to all and every the person or persons in whom the estate devised is for the time being vested by survivorship, descent or devise, or to any person or persons appointed under any power in the will or by the High Court to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid. R. S. O. 1887, c. 110, s. 19.

Power given by last section extended to survivors, devisees, etc. Imp. Act 22-23 V. c. 35, s. 15.

18. If a testator who creates such a charge as is described in section 16 does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee or trustees, the executor or executors for the time being named in the will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore conferred upon the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship is for the time being vested; but any sale or mortgage under this Act shall operate only on the estate and interest of the testator. R. S. O. 1887, c. 110, s. 20.

Executor to have power of raising money where there is no sufficient devise. Imp. Act, 22-23 V. c. 35, s. 16.

19. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the preceding three sections of this Act, or any of them, have been duly and correctly exercised by the person or persons acting in virtue thereof. R. S. O. 1887, c. 110, s. 21.

Purchasers, etc., not bound to inquire as to exercise of powers. Imp. Act, 22-23 V. c. 35, s. 17.

20. The provisions contained in the preceding four sections shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the 18th day of September, 1865; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the said sections had not been enacted; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do. R. S. O. 1887, c. 110, s. 22.

Sections 16 to 19 not to affect certain sales nor to extend to devises in fee or in tail. Imp. Act, 22-23 V. c. 35, s. 18.

21. Where there is in any will or codicil of any deceased person, (whether such will has been made, or such person has died before or after the 1st day of January, 1874, any direction whether express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any real estate, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute and carry the same into effect, the executor or executors

Direction to sell, etc., may be exercised by executor when no other person is appointed to exercise same.

(if any) named in such will or codicil shall and may execute and carry into effect every such direction to sell, dispose of, appoint, incumber or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if the executor or executors of the testator were appointed by the testator to execute and carry the same into effect. R. S. O. 1887, c. 110, s. 23.

Administrator with will annexed may exercise powers of sale, given to the executor.

22. Where there is in any will or codicil thereto of any deceased person, (whether such will has been made, or such person has died before or after the first day of January, 1874, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, incumber, or lease any real estate, or any estate or interest therein, whether such power is express, or arises by implication, and where, from any cause, letters of administration with such will annexed have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given the additional security required by section 58 of *The Surrogate Courts Act*, such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber, or lease such real estate, and any estate or interest therein in as full, large, and ample a manner, and with the same legal effect for all purposes, as the said executor or executors might have done. R. S. O. 1887, c. 110, s. 24.

Rev. Stat. c. 59.

Or when no one named in the will to execute powers of sale, etc.

23. Where there is in any will or codicil thereto of any deceased person (whether such will has been made or such person has died before or after the first day of January, 1874,) any power to sell, dispose of, appoint, mortgage, incumber, or lease any real estate, or any estate or interest therein, whether such power is express, or arises by implication, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute such power, and letters of administration with such will annexed, have been by a Court of competent jurisdiction in Ontario, committed to any person, and such person has given the additional security before mentioned such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if such last named person had been appointed by the testator to execute such power. R. S. O. 1887, c. 110, s. 25.

Executors, etc., may convey in pursuance of a contract for sale made by deceased.

24. Where any person has entered into a contract in writing for the sale and conveyance of real estate, or of any estate or interest therein, and such person has died intestate, or without providing by will for the conveyance of such real estate, or estate or interest therein, to the person entitled or to become entitled to such conveyance under such contract, then, if the deceased would be liable to execute a conveyance, were he alive, the executor, administrator, or administrator with

the will annexed (as the case may be), of such deceased person, shall make and give to the person entitled to the same a good and sufficient conveyance or conveyances of such estates, and of such nature as the said deceased, if living, would be liable to give, but without covenants, except as against the acts of the grantor; and such conveyances shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity. R. S. O. 1887, c. 110, s. 26.

25. Every executor, administrator, and administrator with the will annexed, shall, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, be subject to all the liabilities, and compellable to discharge all the duties of whatsoever kind, which, as respects the acts to be done by him under such powers, would have been imposed upon an executor or other person appointed by the testator to execute the same, or in case of there being no such executor or person, would have been imposed by law upon any person appointed by law, or by any Court or Judge of competent jurisdiction to execute such powers. R. S. O. 1887, c. 110, s. 27.

Duties and liabilities of an executor and administrator acting under the powers in this Act.

26. Where there are several executors, administrators, or administrators with the will annexed, and one or more of them die, the powers hereby created shall vest in the survivor or survivors. R. S. O. 1887, c. 110, s. 28.

Powers given by this Act to two or more to survive.

[As to investment of moneys received for infants under Life Assurance Policies. See Cap. 203, section 165, sub-s. 5.]

27.—(1) For the purposes of the next five sections of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee. "Trustee."

Interpretation as to next five sections.

(2) The provisions of the said five sections relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Extend to joint trustees.

(3) The expression "instrument" shall include an Act of the Legislature of Ontario. 54 V. c. 19, s. 2 (1, 2, 4).

"Instrument."

(4) The said five sections shall apply as well to trusts created by an instrument executed before as to trusts created on or after the 4th day of May 1891 and the powers by the said sections conferred are in addition to the powers conferred by the instrument, if any, creating the trust; Provided always that save as in the said sections expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust. 54 V. c. 19, ss. 3, 14.

Apply to all trusts. Proviso.

Appointment
of agents by
trustees for
certain pur-
poses.

Imp. Act 51-
52 V. c. 59,
s. 2.

Proviso.

28.—(1) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration of property receivable by such trustee under the trust; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this section had not been enacted in case of permitting such money, valuable consideration, or property to remain in the hands or under the control of the solicitor for a period longer than is reasonably necessary to enable the solicitor to pay or transfer the same to the trustee.

(2) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance or otherwise; and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment; Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this section had not been enacted, in case he permits such money to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable him to pay the same to the trustee.

(3) This section shall apply only where the money or valuable consideration or property was or is received on or after the 4th day of May 1891. 54 V. c. 19, s. 7.

Sales by
trustees not
impeachable
on certain
grounds.

Imp. Act 51-
52 V. c. 59,
s. 3.

29.—(1) No sale made by a trustee shall be impeached by any *cestui que trust* upon the ground that any of the conditions subject to which the sale was made, were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall after the execution of the conveyance be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that such purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This section shall apply only to sales made on or after the 4th day of May 1891. 54 V. c. 19, s. 8.

Trustee com-
mitting breach
of trust at
instigation of
beneficiary.

Imp. Act 51-
52 V. c. 59,
s. 6.

30.—(1) Where a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary is a married woman entitled f o

her separate use, whether with or without a restraint upon anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the 4th day of May 1891, except where an action or other proceeding was then pending with reference thereto. 54 V. c. 19, s. 11.

31.—(1) It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person entitled wholly or partly to such income.

Powers of trustees to insure trust property.
Imp. Act 51-52 V. c. 59, s. 7.

(2) This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any *cestui que trust* upon being requested to do so. 54 V. c. 19, s. 12.

31a. [If] in any proceeding affecting trustees or trust property [it appears] to the court] that a trustee, whether appointed by the court, or by an instrument in writing, or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, [is or may be personally liable for any breach of trust whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same.] 62 V. c. 15, s. 1.

Relief of trustees committing technical breach of trust.
Imp. Act 59-60 V. c. 35, p. 3.

LIMITATION OF ACTIONS.

32.—(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

Application of Statutes of limitations to certain actions against trustees.
Imp. Act 51-52 V. c. 59, s. 8.

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.

(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations, applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations. 54 V. c. 19, s. 13.

ADMINISTRATION OF ESTATES.

Powers of
executors as to
settling debts
owing from or
to their
estates.

33.—(1) It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they may think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and, for any of the purposes aforesaid, to enter into, give and execute such agreements, instruments of composition, releases and other things, as they may think expedient, without being responsible for any loss occasioned thereby.

(2) None of the powers in this section conferred shall take effect, or be exercisable, by virtue of this Act, by any trustees or executors, if it is expressly declared in the deed, will or other instrument creating such trustees or executors, that such trustees or executors shall not have such power.

(3) This section shall apply and extend to both present and future trustees and executors, and to administrators upon intestacy and with will annexed and whether already appointed or hereafter to be appointed. R. S. O. 1887, c. 110, s. 31. 62 V. c. 15, s. 2.

34. On the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate. R. S. O. 1887, c. 110, s. 32.

In case of deficiency of assets, debts to rank *pari passu*.

Not to affect liens.

35. In case the executor or administrator gives notice in writing referring to this section and of his intention to avail himself thereof to any creditor or other person of whose claims against the estate he has notice, or to the attorney or agent of such creditor or other person, that he the executor or administrator rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within six months after the notice is given, in case the debt or some part thereof is due at the time of the notice, or within six months from the time the debt or some part thereof falls due if no part thereof is due at the time of the notice, and in default the claim shall be forever barred; Provided always that in case the claimant shall be nonsuited at the trial the claimant, or his executors or administrators, may commence a new action within a further period of one month from the time of the nonsuit. R. S. O. 1887, c. 110, s. 33.

If claim is rejected and notice given an action must be brought within a certain period.

Proviso.

36. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, has satisfied all such liabilities under the said lease or agreement for a lease, as have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease, or agreement for the lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and among the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased, to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any

As to liability of executor or administrator in respect of covenants, etc., in leases.

Imp. Act 22-23 V. c. 35, s. 27.

subsequent claim under the said lease, or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed. R. S. O. 1887, c. 110, s. 34.

As to liability of executor in respect of rents, etc., in conveyances on rent-charge, etc. Imp. Act 22-23, V. c. 35, s. 28.

37. In like manner where an executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, has satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance herein-after mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased, to meet any future liability under the said conveyance, or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed. R. S. O. 1887, c. 110, s. 35.

Distribution of assets under trust deeds for benefit of creditors, or of the assets of a testator or intestate after notice given by trustee, assignee, executor or administrator.

38. Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which such trustee, assignee, executor, or administrator is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed or assignment, or an administration suit (as the case may be), for creditors and others, to send into such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate,

(as the case may be), the trustee, assignee, executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate (as the case may be), or any part thereof amongst the parties entitled thereto, having regard to the claims of which the trustee, assignee, executor or administrator has then notice, and shall not be liable for the proceeds of the trust estate, or assets (as the case may be), or any part thereof, so distributed to any person of whose claim the trustee, assignee, executor or administrator had not notice at the time of the distribution thereof or a part thereof (as the case may be); but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively. R. S. O. 1887, c. 110, s. 36.

SUMMARY APPLICATION TO COURT FOR ADVICE.

39.—(1) Any trustee, executor or administrator, shall be at liberty, without the institution of an action, to apply in Court or in Chambers in the manner prescribed by Rules of Court, for the opinion, advice or direction of a Judge of the High Court on any question respecting the management or administration of the trust property or the assets of a testator or intestate. Trustee, etc., may apply for advice in management, of trust property. Imp. Act 22-23 V. c. 35, s. 30.

(2) The trustee, executor or administrator, acting upon the opinion, advice or direction given by the Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the said application: but this provision shall not extend to indemnify a trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if the trustee, executor or administrator has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction. R. S. O. 1887, c. 110, s. 37.

[As to costs see Cap. 51, sec. 119.]

ALLOWANCE TO TRUSTEES AND EXECUTORS.

40. Any trustee under a deed, settlement or will, any executor or administrator, any guardian appointed by the Court, and any testamentary guardian, or any other trustee howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the High Court or Judge, or by any Master or Referee thereof, to whom the matter may be referred. Allowance to trustees. R. S. O. 1887, c. 110, s. 38.

Allowance to be made though the estate not before the Court.

41. A Judge of the High Court may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any action. R. S. O. 1887, c. 110, s. 39.

Act to apply to existing as well as future trusts.

42. Compensation may be allowed in the case of any trust, heretofore created, as well as in any to be hereafter created. R. S. O. 1887, c. 110, s. 40.

Surrogate Judge may order an allowance to be made to executor or administrator out of the estate for his trouble.

43. The Judge of any Surrogate Court may allow to the executor or trustee or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor and the same shall be allowed to an executor trustee or administrator in passing his accounts. R. S. O. 1887, c. 110, s. 41.

Where allowance fixed by the instrument.

44. Nothing in the next preceding four sections shall apply to any case in which the allowance is fixed by the instrument creating the trust. R. S. O. 1887, c. 110, s. 42.

NOTES.

Liability for Acts of Co-Trustees. Sec. 3 is from Lord St. Leonard's Act (22 & 23 Vict. c. 35) s. 31, which was repealed in England and a new section substituted by 56 & 57 Vict. c. 53, s. 24. The section adds nothing to the security of a trustee. Before the act the provisions thereof were virtually implied; *Dawson v. Clarke* (1811) 18 Ves. 254; 11 R.R. 188; *Worrall v. Harford* (1802) 8 Ves. 8; *King v. Hilton* (1881) 29 Gr. 381. One executor is not liable for a *devastavit* committed by another, unless he has intentionally or otherwise contributed to it; *Williams on Exors.* 9th Ed. 1726. But if, having the means of knowledge by the exercise of ordinary vigilance, one trustee stands by and permits a breach of trust to be committed by a co-trustee he is liable; *Sovereign v. Sovereign* (1869) 15 Gr. 559; *City Bank v. Moulson* (1871) 3 Ch. Chamb. 334; *McCarter v. McCarter* (1884) 7 O.R. 243, and he will be liable for any loss to the estate if he does not get in a debt due by his co-executor, and in consequence lands of the estate have to be sold; *McPhadden v. Bacon* (1867) 13 Gr. 591. If an executor is merely passive by not obstructing his co-executor from getting the assets into his possession, he is not responsible; *King v. Hilton* (1881) 29 Gr. 381.

But if by agreement between the executors, one is to manage one part of the estate and the other another part, each is responsible for the whole; *Gill v. Atty. Gen.* (1659) Hardr. 314, and if one of several is by arrangement appointed acting executor administrator all are liable; *Lees v. Sanderson* (1830) 4 Sim. 28; *Mickleburgh v. Parker* (1870) 17 Gr. 503, and if all join in making a sale, and allow one to receive the money all are liable; *Burrows v. Walls* (1855) 5 D. M. & G. 233. An executor who *unnecessarily* does an act, by which his co-executor obtains sole possession of part of the estate is liable for the co-executor's misapplication of it; *Candler v. Tillett* (1855) 22 Beav. 257; *Re Gasquoine* (1894) 1 Ch. 470. Merely joining in a conveyance and allowing a co-executor to receive the purchase money without knowledge that there would be any surplus after paying debts and encumbrances, and without knowledge of any misappropriation will not create liability *Re Crowter, Crowter v. Hinman* (1885) 10 O.R. 159.

Acquiescence in the employment by a co-trustee of the trust moneys in his business will make a trustee liable; *Archer v. Severn* (1887) 13 O.R. 316.

If one executor should be a banker or a stock broker and a deposit with a banker or the employment of a stock broker to sell securities would have been proper in the ordinary course, the co-executor will not be liable for loss in making a deposit with or employing him; *Churchill v. Hobson* (1713) 1 P. Wms. 241; *Chambers v. Minchin* (1802) 7 Ves. 198; *Re Gasquoine* (1894) 1 Ch. 470; but this is a mere question of selecting a proper agent; *Joy v. Campbell* (1804) 1 Sch. & Lef. 341; *Speight v. Gaunt* (1883) 22 Ch. D. 727, 744. It is not incumbent on one executor to try to prevent by force money from getting into the hands of another; *Langford v. Gascoyne* (1805) 11 Ves. 333; 8 R.R. 170.

The indemnity clause will not protect a trustee from liability for breach of his duty; *Knox v. MacKinnon* (1888) 13 App. Cas. 753; *Rae v. Meek* (1889) 14 App. Cas. 558.

A special indemnity clause will protect a trustee from liability for the acts of his co-trustee. In *Wilkins v. Hogg* (1861) 3 Giff. 116, the clause was "that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys," and one trustee misapplied moneys which his co-trustees had enabled him to receive, the co-trustees were held to be saved from liability, though otherwise their negligence would have rendered them responsible. This case was followed in *Fass v. Dundas* (1881) 43 L.T. 665.

Employment of Agent. A trustee cannot delegate to others the confidence reposed in himself, but he may in the administration of the trust fund avail himself of the agency of third parties such as bankers, brokers and others, if

he does so from a moral necessity or in the regular course of business; *Ex Parte Belchier* (1756) Amb. 218; *Speight v. Gaunt* (1843) 9 App. Cas. 1, 29. But neither this doctrine nor the statute authorizes a trustee to delegate at his own mere will and pleasure, the execution of the trust, and the care and custody of the trust moneys to strangers in any case in which there is no moral necessity from the usage of mankind for the employment of such an agency; *Speight v. Gaunt* (1843) 9 App. Cas. 1. Necessity includes the regular course of business; *Clough v. Bond*, (1837) 3 Myl. & Cr. 490; *Blyth v. Fladgate* (1801) 1 Ch. 337, 360; *Rockport v. Seaton* (1896) 1 I. R. 18.

Allowing a notary or solicitor to have possession and entire control of trust funds is such default as will make a trustee responsible for loss; *Low v. Gemley* (1890) 18 S. C. R. 685. A solicitor should not be allowed to receive dividends of a fund set apart for an infant; *Gilroy v. Stephen* (1882) 51 L. J. Ch. 834. Trustees should inspect the securities alleged to be held for the trust estate; *Clark v. Bellamy* (1899) 19 C. L. T. 174.

Where a trustee employs an agent to collect debts under circumstances which make such employment proper and the money is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was; *Re Brier, Brier v. Evison* (1884) 26 Ch. D. 238.

In making investments in securities ordinarily bought on the stock exchange, the employment of a broker for the purpose of purchasing those securities and doing all things usually done by a broker which may be necessary for that purpose is *prima facie* legitimate and proper; *Speight v. Gaunt* (1842) 22 Ch. D. 727; 9 App. Cas. 1, but it may be that, however usual it may be for a person who wishes to invest his own money and instructs an agent such as an attorney or stock broker to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect, lending it on the agent's own personal security and is a breach of trust, per Lord Blackburn (1883) 9 App. Cas. 19. *Robinson v. Harkin* (1896) 2 Ch. 415.

When loans are made in transactions not governed by the rules of the stock exchange, and it is found convenient to send the money through a broker, solicitor or other agent, this may be done by cheque payable to the borrower on his order; *Rowland v. Witherden* (1851) 3 Mac. & G. 568; *Floyer v. Bostock* (1865) 35 Beav. 603; per Lord Selborne (1883) 9 App. Cas. 11.

To absolve a trustee from liability for loss by bankers, agents and other persons it is necessary that he should not deviate from the line of his duty. If he allows money which ought to be invested to remain on deposit with a banker an unreasonable length of time, he is responsible for any loss caused by the banker's insolvency; *Fletcher v. Walker* (1818) 3 Madd. 73; 18 R. R. 195; *Newton v. Reid* (1831) 9 L. J. O. S. Ch. 273; *Lowry v. Fulton* (1838) 9 Sim. 115; *Moyle v. Moyle* (1831) 2 Russ. & M. 710; *Astbury v. Beasley* (1869) 17 W. R. 638, and will be liable for the loss in interest; *Spratt v. Wilson* (1890) 19 O. R. 28. In many cases, however, the circumstances have been such as to justify the course of the trustee, and he accordingly has been exonerated; *Rowth v. Howell* (1797) 3 Ves. 567; *Swinfen v. Swinfen* (1860) 29 Beav. 211; *Fenwick v. Clarke* (1862) 4 DeG. F. & J. 240; *Johnson v. Newton* (1853) 11 Hare 160; *Wilks v. Groom* (1854) 3 Drew 584.

Entrusting a solicitor of good repute with the money to pay a debt of the estate which had been said by him to have been compromised by the solicitor is a proper act, and the trustee is not liable for the misappropriation of the money; *Re Bird, Oriental Commercial Bank v. Savin* (1873) L. R. 16 Eq. 203.

Misappropriation of a deposit by an auctioneer in good credit during delay in completion of the sale is an act for which executors were held not to be liable; *Edmonds v. Peake* (1843) 7 Beav. 239.

Where executors remitted money to their solicitor to obtain probate they were held not to be responsible therefor, but were held liable for money sent to him prematurely to pay legacy duty; *Castle v. Warland* (1863) 32 Beav. 660. The executors may be exonerated by following the recommendations or course of business of the testator, as where they employed an agent to collect debts recommended by the testator, and were not guilty of any default in not making him account; *Kilbee v. Sneyd* (1828) 2 Moll. 186; *Burritt v. Burritt* (1881) 29 Gr. 321; and where they deposited moneys with the same persons as the testator had entrusted with his moneys though they were not bankers; *Dorchester v. Ethingham* (1829) Tanl. 279; 31 R. R. 97.

A trustee who employs an agent to do that which is not the ordinary business of such an agent is liable for any loss occasioned by such agent performing that unusual duty improperly, as where a London auctioneer (the mortgagor's agent) without any local knowledge was employed to value property at Liverpool consisting of a large residence and grounds: *Fry v. Tapson* (1884) 28 Ch. D. 268.

Section 28 (see *infra*) authorizes the appointment of solicitors and bankers to receive purchase, insurance and other moneys and relieves trustees from liability in the event of default.

Remunerated Trustees. In *Speight v. Gaunt* (1883) 9 App. Cas. 1, stress was laid upon the fact that the trustee gave his services gratuitously. A remunerated trustee who is not guilty of negligence in the selection of servants or agents is not responsible for loss any more than a gratuitous trustee: *Raw v. Cutten* (1832) 9 Bing. 96; 35 R. R. 518; *Jobson v. Palmer* (1893) 1 Ch. 71.

Reimbursement. A trustee was always entitled to be reimbursed his expenses out of pocket: *Worrall v. Harford* (1802) 8 Ves. 8; *Re Tilsonburg Lake Erie and Pacific Ry. Co.* (1897) 24 A.R. 378; *Hughes v. Rees* (1884) 10 P.R. 301.

He will be allowed the expenses of employing an agent, accountant or solicitor in proper cases, but not the charges of a solicitor for doing work which the executor ought to do himself; *Lewin on Trusts*, 8 Ed. 632-639; *Harbin v. Darby* (1860) 28 Beav. 325; *Watson v. Row* (1874) L. R. 18 Eq. 680; *Re Ormrod* (1892) 2 Ch. 318; *Hamilton v. Tighe* (1898) 1 J. R. 123. The expenses are a first lien; *Lewin on Trusts*, 8th Ed. 639; *Re Tilsonburg Lake Erie and Pacific Ry. Co.* (1897) 24 A.R. 378; *Stott v. Milne* (1884) 25 Ch. D. 715.

And in an action against a trustee for administration he is entitled to his costs as a matter of contract, and can be deprived of them only for misconduct; but the mere fact that he denies being indebted, and on taking his accounts, he turns out to be indebted, is no reason for depriving him of costs; *Turner v. Hancock* (1882) 20 Ch. D. 303; *Sanford v. Porter* (1889) 16 A.R. 565; *Walters v. Woodbridge* (1878) 7 Ch. D. 504.

Appointment of new Trustees. S. 4 is known as Lord Cranworth's Act (23 & 24 Vict. c. 145) s. 27. Section 10 of 56 & 57 Vict. c. 53, has now been substituted for it in England. It does not apply to a trustee leaving the country; but such may be a ground for removal by the Court; *Gray v. Hatch* (1871) 18 Gr. 72. The donee of the power might appoint two trustees in the place of a sole trustee; *McLachlin v. Osborne* (1884) 7 O.R. 297; *Re Breary* (1873) W. N. 48; or one in the place of two; *Re Cunningham* (1877) W. N. 258; *West of England and South Wales District Bank v. Murch* (1883) 23 Ch. D. 138; but two trustees would not be justified in retiring at the same time and appointing a single trustee in their place; *Hulme v. Hulme* (1833) 2 Myl. & K. 682.

The discretion given to the donees of the power will not be interfered with by the Court if he is desirous of exercising it; *Re Gadd* (1883) 23 Ch. D. 134; *Re Higginbottom* (1892) 3 Ch. 132; *McLachlin v. Osborne* (1884) 7 O.R. 297, but he cannot appoint himself; *Re Skeat* (1889) 42 Ch. D. 522.

Desire to be Discharged. Trustees who pay the trust fund into Court thereby retire and cannot be treated as desirous of being discharged; *Re Bailey* (1855) 3 W. R. 31; but they may fall under the category of refusing to act; *Re Williams* (1857) 4 K. & J. 87.

Refuses to Act. It has been doubted whether a trustee who disclaims can be said to be a trustee who refuses to act, but the better opinion seems to be that he comes within the power given by the act; *Travis v. Illingworth* (1864) 2 Dr. & Sm. 344; See *Lewin on Trusts* 8th Ed. 666.

Unfit to Act. Temporary absence abroad is not unfitness; *Re Moravian Society* (1858) 26 Beav. 101; but it has been said that a settled residence abroad would be; *Masnard v. Welford* (1853) 22 L.J. Ch. 1053; *Bankruptcy* is unfitness; *Re Adams* (1879) 12 Ch. D. 634; see *Re Hopkins* (1881) 19 Ch. D. 61.

Incapable to Act. This means personally incapable; *Re Watts* (1852) 9 Hare 106; *Re East* (1873) L. R. 8 Ch. 735.

Appointment by Will. A surviving trustee has no power to make an appointment of his successors by will; *Re Parker's Trusts* (1894) 1 Ch. 707.

Who may be Appointed. A person beneficially interested and even the tenant for life may be appointed; *Forster v. Abraham* (1874) L. R. 17 Eq. 351, and an appointment of the husbands of two married women who were *cestui que trust*

was held to be valid; *McLachlin v. Usborne* (1884) 7 O.R. 297. An appointment in consideration of money paid to the donee is invalid; *Sugden v. Crossland* (1855) 3 Sm. & G. 192. If a trustee retires to enable a new trustee to be appointed to commit a breach of trust he will continue responsible; *Lewin on Trusts*, 8th Ed. 668; *Webster v. Le Hunt* (1861) 9 W. R. 918; *Clarke v. Hoskins* (1887) 37 L. J. Ch. 561; *Head v. Gould* (1898) 14 T. L. R. 444.

Retirement before Appointment. A trustee cannot retire from the trust without seeing that a new trustee is appointed and the appointment completed; *Pearce v. Pearce* (1856) 22 Beav. 248.

Administration Suit. A judgment for administration will not take away the power to appoint new trustees but the donee can exercise it only subject to the supervision of the Court; *Re Gadd* (1883) 23 Ch. D. 134.

Death of Trustee before Testator. The provisions of sub-section 2 of s. 4 apply to the case of one of several trustees appointed by the will, but where all the trustees nominated by a will predecease the testator, there is no power to make an appointment; *Nicholson v. Field* (1893) 2 Ch. 511.

Vesting Declaration. S. 5 is similar to s. 12 of Imperial Act 56 & 57 Vict. c. 53. Upon the appointment of new trustees the trust property must be transferred to them. Before the provisions of s. 5 were enacted it was necessary that the transfers should be executed by the persons in whom the legal estate was vested though they had nothing to do with the appointment of the trustees. The act abolishing primogeniture did not extend to trust estates which therefore descended to the heir unless devised by will, see R.S.O. c. 127, s. 59. It would appear that as to trustees dying after 1st July, 1886, lands vested in them in trust would pass to their personal representatives; R.S.O., c. 127, s. 37. *Armour on Titles* 2nd. Ed. 290. A vesting declaration will vest the property in the new trustees although the persons making the appointment had no estate therein; *Re Hunter v. Patterson* (1892) 22 O. R. 571, and may have a greater effect than a conveyance from the trustee; *London and County Banking Co. v. Goddard* (1897) 1 Ch. 662.

Form of Declaration. The following form of declaration may be used or altered to suit circumstances; "And the said (appointor) hereby declares that all the freehold land and hereditaments comprised in the said indenture of settlement and thereby limited to the use of the said (former trustees) shall forthwith and without any assignment, vest in the said (continuing and new trustees) as joint tenants upon the trusts affecting the same under the said indenture"; *Prideaux on Conveyancing*, 14th Ed. Vol. II., pp. 623, 624, 637, 639.

Powers and Authorities. A new trustee has the same powers and authorities as if he had originally been appointed by the trust deed, although some such powers may not extend to assignees; *Re Gilmour and White* (1887) 14 O.R. 694.

Vendor and Purchaser Act. The 6th section is from the English Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78 s. 3; which has been repealed in England and a similar section substituted; 56 & 57 Vict. c. 53, s. 15.

Bare Trustee. A bare trustee is one who has no duty to perform, and who on request would be compellable to convey or transfer to his *cestui que trust*; *Christie v. Ovington* (1876) 1 Ch. D. 279. This definition would seem to be recognized by s. 31 (2) *infra*. It was criticised in *Morgan v. Swansea Urban Sanitary Authority* (1878) 9 Ch. D. 582, where Jessel, M.R. decided that a trustee who had any beneficial interest was not a bare trustee. In the subsequent case of *Re Dowera*, *Dowera v. Faith* (1885) 29 Ch. D. 693, Bacon, V.C., held that married women who had beneficial interests, but who were bound to convey lands by reason of an administration decree, were bare trustees. The section would seem to be unimportant as to trustees dying since 1st July, 1886, since the Devolution of Estates Act would carry the estate to the personal representatives in any case, see *supra*. In England, trust and mortgage estates now descend to the personal representatives; *Conveyancing, &c. Act*, 1881, s. 30.

Married Women. S. 8 is from the English Vendor and Purchaser Act, 1874, (37 & 38 Vict. c. 78) s. 6 now repealed and a similar section, 56 & 57 Vict. c. 53 s. 16 substituted. Even if the married woman has a beneficial interest she may be a bare trustee under the section; *Re Dowera*, *Dowera v. Faith* (1885) 29 Ch. D. 693.

Payments to Trustees. Section 9 was originally enacted in Canada by 12 Vict. c. 71 s. 10. It adopted as to payments to surviving mortgagees or their representatives the repealed English Statute 7 & 8 Vict. c. 76. The section is on the same lines as the English enactments; Lord St. Leonard's Act (22 & 23 Vict. c. 35, s. 23), Lord Cranworth's Act (24 & 25 Vict. c. 145) s. 29 (which deals only with receipts in writing) and The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) s. 36 (see now 56 & 57 Vict. c. 53 s. 20, which is also limited to receipts in writing). The payment to be good must be in money; Dilke v. Douglas (1880) 5 A.R. 63, and must be *bona fide*; Lewin on Trusts, 8th Ed. 457.

If lands are devised to an executor charged with debts and legacies, a purchaser from him is not bound to see to the application of the purchase money; McMillan v. McMillan (1874) 21 Gr. 594; Moore v. Mellish (1883) 3 O.R. 174; but a purchaser from a devisee of lands charged with the payment of legacies must see that the legacies are paid; Gray v. Richmond (1892) 22 O.R. 256. Where a trustee sells land devised to him by a will, an execution creditor of a beneficiary entitled to a share of the money has no charge upon the land and a purchaser is not bound to see to the application of the money; Re Lewis and Thorne (1887) 14 O.R. 133.

Payment into Court. Where a trustee dies or has been absent from the Province for more than a year and is not likely to return persons holding the trust moneys may obtain a discharge by paying them into court; 62 V. c. 15 s. 3.

Survival of Actions. Sections 10, 11 and 12 subject to the express exceptions and limitations contained therein have practically abolished the ancient common law rule as to torts expressed by the maxim *actio personalis moritur cum persona*. An action brought by the deceased in his lifetime may be revived by his representatives; Mason v. Peterborough (1893) 20 A.R. 683. The history of the former state of the law will be found in Williams on Executors, 9th Ed. 695, *et. seq.*

Distress by Executors. Sections 13 and 14 are from Imperial Act 3 & 4 Wm. IV. c. 42 ss. 37, 38; see Williams on Exors. 9th Ed. 800. The sections were formerly necessary as by the common law it was necessary that there should be a reversion in the distrainor and personal representatives as such had no title to the deceased's real estate, and therefore no reversion. Now that all lands vest in the personal representative there would appear to be no necessity for continuing the sections.

Joint Debtors. At common law after the death of one joint debtor the survivor alone was liable; Lambton v. Collingwood (1695) 4 Mod. 315, and the rule was the same in equity; Richardson v. Horton (1846) 6 Beav. 185, except in the case of partnership debts; Kendall v. Hamilton (1879) 4 App. Cas. 504. Where the debt was joint and several, the executors of a deceased debtor would be liable, but could not be served with the summons; May v. Woodward (1676) 1 Freem. 248; Hall v. Huffam (1690) 2 Lev. 228. This is still the law of England. The law of Scotland was different and our legislature at an early date enacted the provisions of s. 15 in conformity with Scottish Law; 1 Vict. c. 7, ss. 1, 2.

Sales of Real Estate by Executors. Sections 16 to 23 were necessary in the days when real estate did not vest in executors. If the testator charged his real estate with the payment of debts or legacies and devised the same to trustees, it was then necessary that some person should have power to raise the money with which the land was charged. If the real estate was devised in fee or in tail charged with debts and legacies, the executors were given no power over it, and a purchaser or mortgagee was relieved from seeing to the application of the money, but not where charged with legacies only; Gray v. Richmond (1892) 22 O.R. 256. Secs. 20-23 have no English equivalent. Since 1st July, 1886, unless the property is devised to the executors as trustees the Devolution of Estates Act authorizes the dealing by the executor with the property. But if the executor derives title to the property under the will he may mortgage for payment of debts; Mercer v. Neff (1898) 29 O. R. 680; and if the testator has been dead less than twenty years the purchaser or mortgagee is not bound to enquire as to debts; Re Bailey (1879) 12 Ch. D. 273; Re Tanqueray (1882) 20 Ch. D. 476, except in the case of leaseholds; Re Whistler (1887) 35 Ch. D. 561; Re Venn and Furze (1894) 2 Ch. 101.

Specific Performance. It will be noticed that s. 24 applies as well where the deceased died intestate as where he left a will.

Trustees. A trustee within s. 27 includes directors of a company; *Re Lands Allotment Co.* (1894) 1 Ch. 616; a solicitor who receives trusts money and does not account (1893) 2 Q.B. 390; a trustee *de son tort*; *Mara v. Browne* (1895) 2 Ch. 69, 94; but not a mere solicitor to trustees, s.c. (1896) 1 Ch. 199.

Solicitors and Bankers. Section 27 is from 51 & 52 Vict. c. 59 s. 1. Section 2 of 51 & 52 Vict. c. 29 (The Trustee Act, 1888) from which s. 28 is taken was enacted as an extension of s. 56 of the Conveyancing etc., Act of 1881, which exonerated a purchaser who paid money to a solicitor where he produced a deed having in the body thereof or endorsed thereon a receipt for the consideration money. This was held not to apply to a case where the vendor was a trustee; *Re Bellamy and Metropolitan Board of Works* (1883) 24 Ch.D. 387. The English section is now replaced by 56 & 57 Vict. c. 53, s. 17. Section 56 was not reenacted in Ontario, notwithstanding the re-enactment of the immediately preceding sections 54 and 55; see R.S.O. c. 119, s. 5. The appointment of the solicitor is sufficiently made under the English section by entrusting him with a deed containing a receipt. In Ontario it may be evidenced in any way showing an appointment.

Section 28 will not authorize an attorney of a trustee to appoint a solicitor or banker to receive the trust moneys; *Re Hetling and Merton's contract* (1893) 3 Ch. 269.

The solicitor must be trusted with the deed by the trustee. If he should have stolen it or had not been permitted by the trustee to have the custody of it the purchaser would not be protected; *Day v. Woolwich Equitable Bldg. Socy.* (1889) 40 Ch. D. 491; one of the trustees cannot be appointed to receive the money; *Re Flower and Metropolitan Board of Works* (1884) 27 Ch.D. 592.

Conditions on Sale by Trustees. Section 29 is similar to 56 & 57 Vict. c. 53, s. 14, which takes the place of The Trustee Act, 1888. A trustee might always sell subject to any reasonable conditions of sale; *Hobson v. Bell* (1839) 2 Beav. 17; including a condition for rescission in the event of being unable or unwilling to remove objections; *Falkner v. Equitable Reversionary Society* (1857) 4 Drew. 352. But care had to be taken not to impose conditions not justified by the state of the title. The trustees might not rashly or improvidently introduce a depreciating condition for which there was no necessity; *Dance v. Goldingham* (1873) L.R. 8 Ch. 902. If such conditions were introduced specific performance would not be decreed either against the trustees or against a purchaser; *Dunn v. Flodd* (1883) 25 Ch.D. 629; 28 Ch.D. 583, and the trustees would have been restrained in an action by the *cestui que trust* from completing the sale; *Dance v. Goldingham* (1873) L.R. 9 Ch. 902.

The sale will not now be impeachable either before or after completion unless made at an undervalue caused by the conditions.

The purchaser will not in any case be entitled to take the objection.

Indemnity for Breach of Trust. The original section from which s. 30 was taken has been replaced in England by 56 & 57 Vict. c. 53, s. 45. To entitle a trustee to indemnity by his *cestui que trust*, the *cestui que trust* must instigate or request or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustee. He must in other words know the facts which constitute the breach of trust. If a *cestui que trust* instigates, requests or consents in writing to an investment not in terms authorized by the power of investment he clearly falls within the section, and in such case his ignorance or forgetfulness of the terms of the power will not *prima facie* protect him. But if all that a *cestui que trust* does is to instigate, request or consent in writing to an investment which is authorized by the terms of power the case is very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him, unless they can show that he instigated, requested or consented in writing to their non-performance of their duty in this respect; *Re Somerset, Somerset, v. Earl Poulton* (1894), 1 Ch. 231.

An instigation or request need not be in writing; *Griffith v. Hughes* (1892), 3 Ch. 105. The Court is not bound to impound the interest of a *cestui que trust* and will not do so if it would be unjust; *Mara v. Browne* (1895), 1 Ch. 69, 94.

Insurance by Trustees. Prior to the act a trustee could not insure the trust property out of income without the consent of the tenant for life; Lewin on Trusts, 8th Ed., 580. The section has been somewhat changed in England by 56 & 57 Vict. c. 53, s. 18.

Relief of Trustees. S. 31 (a) is from the Judicial Trustees Act, 1896 (59 and 60 V. c. 35) s. 3. The power to relieve the trustee is meant to be acted on freely and fairly in the exercise of judicial discretion, but the court must be satisfied on sufficient evidence that the trustee acted reasonably as well as honestly, and if a trustee has not acted as he probably would have acted had it been a transaction of his own he will not be relieved, *Re Turner, Barker v. Ivinney* (1897) 1 Ch. 536; *Re Roberts* (1897) 76 L. T. 479; nor if he advances on mortgage more than should reasonably be advanced or without getting a proper valuation; *Re Stuart, Smith v. Stuart* (1897) 2 Ch. 583. But leaving a debt of 166l. due upon a demand note by a man in good credit where the will authorized the trustees to maintain the estate in the like mode of investment as at the testators death was relieved against although the debtor died insolvent 18 months after the testators death; *Re Grindley, Clews v. Grindley* (1898) 2 Ch. 593; and where trustees erroneously believed they had power to sell leaseholds they were relieved from liability for loss of income caused by a sale which in other respects was proper; *Perkins v. Bellamy* (1898) 2 Ch. 521. The onus is on the trustee to prove that he acted reasonably and honestly; *Re Stuart, Smith v. Stuart* (1897) 2 Ch. 583. Where an estate unexpectedly turned out to be insolvent payments which had been honestly made to a beneficiary were allowed as against creditors; *Re Kay, Mosley v. Kay* (1897) 2 Ch. 518.

Limitations. The Judicature Act (R.S.O. c. 51) s. 58 (1) enacts "Subject to the provisions of section 32 of the Trustee Act no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations." S. 32 is substantially the same as s. 8 of the Trustee Act 1898 (51 & 52 Vict. c. 59).

Directors who by mistake or carelessness misapply money under their control belonging to the Company can in the absence of fraud rely on the section; *Re Lands Allotment Co.* (1894) 1 Ch. 616.

An action to compel trustees to replace moneys lost through breaches of trust is an action to recover money and will be barred at the expiration of six years from the breach of trust, or six years from the time that the interest of the plaintiff beneficiary becomes an interest in possession; *Re Bowden* (1890) 45 Ch. D. 444; *Re Swain* (1891) 3 Ch. 233; *Re Page* (1893) 1 Ch. 304; *Re Somerset, Somerset v. Earl Poulett* (1894) 1 Ch. 231.

An acknowledgement will take the case out of the Statute but it must be an acknowledgement of the breach of trust and a liability of the trustee in consequence thereof; *Want v. Campain* (1893) 9 T.L.R. 254; *Stephens v. Beatty* (1895) 27 O.R. 75; and accordingly paying interest received from a mortgagor is not an acknowledgment of a liability for the insufficiency of the investment; *Re Somerset, Somerset v. Earl Poulett* (1894) 1 Ch. 231, but payment by a solicitor as the agent of the trustees of moneys as interest on alleged investments will be sufficient; *Clark v. Bellamy* (1899) 19 C. L. T. 174.

A tenant for life is barred at the expiration of six years, *Stewart v. Snyder* (1898) 18 C.L.T., 407, 30 O.R. 110. A new trustee cannot recover against the old trustees for a breach of trust more than six years old, he not being a beneficiary within the proviso to sub.-sec. (b); *Re Bowden* (1890) 45 Ch. D. 444. As between trustees, time does not begin to run until the liability is established, so that an action for contribution may be brought within six years from the judgment establishing liability; *Robinson v. Harkin* (1896) 2 Ch. 415. The Statute of Limitations may be set up except in the three following cases (a) fraud by the trustee; (b) retention of trust property by him; (c) receipt by him and conversion of it to his own use.

Where the trustee derived no benefit from the breach of trust, and had no knowledge of it, and was not concerned in it in any way, he could not be said to be a party or privy to the breach of trust though fraudulent, as where the surplus moneys arising from a sale under a power in a mortgage were fraudulently kept by the mortgagee's solicitor on the false representation that he had authority to receive them for the second mortgagee; *Thorne v. Heard* (1895) A.C. 495.

Where moneys have been paid out by the trustee innocently although to a wrong person or for a wrong purpose, the section protects the trustee from demands more than six years old; *How v. Earl Winterton* (1896) 2 Ch. 626.

Money lent by trustees to a mortgagor on insufficient security and therefore in breach of trust and paid by the mortgagor into a bank in which one of the trustees was a partner in part discharge of a debt of the mortgagor to the bank is not money converted by the partner trustee to his own use; *Re Gurney*, *Mason v. Mercer* (1893) 1 Ch. 590.

The section does not authorize an innocent partner in a firm of solicitors to escape liability for misappropriation of moneys by another of the firm; *Moore v. Knight* (1891) 1 Ch. 547.

The expression "still retained" means actually in his hands, or under his control at the date of the writ; *Thorne v. Heard* (1893) 3 Ch. 530, (1894) 1 Ch. 599, (1895) A.C. 495.

Married Woman. The executors of a husband who forcibly deprived his wife of moneys forming part of her separate estate cannot set up the Statute of Limitations; *Wassell v. Leggatt* (1896) 1 Ch. 554.

Interest in Possession. A tenant for life entitled to income may be barred by the Statute of Limitations as to income and may subsequently become entitled in the events which happen to the settled fund by virtue of a resulting trust and such right does not become an "interest in possession" until the other objects of the trust fail and will not be barred; *Mara v. Browne* (1895) 2 Ch. 69. Time does not run against beneficiaries until they are entitled to interests in possession; *Re Somerset*, *Somerset v. Earle Poulett* (1894) 1 Ch. 231; *Stewart v. Snyder* (1898) 18 C.L.T. 407, 30 O. R. 110.

Accounts of Trustees. Where trustees are entitled to the protection of s. 32, their accounts will be restricted to six years before action. For form of order, see *Re Davies*, *Ellis v. Roberts* (1898) 2 Ch. 142.

Breaches of Covenant by Trustees. Much difficulty has been felt as to the meaning of sub-sec. (a) and as to the difference between it and sub-sec. (b). In *re Bowden* (1890) 45 Ch. D. 444, Lord Justice Fry virtually thought that (a) had no meaning, but in *How v. Winterton* (1896) 2 Ch. 626; *Lindley and Rigby, L.J.J.* discussed it elaborately. *Rigby L.J.* thought that it extended to actions founded upon breaches of duty, arising either from a simple promise to undertake a trust or a covenant to undertake it. In the latter case the Statute of Limitations applicable "if the trustee had not been a trustee" would be that relating to specialties and the period of limitation would be 20 years.

Settling Debts. S. 33 is from Lord Cranworth's Act (23 & 24 Vict. c. 145) s. 30, which was repealed in England by the Conveyancing Act 1881 (44 & 45 Vict., c. 41, s. 37, which section is replaced by 56 & 57 Vict., c. 53, s. 21. The section did not apply to administrators until the amendment of 1890, and their powers were limited as before the act; see *Williams on Exors.* 9th Ed. 1694 *et seq.* A sale by an executrix and the testator's partner of partnership property to a limited company partly for cash and partly for shares under an arrangement for the handing over of the purchase money to the partnership bankers is a compromise within this section and is valid; *West of England and South Wales District Bank v. Murch* (1883) 23 Ch. D. 138.

In *Reid v. Reid* (1866) 16 C.P. 247, it was held that an executor or administrator may as such refer to arbitration causes of action which arose in the lifetime of the testator or intestate so as to bind the estate and without making himself personally responsible.

The executors may compromise claims of a legatee; *Re Warren* (1884) 32 W. R. 916.

An executor may pay a claim barred by the Statute of Limitations; *Norton v. Frecker* (1737) 1 Atk. 526; but not after a judicial decision that it is not recoverable; *Midgley v. Midgley* (1893) 3 Ch. 282. But he has no authority to pay a bond the consideration of which is illegal or immoral; *Williams on Exors.* 9th Ed. 1699, nor notes where there was no consideration; *Re Williams* (1896) 27 O.R. 405, nor the claim of a creditor who is prevented from enforcing his claim by the statute of frauds; *Re Rowson* (1885) 29 Ch. D. 358. A claim for dower cannot be compromised by an administrator setting aside a portion of the real estate; *Irwin v. Toronto General Trusts Co.* (1894) 24 O.R. 484.

One of several executors may compromise a claim although the others dissent; *Smith v. Everett* (1859) 27 Beav. 446; but if the effect of the compromise is to relieve him from liability which he was under to the estate jointly with the creditor the compromise will be set aside; *Stott v. Lord* (1862) 31 L. J. Ch. 391.

Reasonable time may be allowed for payment of a debt; *Ratliffe v. Winch* (1853) 17 Beav. 217; *Re Owens* (1883) 47 L. T. 61; *Johnston v. Ogg* (1877) 25 Gr. 261; but if the executor allows the debt to become barred he will be liable; *Williams on Exors.* 9th Ed. 1702.

Right of Retainer abolished. By s. 34 the executor's right of retainer of his own debt in case of a deficiency of assets is abolished; *Re Ross* (1881) 29 Gr. 385.

All Debts to be paid Ratably. Upon the death of a person, his estate if insolvent becomes virtually a trust fund for the payment of his creditors and superior diligence will not entitle any creditor to obtain an advantage over the others.

All creditors are entitled to share, including those resident abroad, though the deceased was domiciled and had assets there; *Milne v. Moore* (1894) 24 O.R. 456.

Creditors who get paid in full are bound to refund the amount illegally received; *Bank of British North America v. Mallory* (1870) 17 Gr. 102; *Chamberlin v. Clark* (1882) 1 O.R. 135, 9 A.R. 273; unless the deficiency is caused by a subsequent wasting or depreciation of the assets; *Re Winslow* (1890) 45 Ch. D. 249.

Position of the Executor when Sued. An executor suffering judgment against him thereby admitted personal assets sufficient to satisfy the claim. If the estate is insolvent the proper course for the personal representative is to obtain an order for administration. It has been suggested, however, that he may plead the deficiency of assets and the Court will then adjust the rights of the parties. If this is not done he will be personally liable; *Donor v. Ross* (1872) 19 Gr. 229; *Taylor v. Brodie* (1874) 21 Gr. 607. If sued, however, in the County or Division Court where an administration order could not be granted it would appear that if there were sufficient assets to satisfy the claim the insufficiency of assets to satisfy all claims would be no defence; *Parsons v. Gooding* (1873) 33 U.C.R. 499.

Liens not Affected. Prior to the Creditors' Relief Act (R.S.O. c. 78) it was held that execution creditors who had executions in the sheriff's hands during the deceased's lifetime did not by virtue of the Act then corresponding to s. 34 lose their priority; *Meyers v. Meyer* (1872) 18 Gr. 185. The effect of the Creditors' Relief Act does not appear from any reported case to have been decided. Liens would now have to be valued, R.S.O. c. 132.

Set-off Against Legatee. Notwithstanding s. 34 an executor can set off a debt due by legatee to an estate although the legatee may have died insolvent; *Bain v. Malcolm* (1887) 13 O.R. 444.

Estoppel. A creditor will not be estopped from claiming against an executor by merely not objecting to a legatee being paid if he was not aware of the insufficiency of the assets; *Re Ryerson* (1897) 29 N.S.R. 81.

Covenants in Leases. It was formerly proper for an executor when a contingent liability existed under a lease to the testator to claim to be indemnified against such liability by the legatees of the estate before making distribution, but under s. 36 such indemnity will now be unnecessary so long as the liabilities under the lease have been satisfied up to the time of the term being assigned by the executor and a sum set apart to answer any future claim in respect of fixed sums agreed by the deceased to be laid out on the property; *Dodson v. Samnell* (1890) 1 Dr. & Sm. 575.

Advertisement for Creditors. The original of section 38 was Lord St. Leonard's Act (22 and 23 Vict., c. 35) s. 29. The original section related only to executors and administrators. The benefit of its provisions are now extended to trustees and assignees for the benefit of creditors. There is no positive rule as to what notices are sufficient. The circumstances of each particular case, such as the place of residence of the deceased and his position in life must be considered; *Re Bracken* (1880) 43 Ch. D. 1. It is not necessary in Ontario to advertise in the Ontario Gazette; *Re Cameron, Mason v. Cameron* (1893) 15 P.R. 272. One month from the date of the advertisement was held sufficient time to give the creditors although the advertisement was not published till a few days later; *Re Bracken* (1889) 43 Ch. D. 1. The provisions of the section apply to claims of next of kin as well as creditors; *Newton v. Sherry* (1876) 1 C.P.D. 246.

Failure to send in a claim will not deprive a creditor of his rights if the personal representative or trustee has knowledge of the claim; *Carling Brewing and Malting Co. v. Black* (1884) 6 O.R. 441; *Markwell's case* (1873) 21 W.R. 135.

The notice must distinctly state that the estate will be distributed amongst the parties entitled thereto, having regard only to the claims of which the party giving it has notice, and that he will not be liable for the same or any part thereof so distributed to any person of whose claim he had not notice; *Stewart v. Snyder* (1898) 18 C.L.T. 407; 30 O. R. 110.

An executor who has distributed the assets after giving the notice will have the same protection as if he had administered the estate under a judgment of the Court, and if he should have set apart and retained legacies as trustee no judgment can be given against him *qua* executor; *Clegg v. Rowland* (1866) L.R. 3 Eq. 368; and in an action against legatees by an unpaid creditor to compel a refund, the executor as such would not be a proper party at all; *Hunter v. Young* (1879) 4 Ex. D. 256.

Where new claims come in after advertisement and distribution of part of the estate, the personal representative or trustee has no *locus standi* to recover back any portion as on an overpayment; *Leitch v. Molsons Bank* (1896) 27 O.R. 621.

An advertisement to send in claims does not amount to a promise to pay statute barred debts; *Scott v. Jones* (1836) 4 Cl. & F. 382; nor stop the running of the Statute of Limitations; *Re Stephens* (1889) 43 Ch. D. 39.

Application to Court for Advice. The section from which s. 39 was taken has been repealed in England, the object thereof now being obtained by originating summons; 56 & 57 Vict. c. 53, s. 51. The object of the section is to assist trustees in the execution of their trust as to little matters of discretion; a petition thereunder should relate only to the management and investment of trust property. Therefore the Court will not upon such a petition construe an instrument or make any order affecting the rights of parties to property. Neither will the court give an opinion on matters of detail which cannot properly be dealt with without the superintendence of the Court and the assistance of affidavits; *Walker & Elgood on Executors*, 2nd Ed. 289, quoted with approval, *Re Williams* (1895) 22 A.R., 196, 200; see also *Re Caldwell* (1868) 2 Ch. Chamb. 150; *Re Spiller* (1860) 2 L. T. N. S., 71; *Re Barrington* (1859) 1 J. & H. 142; *Re Simson* (1858) 1 J. & H. 89.

Advice may be given as to an investment; *Re Lorenz* (1860) 1 Dr. & Sm. 401; as to concurring in a sale; *Earl Poulett v. Hood* (1868) L. R. 5 Eq. 116; and as to converting saw logs into lumber; *Re Caldwell* (1868) 2 Ch. Chamb. 150; as to payment of calls on shares; *Re Box* (1864) 1 H. & M. 552; as to granting a lease; *Re Lees' Trust* (1875) W. N. 61; as to exercising a power of sale; *Re Stone's Settlement* (1874) W. N. 4; as to making an advancement; *Re Kershaw's Trusts* (1869) L. R. 6 Eq., 322; *Re Breed's Will* (1875) 1 Ch. D. 226. Where questions of construction arise a suit must be instituted; *Re Evans* (1861) 30 Beav. 232; *Re Lorenz* (1862) 1 Dr. & Sm. 401; *Re Hooper* (1861) 29 Beav. 656; but a will may now be construed on an originating notice *Re Sherlock* (1878) 18 P. R. 61; *Re Whitty* (1899) 19 C. L. T. 85; *Holmstead & Langton* 1097, 1098. Advice will not be given on a hypothetical case *Re Box* (1864) 1 H. & M. 552. The advice of the Court need not be obtained as to defending a suit brought against the trustee; *Re Williams* (1895) 22 A.R. 196; and the trustee might on the petition be allowed to apply part of the estate in defraying the costs; *Ex Parte Earl* (1881) 16 Ch. D. 587. The application should now be by originating notice; C. R. 938 (g), see *Holmstead & Langton*, p. 1097. The Master in Chambers has no jurisdiction, C. R. 42 (6). One trustee may apply without the concurrence of the other; *Re Mugeridge* (1859) Johns. 625. Where an executrix applied for a direction as to distribution of money or as to advertising for next of kin, the petition was refused in the absence of any of the heirs or next of kin; *Re Harley's Estate* (1897) 17 P. R. 483, but except where there is a deficiency of assets all parties interested need not be served; *Re Mockett* (1859) Johns. 628; Infants need not be served; *Re Tuck's Trusts* (1865) W. N. 15, and the jurisdiction may be exercised although the petition is not served on any one; *Re French's Trusts* (1872) L. R. 15 Eq. 68; *Re Larken's Trust* (1872) W. N. 85. The question of service will be dealt with on hearing the petition; *Re Cook's Trust* (1873) W. N. 49. Where the consent of a married woman was required to investments by trustees and she was a lunatic not so found by inquisition,

the Court, exercising the jurisdiction of s. 39 dispensed with the consent, and directed the income to be paid to the husband on his undertaking to apply it to the maintenance of the wife; *Re T*—(1880) 15 Ch. D. 78.

Litigation. The Court on a Petition under s. 39 permitted trustees to apply certain funds not exceeding £3,000 in payment of costs of litigation for the protection of the estate; *Re Lord River's Estate* (1881) 15 Ch. D. 588, n.

Costs. Where the application concerns income only the costs of the petition may be ordered to be paid out of the income, *Anon* (1860) 8 W. R. 333; but as a rule they will be paid out of the corpus *Re McVeagh, Seton* on Decrees, 4th Ed. p. 491.

The costs of affidavits will be disallowed *Re Muggeridge* (1859) Johns. 625; *Re Mockett* (1859) Johns. 628.

Compensation. Trustees appointed by statute are entitled to compensation; *Re Commissioners of Cobourg Town Trust* (1875) 22 Gr. 377; *Re Toronto Harbor Commissioners* (1881) 28 Gr. 195, and so is a Trustee appointed by By-law to receive municipal debentures and hand them over to a Railway Company on completion of the railway; *Re Ernatinger* (1896) 28 O. R. 106; *Re Tilsonburgh, Lake Erie and Pacific Ry. Co.* (1897) 24 A. R. 378.

The compensation is a lien upon the estate; *Life Association of Scotland v. Walker* (1876) 24 Gr. 293; *Re Tilsonburgh, Lake Erie and Pacific Ry Co.* (1897) 24 A. R. 378; *Harrison v. Patterson* (1865) 11 Gr. 105.

An executor who discharges his duty honestly is entitled to compensation although his accounts, owing to want of business ability are loosely and inaccurately kept; *Hoover v. Wilson* (1897) 24 A. R. 424, and so is an executor who retains money in his hands unemployed; *Gould v. Burritt* (1865) 11 Gr. 523; and although a balance is found against him on a surcharge; *Sieve-wright v. Leys* (1882) 1 O. R. 375, and although he may have invested in unauthorized securities but without loss; *Peacock v. Colling* (1885) 54 L. J. Ch. 743.

Where an administration suit is pending it is improper for a Surrogate Judge to fix the compensation, and his allowance will be disregarded; *Biggar v. Dickson* (1868) 15 Gr. 233; *Cameron v. Bethune* (1868) 15 Gr. 486.

Where a legacy is given to executors "in lieu of all charges for their services in performing the duties imposed on them as executors of this my will" they cannot if they accept probate claim a larger sum; *Williams v. Roy* (1885) 9 O. R. 534, in which a prior decision of *Denison v. Denison* (1870) 17 Gr. 306, where an insufficient legacy was given as compensation, and the Court allowed a further sum, was doubted.

A legacy given as compensation does not on a deficiency of assets abate with other legacies; *Anderson v. Dougall* (1888) 15 Gr. 405. A bequest of the share of the residue is not to be inferred as given in compensation; *Boys' Home v. Lewis* (1883) 4 O. R. 18.

The Statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits according to the sound discretion of the Judge. The adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute; *Re Fleming* (1886) 11 P. R. 426. Where the Judge fixing the commission has erred on the side of liberality, his allowance will not be interfered with if he has not proceeded on a wrong principle; *McDonald v. Davidson* (1881) 6 A. R. 320.

The following cases may be consulted as illustrations of the amount of compensation allowed:—

McLennan v. Heward (1862) 9 Gr. 178. Five per cent. allowed on all moneys received and paid over and two and a half per cent. on moneys received and not paid over.

Torrance v. Chewett, (1866) 12 Gr. 407. Four per cent. on all transfers of stocks and all moneys paid in and collected.

Thompson v. Freeman, (1868) 15 Gr. 334. Remuneration by commission on the transfer of land to a beneficiary valued at \$66,000 and on moneys received and disbursed in a business carried on by an agent, is not the proper method. A lump sum should be allowed.

Denison v. Denison, (1870) 17 Gr. 306. Where the estate was large, requiring great care and judgment for years, \$1,500 was allowed to one executor, and \$1,500 to two others jointly.

Wagstaff v. Lowerre, (1856) 23 Barb 224. The compensation is given for the care and management of the estate and not for the simple act of receiving and paying over, and where the estate consisted of unproductive real estate, a lump sum was allowed.

Re Berkeley's Trust, (1879) 8 P. R. 193. One commission is allowable on the determination of the trust for the receipt and proper application of moneys payable out of the corpus, but none on investment and re-investment of the trust funds. On receipts of income a commission should be allowed out of income, fixed in this case at four per cent. A yearly allowance should be made for looking after taxes and insurance, etc. of real estate, without prejudice to an ultimate commission upon the estate received and handed over.

Stinson v. Stinson (1881) 8 P. R. 560. A lump sum allowed for care of land not realized upon in addition to commission and income.

Re Batt; Wright v. White (1883) 9 P. R. 447. Commission of \$400 was allowed on receipts of \$9,400, although \$3,200 was in securities which were merely handed over.

Re Honsberger, (1885) 10 O. R., 521. Notwithstanding the granting of an administration order, an allowance should be made for moneys received pending administration, but the allowance should be considerably reduced on account of the diminishing of the responsibility; and in *Thompson v. Fairbairn*, (1886) 11 P. R. 333, where all the work was done during an administration suit, five per cent. was allowed on disbursements of \$300, one per cent. on \$2,400 collected by the plaintiff's solicitors, and on \$10,000, money due by the Executrix to the estate; two and a half per cent. on collections of \$12,000 and nothing on \$4,700 appearing on each side of the account, being on a transfer of mortgage by an arrangement between the Solicitors, sanctioned by the Court.

Re Fleming, (1886) 11 P. R. 272, 426. Five per cent. was allowed on \$32,000. moneys received, and one per cent. on \$79,000 securities received and handed over to a co-executor as beneficiary.

Archer v. Severn, (1887) 13 O. R. 316. Five per cent. allowed on \$45,000 received, there being 300 items on one side and 400 on the other side of the account, and a great deal of labor and trouble.

Re Prittie, (1889) 13 P. R. 19. Where the rents were collected by an agent, who was paid a commission, two and a half per cent. was nevertheless allowed to the Executors and \$50 was allowed them on an exchange of lands, said to be valueless, for stock in a Land Company, instead of commission on the par value of the stock.

Re Central Bank, Liquidator's case, (1892) 22 O. R. 247. Two and a half per cent. was allowed to a Liquidator on moneys collected and one and a quarter per cent. on amounts adjusted or set off. See also *Judgment of Master in Ordinary*, 26 C. L. J. 24.

Re Cursitir, (1894) 9 M. L. R. 433. Four per cent. was allowed on the amount received and disbursed, and two per cent. on the amount received and still remaining on hand, subject to a further allowance to be made when the estate should be wound up.

Re Ermatinger (1896) 28 O. R. 106; (1897) 24 A. R. 378. \$400 was allowed for receiving municipal debentures and handing them over on completion of the railway.

No allowance was made for an agent who collected moneys gratuitously. *Chisholm v. Barnard* (1864) 10 Gr. 479, nor for moneys charged against executors on the basis of wilful default, *Bald v. Thompson* (1870) 17 Gr. 154; nor for a share in residue payable to executors, *Boys' Home v. Lewis*, (1883) 4 O. R. 18. The allowance should be spread over the whole term of service, *Re Central Bank*, (1892) 22 O. R. 247; but executors are entitled to be credited with a proportionate amount of the allowance at the end of each year, *Hoover v. Wilson* (1897) 24 A. R. 424.

CHAPTER 130

As amended by 62 V. c. 11, s. 33.

An Act respecting Investments by Trustees.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Trustee Investment Act*" Short title.

2.—(1) Trustees or executors having trust money in their hands, which it is their duty, or which it is in their discretion, to invest at interest, shall be at liberty at their discretion, to invest the same in any stock, debentures or securities of the Government of the Dominion of Canada, or of this Province; or in securities which are a first charge on land held in fee simple, provided that such investments are in other respects reasonable and proper, and such trustees or executors shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such stock, debentures or securities aforesaid, and also, from time to time, at their discretion, to vary any such investments as aforesaid, for others of the same nature; and any such moneys already invested in any such stock, debentures or securities as aforesaid, shall be held and taken to have been lawfully and properly invested.

Trustees or executors may invest trust moneys in certain securities.

Imp. Act 23-24
V. c. 145,
s. 25.

(2) This section shall apply and extend to both present and future trustees and executors. R.S.O. 1887, c. 110, s. 29 (1 and 3).

This section to apply to all trustees, etc.

3.—(1) For the purposes of the following sections of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee.

Interpretation.
"Trustee."

(2) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

(3) The expression "stock" shall include fully paid up shares.

(4) The expression "instrument" shall include an Act of the Legislature of Ontario. 54 V. c. 19, s. 2.

4. The powers hereby conferred are in addition to the powers conferred by the instrument, if any, creating the trust; Provided that nothing herein contained shall authorize any

Additional powers given.
Provided.

trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust. R. S. O. 1887, c. 110. s. 29 (2); 54 V. c. 19, s. 3.

Investment of
trust funds.

5.—(1) It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in terminable debentures or debenture stock of the hereinafter mentioned societies and companies, provided that such investment is in other respects reasonable and proper, and that the debentures are registered, and are transferable only on the books of the society or company in his name as the trustee for the particular trust estate for which they are held in such debentures or debenture stock as aforesaid:—

(a) Of any incorporated society or company which has been, or shall hereafter be authorized by any lawful authority to lend money upon mortgages on real estate, or for that purpose and other purposes, such society or company having a capitalized, fixed, paid up and permanent stock not liable to be withdrawn therefrom amounting to at least \$500,000, and having a reserve fund amounting to not less than 25 per cent. of its paid up capital, and its stock having a market value of not less than 25 per cent. premium;

(b) Or of any society or company heretofore incorporated under chapter 164 of the Revised Statutes of Ontario, 1877, or any Act incorporated therewith, or under chapter 169 of the Revised Statutes of Ontario, 1887, having a capitalized, fixed, paid up, and permanent stock not liable to be withdrawn therefrom amounting to at least \$100,000, and having a reserve fund amounting to not less than 15 per cent. of its paid up capital, and its stock having a market value of not less than 7 per cent. premium; provided that nothing in this clause (b) shall in any way affect any investment made under statutory authority before the passing of this Act. 62 V. c. 11, s. 33.

(2) The trustees may from time to time vary any such investment. 54 V. c. 19, s. 4 (a-c).

Companies
in which
funds invested
to be approved
by Lieutenant-
Governor.

6. No investments shall be made under authority of this Act in the debentures of any society or company of the class first hereinbefore mentioned which has not obtained an order of the Lieutenant-Governor in Council approving of investments in the debentures thereof; and such approval is not to be granted to any society or company which does not appear to have kept strictly within its legal powers in relation to borrowing and investment. 54 V. c. 19, s. 5.

7. The Lieutenant-Governor in Council if he deems it expedient may at any time revoke any Order in Council previously made approving of investments in the debentures or debenture stock of any society or company. Such revocation shall not affect the propriety of investments made before such revocation. 54 V. c. 19, s. 6.

Revocation of
Order in
Council ap-
proving of
investments.

8.—(1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed one half of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. This section shall apply to a loan upon any property on which the trustee can lawfully lend.

When trustee
not chargeable
for lending on
insufficient
security.

Imp. Act 51-52
V. c. 59, s. 4.

(2) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date. 54 V. c. 19, s. 9.

9.—(1) Where a trustee has improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustees shall only be liable to make good the sum advanced in excess thereof with interest.

Trustee lend-
ing more than
authorized
amount.

Imp. Act 51-52
V. c. 59, s. 5.

(2) This section shall apply to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date. 54 V. c. 19, s. 10.

NOTES.

Unauthorized Investments. A settlor or testator may authorize the investment of trust funds in such manner as he may see fit; *Forbes v. Ross* (1788) 2 B.C.C. 430, 2 Cox 113; *Paddon v. Richardson* (1856) 7 De G. M. & G. 563. A power to place the money out at interest at the trustee's discretion or on such good security as he may think safe will not justify an investment on personal security; *Lewin on Trusts*, 8th Ed. 316, or in securities in which it is not usual for prudent men to invest; *Knox v. MacKinnon* (1888) 13 App. Cas. 753; *Stretton v. Ashmall* (1855) 3 Drew 9; *Consterdine v. Consterdine* (1850) 13 Beav. 330; and where there is power to invest on personal security it must be exercised with great caution; *Pickard v. Anderson* (1872) L. R. 13 Eq. 608. Where a settlement contained a power of revocation by the settlor with the consent of the trustee and the trustee invested in securities not authorized by the settlement under instructions by letter from the settlor, the investments were justifiable as what was done amounted to a defective execution of the power; *Re MacKenzie Trusts* (1897) 28 O.R. 312. A power to invest in such securities as trustees "shall think fit" means "shall honestly think fit," and a trustee who receives a bribe or commission on an investment will be held accountable for loss; *Re Smith, Smith v. Thompson* (1896) 1 Ch. 71. An even hand must be held as between the tenant for life and remainderman; *Raby v. Ridehalgh* (1855) 7 De. G. M. & G. 104; *Re Dick* (1891) 1 Ch. 423; *Hume v. Lopes* (1892) A. C. 112; *Mara v. Browne* (1895) 2 Ch. 83; *Re Hotchkin* (1887) 35 Ch. D. 41.

In addition to the securities authorized by the settlement or will, trustees may unless forbidden hereby to do so may invest in;

1. Government securities.
2. First mortgages of real estate.
5. Debentures or debenture stock of loan companies and building societies approved by the Lieutenant-Governor in Council.

Lending on Insufficient Security. The proportion which trustees are authorized to lend on first mortgages of real estate has not been settled by any decision in Ontario. It has always been assumed that the rules laid down in the English cases applied. Trustees in England are authorized in many cases to lend two-thirds of the value of the property and section 4 of Imperial Act 51 and 52 Vict. c. 59 (The Trustee Act, 1888) from which s. 8 was originally taken absolved trustees from liability under the circumstances provided for therein when the amount loaned did not exceed two-thirds of the value stated in the valuer's report. A substantially similar provision is now contained in the Trustee Act 1893 (56 & 57 Vict. c. 53, s. 8). Section 8 of the Ontario Act protects the trustee only to the extent of one-half of the reported value and in this respect differs from the English enactment. Whether it is to be assumed therefrom that the legislature has indicated that a trustee is not justified in lending more than one-half the value of property offered as security is a question not covered by authority.

It has been laid down in England that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value, whereas in cases where the subject of the security derives its value from buildings erected upon the land or its use for trade purposes, the margin ought not to be less than one-half. These have not been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never safely lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept; *Re Godfrey* (1883) 23 Ch. D. 483; *Smethurst v. Hastings* (1885) 30 Ch. D. 490. Where the property is exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure, until he has ascertained not only its present market price, but its intrinsic value apart from those trading considerations which give it a speculative and, it may be, a temporary value, per Lord Watson, *Leahey v. Whitely* (1887) 12 App. Cas. 727, 733.

Trustees should, therefore, not lend as much as one-half on buildings used in trade; *Stickney v. Sewell* (1835) 1 M. & Cr. 8, or for manufacturing, *Royds v. Royds* (1851) 14 Beav. 54; and not more than one-half on cottages; *Re Olive, Olive v. Westerman* (1886) 34 Ch. D. 70; and where the trustees lent £3,000 on the security of a brickfield valued at £7,200 as a going concern, but the land being worth only £2,000, they were (before the Act) charged with the full amount of the loan; *Learoyd v. Whitely* (1886) 32 Ch. D. 347; 33 Ch. D. 106; 12 App. Cas. 727. Where trustees advanced £5,000 on a house and grounds at Liverpool valued by a London surveyor at £7,000 to £8,000, and the surveyor had been employed by the trustee's solicitors and was in fact the agent of the borrower and made an inflated report, they were held to be liable to replace the £5,000; *Fry v. Tapson* (1884) 28 Ch. D. 268.

Trustees may lend on unfinished buildings if due security is taken for their completion, but the buildings should be of the character which experience shows will be constantly let in the neighborhood and not buildings of an experimental character; *Rae v. Meek* (1889), 14 App. Cas. 558, but the fact that houses are unfinished or unlet is a strong circumstance in considering whether an investment is improvident; *Re Salmon, Priest v. Uppleby* (1889) 42 Ch. D. 351, 370.

Where the investment was upon the security of a house and grounds valued (but not by a valuer employed independently of the mortgagor) at £42,750, the trustees were held to be justified in lending only £26,000; *Re Somerset, Somerset v. Earl Poulett* (1894) 1 Ch. 231.

But where trustees slightly exceeded the rule, but acted honestly and as prudent men would have done in dealing with their own funds, they were protected by the Court and were allowed their costs; *Jones v. Lewis* (1850) 3 DeG. & Sm. 471; reversed it is said on appeal, see 34, Ch. D. 73; *Re Godfrey, Godfrey v. Faulkner* (1883) 23 Ch. D. 483; *Re Pearson* (1885) 51 L. T. N. S. 692.

The degree of care which a trustee must exercise is to be tested by a reference to an average standard, and not by the degree of care and prudence which the trustee uses in the management of his own private affairs; *Knox v. McKinnon* (1888) 13 App. Cas. 753; *Rae v. Meek* (1889) 14 App. Cas. 558.

Competency of Valuer. The trustee must "reasonably believe" the valuer to be competent. It has been argued that the words "reasonably believed" in section 3 govern not only the competency, but also the words following that "the valuer is instructed and employed independently of any owner of the property," but it has been held that if the valuer is in fact not instructed or employed independently of the owner of the property, the fact that the trustees believed him to have been employed independently will not relieve them; *Re Walker* (1890) 59 L. J. Ch. 386; *Re Somerset, Somerset v. Earl Poulett* (1894) 1 Ch. 231, 253, see also *Re Stuart, Smith v. Stuart* (1897) 2 Ch. 583.

Local Valuator not now necessary. Section 8 dispenses with the necessity of employing a valuer carrying on business in the locality where the property is situate. But the fact that a valuer has no local knowledge is a circumstance to be considered on the question of the trustees "reasonable" belief in the valuer's competency. A reasonable belief would be a belief formed by the mind of a reasonable man—a belief founded on reason; *United States Express Company v. Donohue* (1887) 14 O. R. 333, 356; *Peek v. Derry* (1887) 37 Ch. D. 541. Where there is nothing special in the nature of the property so as to render the assistance of an expert really necessary for the guidance of a prudent man, trustees will not be guilty of a dereliction of duty in not seeking advice from such a person; *Re Chapman, Cocks v. Chapman* (1896) 2 Ch. 753, 772.

Investment to Stand Good for Proper Amount. An investment which is not of the class in which a trustee is by law or by the settlement empowered to invest is an "unauthorized investment" and a breach of trust and the trustee is bound to replace the amount; *Re Salmon, Priest v. Uppleby* (1889) 42 Ch. D. 351, 367. The *cestui que trust* may ratify it, in which case it will become part of the trust estate and the trustee will be exonerated or he may reject it in which case he may assert a lien upon it for the trust money invested therein, and after realization, compel the trustee to make good the deficiency; *Thornton v. Stokill* (1853) 1 Jur. N. S. 751.

An investment according to the terms of the trust but on insufficient security is part of the trust estate. In *Fry v. Tapson* (1884) 28 Ch. D. 278, Kay J. ordered the trustees to replace the amount loaned with interest and decreed that upon payment they should be entitled to the mortgage. In *Re Salmon, Priest v. Uppleby* (1889) 42 Ch. D. 351, Kekewich J. held that a trustee could not be made liable for loss unless an opportunity were given him to take over the insufficient security, but the Court of Appeal reversed this and held that as the investment was in the authorized class, the realization thereof by new trustees without notice to the negligent trustee (who had retired) did not exonerate him. Cotton L. J., said "The case is entirely distinct from that of an investment outside the terms of the trust which the *cestui que trust* must accept or reject. Here the trustee is only liable for the loss and that liability is to be enforced when the investment is realized," p. 368; Fry L. J. said "The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will be best done by realizing the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security."

Where the *cestui que trust* is an infant, the trustee will be ordered to make good the loss although the security cannot be transferred to him: *Head v. Gould* (1898) 2 Ch. 250.

S. 9 provides a new rule. The Court is to ascertain regardless of present circumstances the amount which the trustees would have been justified in advancing and the trustee is responsible only for the excess to the extent of the deficiency which arises on realization. *Re Somerset, Somerset v. Earl Poulett* (1894) 1 Ch. 231, 258. A sale will not be ordered unless the *cestuis que trust* are before the Court: *Butler v. Butler* (1877) 5 Ch. D. 554, 7 Ch. D. 116.

Retention of Securities. The retention of a mortgage investment on property which has fallen in value so that more than two-thirds of the value of the property is invested is not necessarily a breach of trust. The trustees must exercise a discretion as practical men having due regard to all the circumstances such as the position and solvency of the mortgagor: *Re Medland, Eland v. Medland* (1889) 41 Ch. D. 476.

So long as an investment made by a testator is within the authorized class and the security continues satisfactory, the executors may retain it, and when the security becomes insufficient they are not liable for still retaining it in the absence of wilful default which includes want of ordinary prudence: *Re Chapman, Cocks v. Chapman* (1896) 2 Ch. 763.

Relief of Trustees. Trustees acting reasonably and honestly may be relieved from liability; 62 V. c. 15 s. 1; see notes to R. S. O. c. 129 s. 31 (a) p. 393.

CHAPTER 131.

An Act to Protect persons acting as Executors or Administrators.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

1. Where any one has been or is hereafter appointed, by a Court having jurisdiction in that behalf, administrator of the estate of any person who on account of absence for seven years or for any other reason has been presumed to be dead, or where probate of a will made by any such person has been or shall be granted by such Court, all acts done under the authority of such appointment or probate, shall, notwithstanding it may thereafter appear that the presumption of death was erroneous, be as valid and effectual as such acts would have been had such person been dead ; but the person erroneously presumed to be dead shall, subject to the provisions of sections 3 and 4, have the right to recover from the person acting as executor or administrator any part of the estate remaining in his hands undistributed, and no more ; and shall, subject to the provisions of the statutes of limitations, be entitled to recover from any one who received any portion of his estate as one of his next of kin, or as a devisee, legatee or heir, or as the husband or wife of such person, the portion so received, or the value thereof. 53 V. c. 29, s. 1

Protection of persons acting as executors and administrators of persons supposed to be deceased.

2. Where a will is admitted to probate, or a grant of administration is made with will annexed, or on account of supposed intestacy, by a Court having jurisdiction in that behalf, all acts done under the authority of such will or grant of administration shall, notwithstanding it may afterwards appear that the deceased had left a will, or left a will which superseded that of which probate was granted or which was annexed to the said letters, or notwithstanding that it appears that the will admitted to probate or administration was not duly executed, or was for any reason invalid, be as valid and effectual as such acts would have been if such will had been the last will of the deceased, and had been duly executed and had been valid, or in case of administration as on intestacy as valid as such acts would have been if the deceased had died intestate ; but upon the revocation of the grant of probate or administration, the new personal representative of the deceased shall, subject to the provisions of sections 3 and 4, have the

Protection of personal representatives acting upon supposed intestacy of deceased.

right to recover from the person acting as executor or administrator as aforesaid, any part of the estate remaining in his hands undistributed, and no more; and shall, subject to the provisions of the statutes of limitations, be entitled to recover from any one who erroneously received any portion of the estate of the deceased as one of his next of kin, or as a devisee, legatee, or heir, or as the husband or wife of the deceased the portion so received or the value thereof. 53 V., c. 29, s. 2.

Costs of
executor and
administra-
tors.

3. The said executor or administrator shall have the right to retain out of any amount remaining in his hands undistributed his proper costs and expenses in the administration of the estate. 53 V., c. 29, s. 3.

Persons
acting
fraudulently.

4. Nothing herein contained shall protect any person acting as administrator or executor where such person has been privy to any fraud by means of which the grant of administration or probate was obtained, or in cases arising under section 1 in respect of anything done after he becomes aware that the person who was presumed to be dead is alive, or in cases arising under section 2, that the will was not duly executed, or for some other reason was invalid, unless the thing so done was in pursuance of a contract for valuable consideration made before the said executor or administrator was aware to the effect aforesaid. 53 V. c. 29, s. 4.

NOTES.

Sections in pari materia. S. 21 of The Surrogate Courts Act (R. S. O. c. 59) provides that probate or Letters of Administration by whatever Court granted shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, and section 63 provides that in case any probate or administration is revoked under that Act all payments *bona fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor or administrator is protected as to all payments which the subsequently appointed representative might have lawfully made, and by section 64, all persons and corporations *bona fide* making or permitting payments or transfers upon any probate or letters of administration are protected notwithstanding any defect or circumstance affecting their validity. Those sections would appear to be in affirmance of the common law; *Allen v. Dundas* (1789) 3 T. R. 125; *Prosser v. Wagner* (1856) 1 C. B. N. S. 289; *Irwin v. Bank of Montreal* (1876) 38 U. C. R. 375. They are, however, based upon the hypothesis of death. Where a person is not dead a Surrogate Court has no jurisdiction over his estate and a grant of probate or letters of administration is void; *Jochumsen v. Suffolk Savings bank* (1861) 3 Allen (Mass) 87, but see *Roderigas v. East River Bank* (1875) 63 N. Y. 460.

The present Act protects not only all persons dealing with personal representatives but also the personal representatives themselves, so long as they acted *bona fide*. The protection extends to all cases whether the grant of probate or letters of administration was merely voidable and subject to revocation or absolutely void. The distinction between void and voidable grants will be found discussed in *Williams on Executors*, 9th Ed. 501, *et seq.*

Presumption of Death. A party who has not been heard of for 7 years may be presumed to be dead, *Williams on Executors*, 9th Ed. 264 n. (s.) and under special circumstances, such as the non-arrival of a vessel upon which he sailed, the presumption may be made before the expiration of 7 years; *Sillick v. Booth* (1841) 1 Y. & Coll. C. C. 117; *Lakin v. Lakin* (1865) 34 Beav. 443; *Danby v. Danby* (1859) 5 Jur. N. S. 54; *Re Beasley* (1869) L. R. 7 Eq. 498; *Hickman v. Upcall* (1875) L. R. 20 Eq. 136.

Refund. A person who received a legacy from an executor under a will which was afterwards set aside, was before the Act liable to refund the same to a subsequently appointed administrator; *Haldan v. Beatty* (1876) 40 U. C. R. 110.

Persons Acting Fraudulently. If after the grant of letters of administration, a will should be discovered, the administrator should take steps to have the grant revoked; *Elme v. Da Costa* (1791) 1 Phill. 173.

YORK UNIVERSITY LAW LIBRARY

PART IX.

Commercial Law.

CHAPTER 78.

An Act to prevent Priority among Execution Creditors.

As amended by 62 V. c. 11, s. 13.

SHORT TITLE, s. 1.	STATEMENT TO BE KEPT IN SHERIFF'S OFFICE PENDING DISTRIBUTION, s. 30.
INTERPRETATION, s. 2.	SHERIFF TO GIVE INFORMATION AS TO ESTATE, s. 31.
NO PRIORITY AMONG EXECUTION CREDITORS, s. 3.	DISTRIBUTION BY SHERIFF WHERE AMOUNT LEVIED IS INSUFFICIENT TO MEET ALL CLAIMS, s. 32.
NOTICE TO BE ENTERED BY SHERIFF AFTER LEVY, s. 4.	DIRECTIONS BY JUDGE TO AVOID UNNECESSARY PARTIES AND TRIALS, s. 33.
DISTRIBUTION OF MONEY LEVIED, ss. 4, 5, 22, 32.	DIRECTION BY JUDGE TO SHERIFF WHERE CLAIM IS DISPUTED, s. 34.
PROCEEDINGS WHERE DEBTOR ALLOWS EXECUTIONS TO REMAIN UNSATISFIED, ss. 6-21.	DECISIONS TO BIND ALL CREDITORS, s. 35.
PROCEDURE BY SHERIFF ON ATTACHMENT UNDER ABSCONDING DEBTORS Act, s. 22.	SHERIFF TO DEPOSIT MONEYS IN BANK, s. 36.
COSTS OF CLAIMANT, s. 23.	ATTACHMENT OF DEBTS OWING TO EXECUTION DEBTOR, s. 37.
PAYMENT TO SHERIFF OF FUND IN COURT, s. 24.	APPEAL, s. 38.
SHERIFF MAY OBTAIN GOODS IN HANDS OF DIVISION COURT BAILIFF, s. 25.	POWERS OF JUDGE, s. 39.
APPORTIONMENT WHERE AMOUNTS LEVIED INSUFFICIENT TO PAY ALL CLAIMS, s. 26.	DEFECTS OF FORM IN PROCEEDINGS, s. 40.
LEVYING INTEREST AND COSTS, s. 27.	FEES PAYABLE TO THE CROWN, s. 41.
SHERIFF'S POUNDAGE, s. 28.	ACT NOT TO INTERFERE WITH THE INSOLVENT LAWS, s. 42.
MONEY MADE ON ONE WRIT TO BE CONSIDERED MADE ON ALL ENTITLED TO BENEFIT THEREOF, s. 29.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title. 1. This Act may be cited as "*The Creditors' Relief Act.*"
R. S. O. 1887 c. 65, s. 1.

Interpretation. 2. In this Act the word "sheriff" shall include coroners; the word "Judge" shall mean the Judge of the County Court of the county or district in which the claims are filed, and shall include a Junior or Deputy-Judge, or a Judge of another county authorized to act for the Judge of the County Court in which

the claims are filed. If a Judge is disqualified to act in a matter arising under this Act, the Judge of the County Court of an adjoining county shall have jurisdiction to act in his place. R. S. O. 1887, c. 65, s. 2.

3. Subject to the provisions hereinafter contained, there shall be no priority among creditors by execution from the High Court or County Courts. R. S. O. 1887, c. 65, s. 3. No priority among execution creditors.

4.—(1) In case a sheriff levies money upon an execution against the property of a debtor, he shall forthwith enter in a book to be kept in his office, open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed retably, amongst all execution creditors and other creditors whose writs, or certificates given under this Act, were in the sheriff's hands at the time of the levy, or who shall deliver their writs or certificates to the said sheriff within one month from the entry of notice; subject, however, to the provisions hereinafter contained as to the retention of dividends in the case of contested claims, and to the payment of the costs of the creditor under whose writ the amount was made. Sheriff, after levy, to enter notice in book thereof.
Distribution.

(2) The notice shall state the day upon which it was entered and may be in Form A, given in the Schedule hereto. R. S. O. 1887, c. 65, s. 4 (1, 2). Form of notice.

(3) The two preceding subsections shall not apply to any moneys received by a Sheriff as the proceeds of a sale of property by him under an interpleader order; but upon the determination of the interpleader issue in favour of the creditors, the moneys whether in the Sheriff's hands or in Court pending the trial of the issue, shall be distributed by the Sheriff among the creditors contesting the adverse claim. 56 V., c. 5, s. 12, (1). Moneys realized on sale under interpleader order.

Interpleader
(4) Where proceedings are taken by the sheriff or other officer for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* (in proportion to the amount of their executions or certificates) to the expense of contesting any adverse claim, shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings on behalf of all creditors interested, and the costs thereof, as between solicitor and client shall be a first charge upon the moneys or goods which may be found by the proceedings to be applicable upon the executions or certificates. R. S. O. 1887, c. 65, s. 4, (3). Rights of creditors in case of interpleader proceedings.

(5) "Adverse claim" in the next preceding subsection shall mean any claim to contest which an interpleader issue is directed; and upon any interpleader application the Court or Judge shall have a discretion to allow to other creditors who Meaning of "adverse claim."

desire to take part in the contest, a reasonable time in which to place their executions in the Sheriff's hands, upon such terms as to costs and otherwise as may be just and reasonable. 56 V. c. 5, s. 12, (2).

Provisions in case of subsequent levy.

(6) In case the sheriff shall, subsequently to the entry of the notice, but within the month, levy a further amount from the property of a debtor, the same shall be dealt with as if such amount had been levied prior to the entry of the notice, but if after the month a further amount is levied a new notice shall be entered; and the distribution to be made of the amount so levied and of the further amount levied within a month of the entry of the last mentioned notice shall be governed by the entry thereof in accordance with the foregoing provisions of this section; and so on from time to time. R. S. O. 1887, c. 65, s. 4 (4).

No preference in respect of writ against goods or lands.

(7) In distributing money under this section creditors who have executions against goods or lands only or against goods and lands shall be entitled to share ratably with all others any moneys realized under execution against either goods or lands or against both. 51 V. c. 11, s. 2. See 57 V. c. 26, s. 1.

[As to rights of employees of execution debtors in respect of wages, see Chap. 156, Sec. 4.]

Certain creditors excluded.

5. No creditor shall be entitled to share in the distribution of money levied from the property of a debtor unless either by the delivery of a writ of execution, or otherwise under this Act, he has established a claim against the debtor either alone or jointly with some other person. R. S. O. 1887, c. 65, s. 5.

Proceedings where debtor allows executions to remain unsatisfied.

6. If a debtor permits an execution issued against him under which any of his goods or chattels are seized by a sheriff, to remain unsatisfied in the sheriff's hands till within two days of the time fixed by the sheriff for the sale thereof, or for twenty days after the seizure, or allows an execution against his lands to remain unsatisfied for nine months after it is placed in the sheriff's hands, the proceedings hereinafter authorized may be taken by other creditors as claimants in respect of debts which are overdue. R. S. O. 1887, c. 65, s. 6.

Affidavit by creditor.

7.—(1) An affidavit to the effect of Form B. in the Schedule to this Act, of the debt and the particulars thereof, may be made in duplicate by the creditor, or by one of the creditors in case of a joint debt, or by a person cognizant of the facts. Prior to or simultaneously with the filing with the clerk of the County Court of the affidavit, there shall be filed with the clerk the certificate of the sheriff, or an affidavit, shewing that such proceedings have been had against the debtor as entitle the creditor to proceed under this Act.

Service on debtor.

(2) The claimant is to serve on the debtor one of the duplicates, and a notice stating that the claimant intends to file the other duplicate with the clerk of the County

Court by reason of there being in the sheriff's hands a writ of execution against the goods and chattels (or lands) of the debtor, and that the claimant intends to call on the sheriff to levy the said debt out of the property of the debtor under the authority of this Act; which notice is to contain the other particulars, shown in the Form C, given in the Schedule to this Act. The notice may be either attached to the affidavit served, or endorsed thereon; where the affidavit is to be served out of Ontario the Judge shall limit the time at which the next step may be taken by the claimant as hereinafter provided. R. S. O. 1887, c. 65, s. 7.

8.—(1) An execution debtor may give notice in writing to the sheriff that any claims to be served upon him may be served upon any solicitor in the Province, whose name and address shall be given, or by mailing the same to an address stated in the notice; the sheriff shall thereupon enter the notice in the said book in section 4 mentioned, and so long as any execution, which was in the sheriff's hands at the time the notice was given shall remain in his hands, shall repeat such entry immediately below any notice (Form A) given in respect of the execution, unless the notice be revoked in writing, in which case the entry or entries thereof shall be marked "revoked."

Notice by debtor of address for service.

(2) So long as the notice is not revoked in manner aforesaid an affidavit of claim and accompanying notice under this Act, may, where a solicitor is named, be served upon an execution debtor by serving the same upon the solicitor in accordance with this Act, or if mailing is required, then by mailing the same, enclosed in an envelope, prepaid and registered, to the address given in the notice.

Service of affidavit of claim with notice.

(3) In case the notice (Form C) served on a debtor does not state some place in or within three miles of the county town of the county in which the proceedings are being taken, at which service may be made upon the claimant, or does not give the name and address of some solicitor in the Province who may be served on the claimant's behalf, service of any notice, paper or document requiring service may be made upon the claimant by mailing the same, prepaid and registered, enclosed in an envelope addressed to the claimant at the county town.

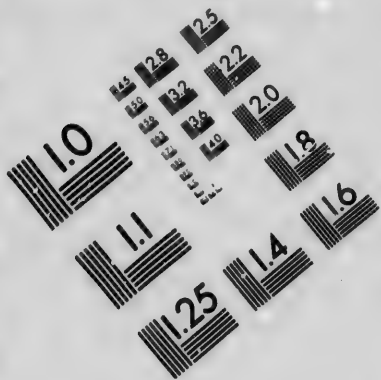
Service on claimant where no address given.

(4) The claimant shall file with the clerk of the County Court of the County, the sheriff of which has the execution, one of the said duplicate affidavits of claim, and a copy of the said notice, with an affidavit of due service; which affidavit may be in the Form D.

Affidavit to be filed with clerk of county court.

(5) The copy of affidavit and the notice shall, where practicable, be personally served upon the debtor; but if it be made to appear to a Judge that the claimant is unable to effect prompt personal service, the Judge may order substituted or other service, or may appoint some act to be done which shall be deemed sufficient service. R. S. O. 1887, c. 65, s. 8.

Mode of service.



1.5 2.8 2.5
1.8 3.2 2.2
2.0

0.1
0.2
0.3

Certificate to be given to creditor where claim not disputed.

9.—(1) If the claim is not contested in manner hereinafter mentioned, the County Court Clerk—after ten days from the day of personal service, or service under subsection 2 of section 8, or within the time mentioned in the order (as the case may be), on application and the filing with him of proof of personal service upon the debtor of an affidavit and notice in accordance with this Act, or proof of compliance with a Judge's order in that behalf, or upon the determination of the dispute in favour of the claimant, either in whole or in part—shall deliver to the creditor, or any one on his behalf, a certificate to the effect of Form E, in the Schedule hereto; and in case the claim is only disputed as to a part, the creditor may elect, by a writing filed with the clerk, to abandon such part and obtain a certificate as to the residue.

Effect of certificate.

"
Execution

(2) The certificate shall be delivered to the sheriff, and thereby from the time of the delivery the claimant shall be deemed to be an execution creditor within the meaning of this Act, and to be entitled to share in whatever is made under the executions of creditors in the sheriff's hands, as if he had delivered to the sheriff an execution against lands or goods, or both, as the case may be, and the certificate shall in like manner bind the lands and goods of the debtor; subject, however, to the debt being afterwards disputed by a creditor as hereinafter provided.

Certificate an execution for interpleader purposes.
Address for service to be endorsed on certificate.

(3) A certificate under this Act shall in interpleader proceedings be deemed to be an execution.

(4) If the certificate is obtained by a solicitor, the name and place of abode of the solicitor shall be endorsed thereon; and if the certificate is sued out by the claimant in person there shall be endorsed thereon a statement of some place in, or within three miles of the county town of the county in which the proceedings are being taken, at which service may be made upon the claimant; and, in default thereof, service of any notice, paper or document requiring service, may be made upon the claimant by mailing the same, prepaid and registered, enclosed in an envelope addressed to the claimant at the county town.

On receipt of certificate sheriff to make further levy.

(5) On receiving the certificate the sheriff shall make a further seizure of the lands and tenements, or goods and chattels, as the case may be (if any), of the debtor to the amount of the debt so claimed, and the sheriff's fees; and so on from time to time in case more certificates are received after the further seizure so made. R. S. O. 1887, c. 65, s. 9.

Time certificate to remain in force.

(6) A certificate issued under this Act shall remain in force for three years from the date thereof and no longer, unless renewed, but such certificate may from time to time be renewed in the same manner as a writ of execution, but notwithstanding the expiry of a writ or certificate prior to the termination of the month during which a notice of money having been made is under this Act required to be posted, the said writ and certificate shall, as to any money levied during such month, be deemed to be in full force and effect. R. S. O. 1887, c. 65, s. 29 (2); 60 V. c. 14, s. 9.

10.—(1) The claim may be contested by the execution debtor or by a creditor interested in contesting the same. Disputing claim.

(2) If the debtor contests the claim, he shall for that purpose file with the clerk an affidavit stating that he has a good defence to the claim, or to a specified part of the claim on the merits, but the Judge may dispense with the affidavit on terms or otherwise. Affidavit of debtor.

(3) The debtor shall file the affidavit and serve upon the claimant a copy thereof within ten days after the personal service, or service under subsection of 2 section 8, upon him of the affidavit of claim and the notice, or within the time which the Judge by an order dispensing with personal service directed, or within any further time which the Judge may allow: the affidavit shall have endorsed thereon a statement of some place in, or within three miles of, the county town of the county in which the proceedings are being taken, at which service may be made upon the debtor, or the address of some solicitor in the Province who may be served on the debtor's behalf, and in default thereof, service of any notice, paper, or document requiring service, may be made upon the debtor by mailing the same, prepaid and registered, enclosed in an envelope addressed to the debtor at such county town. Filing and service of affidavit.

(4) If the contest is by a creditor, he shall for that purpose file with the clerk an affidavit to the effect that he has reason to believe that the debt claimed is not really and in good faith due from the debtor to the claimant; but the Judge may dispense with the affidavit on terms or otherwise. Address for service.

(5) Such affidavit by a creditor may be so filed, and a certificate thereof delivered to the sheriff, at any time before distribution is made. Creditor disputing claim.

11.—(1) In case of a claim being contested by a creditor after a certificate has been placed in the sheriff's hands, the sheriff, unless the Judge otherwise orders, shall proceed and levy as if such contestation had not been made, and the sheriff shall, until the determination of the contestation, retain in the bank the amount which would be apportionable to the claim if valid, and he shall, as soon after the expiry of the said month as practicable, distribute the residue of the money made amongst those entitled. Time for filing affidavit.

(2) The claimant whose claim is contested may apply to a Judge for an order allowing his claim and determining the amount; and in case he does not make such application within eight days of his receiving notice of the contestation (or within such further time, if any, as the Judge upon the delay being reasonably accounted for may allow), he shall be taken to have abandoned his claim; if the contestant is a creditor and there is reason to believe that the contestation is not being carried on in good faith, any other creditor may apply for an order permitting him to intervene in the contest. Distribution by sheriff in case of contestation.

Proceedings to enforce claim.

R. S. O. 1887, c. 65, s. 11.

Mode of determining questions in dispute.

12.—(1) The Judge may determine any questions in dispute in a summary manner, or may direct an action or issue, in any Court or county; for the trial thereof, and may make such order as to the costs of the proceedings as may be just.

Where sum in dispute is over \$400.

(2) Where there is a dispute as to material facts, and the sum in controversy appears to be over \$400, exclusive of costs, the Judge shall direct the trial to be in the High Court and may name the county in which the trial is to take place, subject to any order which the High Court or a Judge thereof may see fit to make in that behalf. In case an issue is directed it shall be tried in all respects as if it had been an action in the Court in which it was ordered to be tried. R. S. O. 1887, c. 65, s. 12.

Examination of parties.

13. The same proceedings may be had for the examination of parties or others, either before or at the trial, as may be taken in an ordinary action, and such proceedings, may also be taken prior to the application to the Judge, and as a foundation therefor. R. S. O. 1887, c. 65, s. 13.

Proceedings by creditor who has obtained a division court judgment.

14. A creditor who has recovered a judgment in a Division Court against the debtor may serve upon the sheriff a memorandum of the amount of his judgment and of the costs to which he is entitled, under the hand of the clerk and the seal of the Division Court; and the memorandum so served shall have the same effect for the purposes of this Act as if the creditor had delivered to the sheriff a writ of execution directed to the said sheriff from a County Court. R. S. O. 1887, c. 65, s. 14.

Establishing claim in another county.

15. Where a creditor has taken in one county the prescribed proceedings in respect of his claim, and desires to establish his claim for the purposes of this Act in another county also, he may do so by obtaining from the said County Court Clerk another certificate (Form E), and delivering the same to the sheriff of such other county, and the delivery of the certificate to the sheriff shall have the same effect for the purposes of this Act in the county in which the same takes place, from the day of the delivery, as if a new notice and affidavit of claim had been served for the county and other proceedings had in respect thereof under the previous provisions of this Act. R. S. O. 1887, c. 65, s. 15.

Writs may be sued out into any county.

16. A creditor, entitled to a certificate from the County Court Clerk, may sue out a writ of execution into any county in the same manner as on an ordinary judgment. R. S. O. 1887, c. 65, s. 16.

Decision in one county binding in others.

17. In case a claim is contested in one county, the decision thereon shall, as between the parties to it, determine the amount of the claim for the purposes of this Act in all other

counties in which the claim is filed, and the certificate of the Clerk of the County Court of the county in which the contest has taken place, of the result thereof, shall be *prima facie* proof of the decision. A certificate shall, upon payment of a fee of fifty cents, be granted to any party to the proceedings who applies therefor. R. S. O. 1887, c. 65, s. 17.

18.—(1) The clerk of the County Court shall keep a book in which, before granting a certificate or issuing an execution for a claim, he shall enter the following particulars with reference to every claim in respect of which he gives a certificate under this Act;

- (a) The name of every claimant, and of every debtor;
- (b) The date of entry of judgment;
- (c) The amount of debt, exclusive of costs;
- (d) The amount of costs;
- (e) If the proceedings have been set aside, this fact, and shortly the reason therefor;

(2) The entry shall (subject to the provisions of this Act) be an award of judgment for the debt and costs, and shall have the same effect as an entry of judgment for non-appearance to a specially endorsed writ. The clerk shall index the entries in the book alphabetically under the name of every debtor. Clerk of county court to keep book of record.

(3) In case the original papers happen to be lost or destroyed, a copy of the entry in the book shall be evidence of all matters therein set forth. Copy of entry of evidence. R. S. O. 1887, c. 65, s. 18.

19.—(1) With respect to claims, the Judge, before or after a certificate is issued by the clerk under this Act, or delivered to the sheriff, may, on the application of the debtor, and notice to a claimant, give to the debtor further time to pay the claim where the Judge is of opinion that this can be done without injustice to the creditor, or may give to the debtor further time on terms which in the opinion of the Judge may be just. There may be successive orders for this purpose, but no claim shall be delayed by such orders for more than three months in all. Granting time to debtor. *again, 4 days.*

(2) This section shall not apply to creditors who have obtained judgment in the ordinary way; and the orders for time are not to prejudice executions obtained by such creditors on such judgments. Preceding subsection not to apply in certain cases. R. S. O. 1887, c. 65, s. 19.

20.—(1) In case the debtor, without any sale by the sheriff, pays the full amount owing in respect of the executions and claims in the sheriff's hands at the time of such payment, and no other claim has been filed with the Clerk of the County Court, or in case all executions and claims in the sheriff's hands are withdrawn, and any claims served are paid or withdrawn, no notice shall be entered as required by section 4 of this Act, Payment by debtor before sale. *these findings.*

and no further proceedings shall be taken under this Act against the debtor by virtue of the executions having been in the sheriff's hands. R. S. O. 1887, c. 65, s. 20 (1); 51 V. c. 11, s. 3.

Effect of
expiry or with-
drawal of
writs.

(2) Save as aforesaid, after a certificate has been filed with the sheriff, the withdrawal or expiry of the writ, upon which the proceedings are founded, or any stay upon the writ, or the satisfaction of the plaintiff's claim thereon, or the setting aside or return of the writ, shall not affect the proceedings to be taken under this Act, and except so far as the action taken in regard to the writ may affect the amount to be levied, the sheriff shall proceed and levy upon the goods or lands of the debtor, or both, as he would have proceeded had the writ or writs remained in his hands in full force to be executed, and he may also take the like proceedings as he would have been entitled to take had the writ been a writ of *venditioni exponas*. R. S. O. 1887, c. 65, s. 20 (2).

Application of
moneys paid
by debtor to
sheriff volun-
tarily.

(3) In case a debtor voluntarily, and without any sale by the sheriff, pays to the sheriff part of the amount owing, in respect of an execution or claim in the sheriff's hands, and there is at the time no other execution or claim in the sheriff's hands, the sheriff shall apply the same on the execution or claim so in his hands, and section 4 of this Act shall not apply to the money so received by the sheriff. 52 V. c. 10, s. 7.

Service on
Toronto agent

21. Where the address of a solicitor is given for service, and is not within three miles of the county town where the proceedings are carried on, service may be made upon him by serving his agent in Toronto. R. S. O. 1887, c. 65, s. 21.

Proceedings
on attach-
ment.
Rev. Stat.
c. 79.

22. If either before or after the receipt by the sheriff of an execution against the goods or lands of a debtor, a writ of attachment under *The Act respecting Absconding Debtors* is placed in the hands of the sheriff before he distributes the estate of the debtor, the sheriff shall realize the estate of the debtor, as provided by *The Act respecting Absconding Debtors*, but the same when so realized shall be distributed under the provisions of this Act. R. S. O. 1887, c. 65, s. 22.

Costs of claim-
ant.

23. The clerk shall ascertain and state in his said certificate, the amount of the costs to which the claimant is entitled as against the debtor. Such costs shall be the following:

1. For serving the affidavit of claim, to be allowed upon the scale of the High Court in the case of claims over \$400, and on the County Court scale in the case of claims exceeding \$200 and not exceeding \$400, and on the Division Court scale in the case of claims of \$200 and under;

2. If the claim does not exceed \$200 no greater fees are to be allowed for service of the claim and notice and mileage in respect thereof, than would be allowable to the Division Court

bailiff for the service of a Division Court summons and mileage if the claim had been sued in the proper Division Court;

3. The fees paid to the County Court Clerk under this Act shall also to be allowed, which fees shall be the same as he is allowed for like proceedings in the County Court, unless the claim appears to be within the jurisdiction of the Division Court, in which case his fees shall be those allowed for like proceedings in the Division Court;

4. Where there is no contest the sum of \$5 for fees of a solicitor (if employed), unless the amount of the claim is within the jurisdiction of the Division Court, in which case the sum of \$2 only shall be allowed;

5. In case of a contest, such additional costs (if any) as the Judge may allow, to be taxed according to the scale of the High Court, County Courts, or Division Courts, according as the amount in dispute is within the jurisdiction of one or other of these Courts;

6. The costs of obtaining an order for substituted service or other similar order and of such service, or the costs of and incidental to service out of the Province, in either case to be taxed by the clerk of the Court, and stated in his certificate aforesaid; if the claim is within the jurisdiction of the Division Court, only such a sum to be allowed for costs as would have been incurred in obtaining a judgment in the Division Court. R. S. O. 1887, c. 65, s. 23.

24. Where there is in any Court a fund belonging to an execution debtor, or to which he is entitled, the same, or a sufficient part thereof to meet the claims in the sheriff's hands, may, on the application of the sheriff or any party interested, be paid over to the sheriff, and the same shall be deemed to be money levied under execution within the meaning of this Act. R. S. O. 1887, c. 65, s. 24.

Payment to
sheriff of fund
in court.

25.—(1) If the sheriff does not find property of a debtor leviable under the executions and claims in his hands sufficient to pay the same in full, and the sheriff finds goods and chattels in the hands of the bailiff of a Division Court under a writ of execution or attachment against the debtor, the sheriff shall demand and obtain the goods and chattels from the bailiff, who shall forthwith deliver the same to the sheriff, with a copy of every writ of execution in his hands against the debtor, and a memorandum shewing the amount to be levied thereunder, including the bailiff's fees so far as proceedings have been taken by him, and shewing the date upon which each writ was received by him.

Sheriff may
obtain goods
in hands of
division court
bailiff.

(2) In case the bailiff fails to deliver any of the goods, he shall pay double the value of the property retained, such double value to be recovered by the sheriff from the bailiff with costs of suit, and to be by the sheriff accounted for as

Penalty if
bailiff fails to
deliver.

part of the estate of the debtor. R. S. O. 1887, c. 65, s. 25 (1, 2).

Bailiff's fees when goods in his possession are taken by sheriff.

(3) The costs and disbursements of the bailiff shall be a first charge upon the goods, and shall be paid by the sheriff to the bailiff upon demand, after being taxed by the Division Court Clerk. 52 V. c. 12, s. 7, part.

Distribution.

(4) The sheriff shall distribute the proceeds among the creditors under the provisions of this Act, and the Division Court execution creditors shall be entitled, without further proof, to stand in the same position as execution creditors whose writs are in the sheriff's hands. R. S. O. 1887, c. 65, s. 25 (3).

Mode of apportioning money where amount insufficient to pay claims in full.

26. Where the amount levied by the sheriff is not sufficient to pay the execution debts and other claims, with costs, in full, the money shall be applied to the payment ratably of such debts and costs of the creditors, after retaining the sheriff's fees, and after payment in full of the taxed costs and the costs of the execution to the creditor at whose instance and under whose execution the seizure and levy were made. R. S. O. 1887, c. 65, s. 26.

Levying interest and costs of renewing certificate.

27. The sheriff, if directed by an endorsement upon the certificate, shall, in addition to the amounts named in the certificate, levy interest thereon from the date of the certificate, or the date named in that behalf in the certificate, and also the sum of \$1.35 for the disbursements on every renewal of the certificate: and where such renewal is made upon the application of a solicitor, he shall levy the further sum of \$1.25 for the solicitor's costs on the renewal. R. S. O. 1887, c. 65, s. 27.

Sheriff's poundage.

28. Where money is to be distributed by a sheriff under this Act, the sheriff shall not be entitled to poundage as upon separate writs or claims, but only upon the net proceeds of the estate distributable by him, and at the same rate as if the whole amount had been payable upon one writ. R. S. O. 1887, c. 65, s. 28.

Money made on any writ to be considered as made on all writs entitled to benefit thereof.

29.—(1) Where money is made upon a writ, the same shall be taken for the purposes of the sheriff's return, and otherwise to be made upon all the writs or certificates entitled to the benefit thereof, and the sheriff shall, upon payment being made to the person entitled upon such writ or certificate, endorse thereon a memorandum of the amount so paid, but he shall not, except on the request of the party issuing the writ, or by direction of the Court out of which the same issues, or of a Judge having the authority of a Judge of such Court, return the writ until the same has been fully satisfied, or unless the same has expired by effluxion of time, in which case the sheriff shall make a formal return of the amount made thereon. R. S. O. 1887, c. 65 s. 29 (1).

Return.

(2) The like proceedings may be taken to compel payment by the sheriff of money payable in respect to an execution or other claim as can now be had to compel the return by the sheriff of a writ of execution. R. S. O. 1887, c. 65, s. 29 (3). Compelling payment by sheriff.

30. The sheriff shall, pending the distribution of moneys levied, keep, in the said book mentioned in section 4, in his office, a statement according to Form F in the Schedule hereto, shewing, in respect of any debtor of whose property money has been levied, the following particulars :— Statement to be kept in sheriff's office pending distribution.

(a) The amounts levied and the dates of levy ;

(b) Each execution, certificate, or order in his hands at the time of entering the notice Form A required by section 4, or subsequently received during the month, the amount thereof for debt and costs, and the date of receipt, and such statement shall be amended from time to time as an additional amount is levied, or a new execution, certificate or order is received. R. S. O. 1887, c. 65, s. 30.

31. The sheriff shall at all times without fee answer any reasonable question which he may be asked orally in respect to the estate of the debtor by a creditor, or any one acting upon behalf of a creditor, and shall facilitate the obtaining by him of full information as to the value of the estate, and the probable dividend to be realized therefrom in his county, or any other information in connection with the estate which the creditor may reasonably desire to obtain. R. S. O. 1887, c. 65, s. 31. Sheriff to give information as to estate of debtor.

32. Where the money levied is insufficient to pay all claims in full, and the time has come for distributing the money levied, the sheriff may forthwith distribute the same as directed by this Act; or he may first prepare for examination by the debtor and his creditors a list of the creditors entitled to share in the distribution of the amount levied, with the amount due to each for principal, interest and costs; the list to be arranged so as, among other things, to shew the amount going to each creditor under the provisions of this Act, and the total amount to be distributed; and the sheriff may deliver, or send (prepaid and registered) by post to each creditor or his solicitor, a copy of the list, with the several particulars aforesaid; and in such case the further proceedings may be as follows: Distribution by sheriff where amount levied insufficient to meet all claims.

1. If within eight days after all the said copies have been delivered or posted, or within any further time the Judge may allow, no objection is made as provided by this Act, the sheriff shall make distribution forthwith pursuant to such list;

2. In case an objection is made as provided by this Act, the sheriff shall forthwith distribute such an amount of the

money made, and to such persons pari passu. as may not interfere with the effect of the objection in case the same should be allowed;

3. The sheriff may disregard objections which are frivolous, or manifestly insufficient to interfere with the distribution proposed, and distribute as if such objections had not been made;

Contestation.

4. Any person prejudiced by the proposed scheme of distribution, may contest the same in manner following, namely, by giving a notice in writing to the sheriff, stating therein distinctly his objection to the scheme (or any part thereof) and the grounds of objection, and by, at the same time, delivering to the sheriff an affidavit of previous service of a copy of the notice on the debtor and the creditors interested in resisting the objection, unless the Judge shall by order have dispensed with service, or on affidavit of service as the Judge shall have sanctioned;

5. The contestant shall, within eight days thereafter, apply upon notice to the Judge for an order adjudicating upon the matter in dispute; and otherwise the contestation shall be taken to be abandoned. The notice may be in the Form G in the Schedule hereto;

6. The Judge may determine any questions in dispute in a summary manner, or may direct an issue or action for the trial thereof, either by a jury or otherwise and in any Court or county, and may make such order as to the costs of the proceedings as may be just. This subsection is subject to the same provisions as are set forth in subsection 2 of section 12 of this Act;

7. In the event of a claimant under a contestation being held not entitled, or only entitled to part of his claim, the money retained pending the contestation, or the portion as to which the claimant shall have failed, shall be distributed among the execution creditors and other creditors who would have been entitled thereto, as the same would have been distributed had the claim in respect thereof not been made R. S. O. 1887, c. 65, s. 32.

Rights of subsequent execution creditors where first execution followed by a mortgage of sale.

8. In case an execution debtor shall subsequent to the receipt of the first execution by the sheriff and before the time for distribution has expired have executed any mortgage or chattel mortgage or otherwise charged any portion of his estate, the giving of such mortgage or other security shall not have the effect of preventing subsequent execution creditors or other creditors who shall have filed their claims as required by this Act from sharing in the distribution of the moneys realized by the sheriff, or the sheriff from selling the interest seized under the first execution, but in distributing the moneys so realized, the said sheriff shall deduct and retain for the person entitled thereto the amount of any incumbrance so created pro rata from the amount which would otherwise be payable to the said subsequent creditors.
62 V. c. 11, s. 13.

vide note.

33. In case several creditors are interested in a contestation, either for or against the same, the Judge shall give such directions for saving the expense of an unnecessary number of parties and trials, and of unnecessary proceedings, as may be just, and he shall direct by whom and in what proportions any costs incurred in the contestation, or in any proceedings thereunder, shall be paid; and whether any and what costs shall be paid out of the money levied. R. S. O. 1887, c. 65, s. 33.

Directions by Judge to avoid unnecessary parties and trials.

34.—(1) The Judge may, if he sees fit, direct the sheriff to levy for an amount sufficient to cover a claim which is in dispute, or part thereof, or in case it appears to the Judge that it is improbable that the defendant has other sufficient property, he may order the sheriff to retain in his hands during the contestation the share which, if the claim is sustained, will be apportionable to it, or may make an order combining the orders above authorized, or such similar order as may be just.

Direction by Judge to sheriff where claims disputed.

(2) An order to levy under this section shall clothe the sheriff with the same authority as he would possess under a writ of execution, duly issued against the debtor, directing the sheriff to levy the like amount out of the goods and lands of the debtor. R. S. O. 1887, c. 65, s. 34.

35. The decision under this Act of a County Court Judge, or a Divisional Court on an appeal, shall bind all creditors, unless it appears that the decision was obtained by fraud or collusion by the parties to the contestation. R. S. O. 1887, c. 65, s. 35; 59 V. c. 18, Sched. (38).

Decisions to be binding on all creditors.

36. In case a sheriff has money in his hands, which, by reason of the provisions of this Act, or otherwise, he cannot immediately pay over to the execution creditors, or other claimants under this Act, he shall deposit the money, whenever the same amounts to \$100, in some incorporated bank designated for this purpose from time to time by order of the Lieutenant-Governor in Council, or where there is no such bank, then in some incorporated bank in which public money of the Province is then being deposited: the deposit to be made in the name of the sheriff, but to a special account in his name as "Trustee for the creditors of" (the debtor). R. S. O. 1887, c. 65, s. 36.

Sheriff to deposit moneys in bank.

make a special account.

37.—(1) Where there are in the sheriff's hands several executions and claims, and there are not, or do not appear to be, sufficient lands or goods, as the case may be, to pay all and his own fees, he may apply for an order attaching any debt owing to the execution debtor by any person resident in the county of such sheriff, whether the debt is owing by such person alone or jointly with another person resident or not

Attaching orders by sheriff or creditors.

resident in such county, and to procure the attachment the sheriff may take the same proceedings as a creditor; and in such case a writ of execution, or other writ in the course of the proceedings, may be directed to him in the same manner as if the attachment were by a creditor; and the proceeds of the debts attached shall be distributed in the same manner as if he had realized the same under execution.

(2) In case the sheriff does not take such proceedings, any person entitled to distribution may take the same for the benefit of himself and all other persons entitled to distribution as aforesaid, and the person owing the attached debt shall pay the same to the sheriff.

(3) Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the sheriff, who in making distribution shall apportion to such judgment creditor a share *pro rata*, according to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by the garnishee proceedings unless the judgment creditor has placed a writ in the sheriff's hands.

(4) Money garnished and paid into the sheriff's hands shall be deemed to be money levied under execution, within the meaning of this Act, except that, unless the garnishee proceedings were taken by him, the sheriff shall only be entitled to charge poundage on such moneys at the rate of one and a quarter per cent.

(5) The provisions of subsections 3 and 4 of this section shall also apply, as nearly as may be, to any person who attaches a debt in the Division Court before judgment, and to the money so attached.

(6) In case a garnishee, under an order of the Court, pays to the attaching creditor, or in case a garnishee, without notice that the sheriff is entitled, pays the amount of his debt into Court and the same is paid out to the said creditor, the sheriff may recover from him the amount so received. R. S. O. 1887, c. 65, s. 37.

Appeal.

38. If any party to any contestation, matter or thing upon which a Judge has made or rendered any final order or judgment, is dissatisfied with such order or judgment, and the same is in respect to a question involving a sum greater than \$100, he may appeal therefrom to a Divisional Court of the High Court, subject to the like practice, as nearly as may be, as is from time to time in force in respect of appeals from a County Court or Judge, unless and until Rules establishing a different practice shall be made under the provisions of sections 122 and 125 of *The Judicature Act*, which shall apply to this Act. R. S. O. 1887, c. 65, s. 38, part; 59 V. c. 18, Sched. (39).

Rev. Stat.
c. 51.

39. A Judge for the purpose of giving effect to this Act and carrying out its provisions shall have all the powers which a County Court or a Judge thereof has by law for other purposes; and any proceedings wrongly taken under this Act may be set aside by the Judge, with or without costs as he thinks fit. R. S. O. 1887, c. 65, s. 40. Powers of Judge.

40. No proceeding under this Act shall be void for any defect of form; and the Rules, for amending or otherwise curing irregularities or defects, which may from time to time be in force in the County Courts shall apply to this Act. R. S. O. 1887, c. 65, s. 41. Defects of form.

41. Besides the fees otherwise authorized to be paid to the Clerk of the County Court for his own use, the following fees shall be levied on the following proceedings under this Act upon all claims filed, where the amount of the claim exceeds \$200, and the same shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps* :— Scale of fees.
Rev. Stat.
c. 25.

	\$	cts.
On an affidavit of claim, where the amount claimed exceeds \$200 but does not exceed \$400.....	0	75
On every such affidavit where the claim exceeds \$400..	1	50
On every certificate of clerk given under section 9, where the claim exceeds \$200, but does not exceed \$400..	0	75
On every such certificate where the claim exceeds \$400.	1	50
On every order made by the Judge allowing or disallowing a claim, where the claim exceeds \$200, but does not exceed \$400	0	50
On every such order where the claim exceeds \$400...	1	00

Where the claim is contested; on the proceedings after the order, the same fees as are now payable on like proceedings in the High Court. R. S. O. 1887, c. 65, s. 42.

42. This Act is not intended to interfere with the Insolvency Laws which may from time to time be in force in this Province, but this Act is intended to be subject to such laws, and subject as aforesaid to apply to all debtors whether solvent or not. Act not to interfere with Insolvency Laws.
R. S. O. 1887, c. 65, s. 43.

SCHEDULE.

FORM A.

(Section 4 sub.-s. 2.)

SHERIFF'S NOTICE.

Notice is hereby given that I have, by virtue of certain executions delivered to me against the goods and chattels and lands and tenements (or as the case may be) of C.D., levied and made out of the property of the said C. D., the sum of \$

And notice is further given that this notice is first posted in my office on the first day of May, 18 , and that distribution of the said money will be made amongst the creditors of the said C. D. entitled to share therein, at the expiration of one month from the said first day of May.

F. G.,
Sheriff.

Dated 1st May, 18 .

R. S. O. 1887, c. 65, Sched. Form A.

FORM B.

(Section 7, sub.-s. 1.)

AFFIDAVIT OF CLAIM.

THE CREDITORS' RELIEF ACT.

In the County Court of the County of [state
county or united counties in which it is intended proceedings shall be
taken].

A. B. Claimant,

vs.

C. D. Debtor.

I, A. B., of
Merchant (or as the case may be) make oath and say:—

1. I am the above named claimant (or the duly authorized agent of the claimant in this behalf, and have a personal knowledge of the matter hereinafter deposed to).

2. The above named debtor is justly and truly indebted to me (or to the above named claimant) in the sum of \$ for [here state shortly the nature and particulars of the claim as they are required to be stated upon a specially endorsed writ].

Sworn before me at
this day of
A. D. 18

R. S. O. 1887, c. 65, Sched. Form B.

FORM C.

(Section 7, sub-s. 2.)

NOTICE TO BE SERVED WITH CLAIM.

THE CREDITORS' RELIEF ACT.

In the County Court of the County of

A. B. Claimant,

vs.

C. D. Debtor.

To the above (or within) named debtor.

Take notice that the claimant intends to file with the clerk of the County Court of (or as the case may be) the original affidavit of claim of which a duplicate is served herewith, and that this proceeding is taken by reason of there being in the hands of the sheriff of the said county (or united counties) a writ of execution against your goods and chattels and lands and tenements (or as the case may be), and that the claimant intends to call on the sheriff to levy the amount of the said debt from your property under the authority of *The Creditors' Relief Act*.

And further, take notice that in case you desire to contest the said claim, or any part thereof, you must, within ten days after the service of this notice upon you, file with the clerk of the said Court an affidavit stating that you have a good defence to the said claim on the merits, or that you have such defence to a specified part of the claim, otherwise such claim will be treated as admitted by you, or may be so treated as to the part not contested.

You are further hereby notified that unless you endorse upon such affidavit filed by you a statement of some place in, or within three miles of the county town of the said county (or united counties) at which service may be made upon you, or the address of some solicitor in the Province of Ontario who may be served on your behalf, service may be made upon you of any notice, paper, or document requiring service, by mailing the same enclosed in an envelope addressed to you at the said county town.

NOTE.—In case the above notice is endorsed upon the copy of the affidavit served, the heading of the notice may be omitted. Where further time is given by a Judge, the notice should be varied accordingly.

R. S. O. 1887, c. 65, Sched. Form C.

FORM D.

(Section 8, sub-s. 4.)

AFFIDAVIT OF SERVICE OF CLAIM.

THE CREDITORS' RELIEF ACT.

In the County Court of the County of

A. B. Claimant,

vs.

C. D. Debtor.

I, G. H., of in the county of make oath and say:—

1. That I did, on the day of personally serve C. D., the above named debtor, with an original affidavit identical with the annexed affidavit, and that there was at the time the said affidavit was so served, attached to (or endorsed upon) the said affidavit so served a true copy of the notice addressed to the debtor, now attached to (or endorsed upon) the said annexed affidavit.

Sworn before me at
this day of
A. D. 18

R. S. O. 1887, c. 65, Sched. Form D.

FORM E.

(Section 9, sub-s. 1 and section 15.)

CERTIFICATE OF PROOF OF CLAIM.

THE CREDITORS' RELIEF ACT.

In the County Court of the County of

A. B. Claimant,

vs.

C. D. Debtor.

I, _____ clerk of the County Court of the
 County of _____, do hereby certify that the above
 named claimant did on the _____ day of _____
 file with me a claim against the above named debtor, for the sum of
 _____ together with an affidavit of personal service thereof (or
 as the case may require) and of the notice required by *The Creditors' Relief*
Act, upon the said debtor, and that it thereby appears that such service
 was made upon the said debtor on the _____ day of _____
 18__.

And I further certify that the debtor has not contested the said claim (or,
 has only contested the sum of _____ portion of the said claim,
 or as the case may be), and that the claimant is entitled to the sum of
 _____ against the said debtor and the further
 sum of _____ for costs.

R. S. O. 1887, c. 65, Sched. Form E.

FORM F.

(Section 30.)

SHERIFF'S STATEMENT OF EXECUTIONS ON HAND AGAINST C. D.

CAUSE.	Proceeding.	Claim without Costs.	Costs.	Date of receipt by Sheriff.	Amount Levied.	Date of Levy.
A. B. v. C. D.	<i>Fi. fa.</i> goods and lands ..	\$ 504	\$ 30	18th Feb., 1886 ..	500	1st May, 1886.
F. G. v. C. D. & E. G.	<i>Fi. fa.</i> goods and lands ..	400	20	1st March, 1886. ...	300	3rd May, 1886. Nothing made against E. G.
K. L. v. C. D.	Garnishee or- der	500	30	300	10th May, 1886.
M. N. v. C. D.	Creditor's Cer- tificate	400	5	15th May, 1886.		

R. S. O. 1887, c. 65, Sched. Form F.

(Section 32, sub-s. 5.)

THE CREDITORS' RELIEF ACT.

A. B. Claimant,

228.

C. D. Debtor.

Take notice that I will on the _____ day of _____ next, apply to the Judge of the County Court of the County of _____ at his chambers at the court house in the town of _____ for an order adjudicating upon the right of you the said _____ to rank upon the said moneys for any amount whatever (*or as the case may be*); and further take notice that I will, upon the said application, read the affidavits of *E. F. and X. Y.*, filed with the clerk of the said Court.

Dated etc.

R. S. O. 1887, c 65, Sched. Form G.

NOTES.

Application of Act:—The Act applies to all moneys received by a sheriff in his official capacity, *Young v. Ward* (1896) 27 O.R. 588. It is not to be extended to cases not actually provided for by the Act, and therefore the appointment of a Receiver may be made for the benefit of the plaintiff alone, *McLean v. Allen* (1890) 14 P.R. 84, and such is now the practice. Executions subsequent to a mortgage by the debtor before the Act of 1899 attached only upon the equity of redemption left in the debtor, and were not entitled to share ratably with prior executions, *Roach v. McLachlan* (1892) 19 A.R. 496. If the debtor disposes of the goods absolutely, executions which come in after the sale do not share with prior executions, *Breithaupt v. Marr* (1893) 20 A.R. 689. A chattel mortgagee, whose mortgage so intervenes between executions, may pay off the prior executions, the holders of which will thus receive their claims in full, *Davies Brewing & Malting Co. v. Smith* (1885) 10 P.R. 627. See as to debtor paying off without sale by sheriff, s. 20.

Payment by debtor. A debtor cannot pay off a specific execution, so as to retire the same from the sheriff's hands, if there are other executions. Money so received by the sheriff is distributable among all the execution creditors, *Young v. Ward* (1896) 27 O.R. 588.

Partnership creditors. The Act does not alter the legal effect of executions, nor give to firm or separate creditors of partners any different rights, *McDonagh v. Jephson* (1889) 16 A.R. 107.

Interpleader. Only those persons who are parties to or whose rights are secured by an interpleader order are entitled to share in the benefits, *Reid v. Gowans* (1886) 13 A.R. 501; *Bank of Hamilton v. Durrell* (1888) 15 A.R. 500; but where the claimant abandons before delivery of any issue, creditors whose executions are subsequent to the interpleader order are entitled to participate, *Wait v. Sager* (1891) 14 P.R. 347.

Rights of creditors without execution. There is no power to stay distribution by a sheriff until a judgment is recovered by a creditor, or to preserve the priority of a judgment which has been set aside in case the latter shall be restored on appeal, *Mason v. Cooper* (1893) 15 P.R. 418. A creditor who does not come in within the period prescribed is nevertheless a "creditor interested" within s. 10, and is entitled to contest the claims of other creditors, *Bank of Hamilton v. Aitken* (1893) 20 A.R. 616.

Mortgage actions. A surplus after sale in a mortgage action, to which execution creditors are entitled must be paid to the sheriff and distributed ratably, *Harvey v. McNeil* (1888) 12 P.R. 362, and a surplus paid into Court by a mortgagee after a sale under the powers of a mortgage will be similarly dealt with, *Re Bokstal* (1896) 17 P.R. 201.

Fraudulent conveyances. An action by an execution creditor to set aside a fraudulent conveyance must be brought in the High Court if the executions in the sheriff's hands exceed \$200, *Dominion Bank v. Heffernan* (1886) 11 P.R. 504.

Contestations. On a contestation by a creditor of another creditor's claim, only the *bona fides* of the claim can be considered. Other defences which the debtor may have cannot be raised e.g. that the debt is not due, *Bowerman v. Phillips* (1888) 15 A.R. 679. Judgments which have been recovered cannot be contested under the Act. An action to set them aside if fraudulent is necessary, *ib.*

Entries. Under s. 4 the sheriff must "forthwith" enter notice thereof. This means "without any delay" and where a sheriff delayed 15 days, and other claims in consequence came in the first execution creditor recovered damages from the sheriff, *Maxwell v. Scarfe* (1889) 18 O.R. 529.

Garnishment. Section 37 entitles the sheriff only to an attaching order when there are several executions and claims, and not sufficient lands or goods to pay all and his own fees, and when there is a debt owing to the execution debtor by a person resident in his bailiwick. *Re Thompson* (1896) 17 P.R. 109. If prior to the levy and entry by the sheriff under the Act a creditor has

garnished a debt due, and has recovered the same, neither the sheriff nor any other creditor would have any right to any part thereof, *Traders' Bank v. McConnell* (1888) 24 C.L.J. 87. And it may be that a mere attaching order *nisi* will have the same effect, and that the section is confined to creditors having executions and claims in the sheriff's hands at the time of the attachment of the debt, see *Re Thompson* (1896) 17 F.R. 109. *Bicknell & Seager D. C. Act*, Vol. 1, pp. 280, 281.

Absconding debtors. If goods are seized and sold under the Absconding Debtors Act, the Creditors Relief Act had no application to the distribution of proceeds prior to the revision of 1887, *Macfie v. Pearson* (1885) 8 O.R. 745. It would appear now that all executions and claims under the Creditors' Relief Act share ratably under s. 18 of the Absconding Debtors Act, and such is the practice.

Division Courts. The Act applies to an execution against lands issued from a Division Court, *Young v. Ward* (1896) 27 O.R. 588.

Under s. 25 it is the duty of the Division Court Bailiff to deliver the goods forthwith, i.e., without any delay, to the sheriff upon demand, and he will not be entitled to recover any costs after that time, see *Re Morrison*, *Ex parte Sheriff of Essex* (1893) 2 Q.B. 111; *Re Thomas*, *Ex parte Sheriff of Middlesex* (1899) 1 Q.B. 66, (1899) 1 Q.B. 460.

CHAPTER 145.

An Act to amend the Mercantile Law.

SHORT TITLE, s. 1.

SURETIES :

Paying principal's debt to be entitled to securities, remedies, etc., of the creditor, ss. 2, 3.

Rights, *inter se*, s. 4.

BILLS OF LADING :

Rights, under, transferable by endorsement, s. 5 (1, 2).

Conclusive as against the signer, s. 5 (3).

WAREHOUSE RECEIPTS, ETC., AS COLLATERAL SECURITY, ss. 6-20.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Mercantile Amendment Act.*" R. S. O. 1887, c. 122, s. 1.

{ Right of sureties paying the principal debt, etc., to assignment.

2. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty, or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty. R. S. O. 1887, c. 122, s. 2.

And to remedies on such assignment.

3. Such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and on proper indemnity, to use the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be a defence to such action or other proceeding by him. R. S. O. 1887, c. 122, s. 3.

What only one co-surety, etc., may recover from another.

4. No co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which as between those parties themselves, such last mentioned person is justly liable. R. S. O. 1887, c. 122, s. 4.

BILLS OF LADING.

5. Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid;

Therefore it is enacted as follows;

1. Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have transferred to, and be vested in him all rights of action, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made to himself.

Rights and liabilities of consignees and endorsees of bills of lading Imp. Act, 18-19 V. c. 111.

use if contract with consignee & endorsee

2. Nothing in this section contained shall prejudice or effect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Certain rights and liabilities not affected.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel or train shall be conclusive evidence of the shipment as against the master or other person signing the same, notwithstanding that the goods or some part thereof may not have been so shipped, unless the holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary; but the master or other person so signing, may exonerate himself in respect to such misrepresentation, by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims. R.S.O. 1887, c. 122, s. 5.

Bills of lading as evidence against signer.

WAREHOUSE RECEIPTS, ETC., AS COLLATERAL SECURITY.

6. The words "goods, wares and merchandise" when used in the following sections of this Act, shall, except where otherwise expressly provided in said sections, be held to comprise, in addition to the things usually understood thereby, timber, boards, deals, staves and other lumber. R.S.O. 1887, c. 122, s. 14.

Interpretation. "Goods, wares and merchandise."

Cove receipts, etc., may be transferred by endorsement as collateral security.

And may sell the goods if such bills are not duly paid, returning surplus, etc.

7. Any cove receipt, bill of lading, specification of timber or any receipt given by a cove keeper, miller, or by the keeper of a warehouse, wharf, yard, harbour or other place, for cereal grains, goods, wares or merchandise laid up, stored or deposited, or to be laid up, stored or deposited in or on the cove, mill, warehouse, wharf, yard, harbour or other place in this Province, of which he is keeper, or any bill of lading or receipt given by a master of a vessel, or by a carrier for carrying cereal grains, goods, wares or merchandise shipped in such vessel or delivered to such carrier for carriage from any place whatever, to any part of this Province or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in specie or converted into flour, may, by endorsement thereon by the owner of, or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any private person as collateral security for any debt due to such private person, and being so endorsed shall vest in such private person from the date of the endorsement, all the right and title of the endorser to or in such cereal grains, goods, wares or merchandise, subject to the right of the endorser to have the same retransferred to him, if the debt is paid when due; and in the event of the non-payment of the debt when due, such private person may sell the said cereal grains, goods, wares or merchandise and retain the proceeds or so much thereof as will be equal to the amount due to the private person upon the debt, with any interest or costs, returning the overplus, if any to the endorser. R. S. O. 1887, c. 122, s. 15.

Cove-keeper, etc., owning or being entitled to the goods, may, notwithstanding, give a receipt, etc., and endorse it.

8. Where a person engaged in the calling of cove-keeper, miller, or of keeper of any warehouse, wharf, yard, harbour or other place, master of a vessel or carrier, by whom a receipt or bill of lading may be given in such his capacity, as hereinbefore mentioned, for cereal grains, goods, wares or merchandise, is at the same time the owner of or entitled himself (otherwise than in his capacity of cove-keeper, miller, or of keeper of a warehouse, wharf, yard, harbour or other place, or of master of a vessel or carrier) to receive such cereal grains, goods, wares or merchandise, any such receipt or bill of lading, or any acknowledgment or certificate intended to answer the purpose of such receipt or bill of lading, given and endorsed by such person, shall be as valid and effectual for the purposes of this Act, as if the person giving such receipt or bill of lading acknowledgment or certificate, and endorsing the same, were not one and the same person. R. S. O. 1887, c. 122, s. 16.

Goods, except timber, etc., not to be held beyond six months.

9. No such cereal grains, and no such goods, wares or merchandise (other than timber, boards, deals, staves or other lumber), shall be held in pledge by such private person for any period exceeding six months; and no transfer of such bill of lading, specification of timber or receipt, shall be made under this Act

to secure the payment of any debt, unless the debt is contracted at the same time with the endorsement of the bill of lading, specification of timber or receipt; and further, no sale of any cereal grains or of goods, wares or merchandise, (other than timber, boards, deals, staves or other lumber,) shall take place under this Act until and unless ten days notice of the time and place of the sale has been given by registered letter transmitted through the post office, to the owner of such cereal grains or such goods, wares or merchandise other than as aforesaid prior to the sale thereof. R. S. O. 1887, c. 122, s. 17.

Debt to be contracted at time of transfer of bill.

Goods not to be sold without notice to the owner.

10.—(1) No timber, boards, deals, staves or other lumber, shall be held in pledge by such private person, for any period exceeding twelve months; and no transfer of any such receipt or bill of lading shall be made under this Act to secure the payment of any debt, unless the debt is contracted at the same time with the endorsement of the receipt or bill of lading; and further, no sale of any timber, boards, deals, staves or other lumber, shall be made under this Act, until and unless thirty days' notice of the time and place of such sale has been given, by registered letter transmitted through the post office, to the owner of the timber, boards, deals, staves, or other lumber prior to the sale thereof.

Timber, etc., not to be held beyond twelve months, etc.

(2) Every such sale shall be made by public auction, after notice thereof by advertisement, stating the time and place thereof, for at least eight days consecutively, in at least two daily newspapers published in or nearest to the place where such sale is to be made.

Sale to be by auction after notice.

(3) A daily newspaper shall be deemed to be published nearest to a place if no two other daily newspapers are published in or nearer to such place.

(4) If in any place where any such sale by auction is to be made, there is not a newspaper published daily, but some newspaper or newspapers is or are published there less often than daily, then the advertisement shall also be published in every issue of such local newspaper, or of at least one of such local newspapers, during the time of its being published in daily newspapers. R. S. O. 1887, c. 122, s. 18.

In places where no daily newspaper is published.

11. All advances made on the security of any such cove receipt, bill of lading, specification, receipt, acknowledgment or certificate as aforesaid, shall give and be held to give to the person making the advances, a claim for the repayment of such advances on the cereal grains, goods, wares or merchandise therein mentioned, prior to and by preference over the claim of any unpaid vendor, or other creditor, save and except claims for wages of labour performed in making and transporting such timber, boards, deals, staves or other lumber. R. S. O. 1887, c. 122, s. 19.

Advance on cove receipts, etc., to give a lien on timber, etc., prior to claims of vendors or creditors.

Transfer of
warehouse
receipts for
crude
petroleum
issued by
incorporated
companies.

12. All transportation and warehouse receipts, accepted orders and certificates for crude petroleum, issued by any company heretofore, or which may, at any time hereafter, be incorporated under competent authority, and authorized to carry on the business of warehousing, shall be transferable by endorsement, either special or in blank, and upon being endorsed in blank shall become transferable by delivery, and every such endorsement or transfer by delivery shall transfer all right of property and possession of the petroleum mentioned in any such transportation or warehouse receipt, accepted order or certificate, to the endorsee or transferee thereof, subject to the terms and conditions of such transportation or warehouse receipt, accepted order or certificate, as fully and completely as if a sale of the petroleum mentioned therein had been made in the ordinary way; and on the delivery of any petroleum mentioned in such document, by such company, in good faith, to a person in possession of such transportation or warehouse receipt, accepted order or certificate, endorsed or transferred as aforesaid, the company shall be freed from all further liability in respect thereof, and the endorsee, or transferee or holder of every such transportation or warehouse receipt, accepted order or certificate, to whom the property in the petroleum mentioned therein passes by reason of such endorsement or delivery, shall have transferred to and vested in him all rights of action and be subject to the same liabilities in respect of such petroleum as if the contract contained in the transportation or warehouse receipt, accepted order or certificate had been made by the company with himself. R. S. O. 1887, c. 122, s. 20.

NOTES.

Right of Surety, &c. to Assignment. Ss. 2, 3 and 4 are similar in terms to Imperial Statute 19 & 20 V. c. 97, s. 5.

Who are Sureties. There are three classes of suretyship;

- (a) Where there is an agreement between creditor, debtor, and surety.
- (b) Where the agreement is between principal and surety only e.g. both being principal debtors to the surety.
- (c) Where there is no agreement, but there is a primary and secondary liability of two persons for one and the same debt, e.g. the relationship between the maker and endorser of a note.

General Right to Securities. With regard to the first class the surety is entitled from the beginning to the benefit of all securities taken at the time of the suretyship or subsequently. *Newton v. Chorlton* (1852) 10 Harc 666; *Lake v. Brutton* (1857) 8 D. M. & G. 441; *Pledge v. Buss* (1859) Johns. 663; *Forbes v. Jackson* (1882) 19 Ch. D. 615, and the creditor must not exercise any other legal right to which he may become entitled against any of the property comprised in the security. *Pearl v. Deacon* (1851) 24 Beav. 186, 1 De. C. & J. 461; even by appropriating payments; *Kinnard v. Webster* (1878) 10 Ch. D. 139 and if he does the surety will be discharged to the extent of the security. *Taylor v. Bank of New South Wales* (1886) 11 App. Cas. 596. If through any neglect on the part of the creditor, a security, to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged to the value thereof, *Strange v. Fooks* (1863) 4 Giff. 408; and where the creditor neglected to register a chattel mortgage for the debt and the same thereby became void as against a trustee in bankruptcy the surety was discharged. *Wulff v. Jay* (1872) L. R. 7 Q. B. 756.

In the second class, both the principal and surety are, as regards the creditor, principal debtors, but upon the creditor receiving notice of the claim of the surety to the rights of a surety, he will not be at liberty to do anything to their prejudice or to refuse (when all his own just claims are satisfied) to give effect to them. *Davies v. Stainbank* (1855) 6 D. M. & G. 694; *Hippins v. Harrison* (1823) 2 Glyn & Jamieson 63; *Overend Gurney & Co. v. Oriental Financial Corporation* (1874) L. R. 7 H. L. 348; *Duncan Fox & Co. v. North and South Wales Bank* (1880) 6 App. Cas. 11; *Rouse v. Bradford Banking Corporation* (1894) 2 Ch. 32, 56; (1894) A.C. 586.

During the currency of a bill, endorsers are not sureties or in the nature of sureties to the indorsee, and they have no equity to prevent the indorsee from dealing as it may seem to him most desirable, with any other parties, unless thereby he prevents himself from giving notice of dishonour; but after dishonour and notice of dishonour they are entitled to the benefit of all payments made by the acceptor, and on paying the holder, to all securities held by him against prior parties for the payment of the bill, *Duncan Fox & Co. v. North & South Wales Bank* (1880) 6 App. Cas. 1. See *Trerice v. Burkett* (1882) 1 O. R. 80.

Satisfied Securities. Prior to the enactment of ss. 2, 3 and 4 (26 Vict. c. 45 s. 4) a surety who paid off a bond or judgment upon which both he and his principal were liable could not require the creditor to assign the same and an assignment to him or a trustee for him was ineffectual because by the act of payment the obligation was satisfied. The Act confers on the surety a right which he did not have before; *De Wolf v. Lindsell* (1868) L. R. 5 Eq. 209.

When right accrues. The creditor must first be paid in full; *Ewart v. Latta* (1865) 4 Macq. H. L., 983.

How enforced. An assignment by the creditor cannot be compelled by motion. *Phillips v. Dickson* (1860) 8 C. B. N. S. 391; but an action by the surety may be maintained -ib.

Enforcing judgments. An execution issued in the name of the creditor by one or two contractors who had paid a judgment against both without the con-

sent of the creditor and without an assignment of the judgment was set aside. *Potts v. Leask* (1875) 36 U. C. R. 476 but in *Re McMyn Lightbourn v. McMyn* (1886) 33 Ch. D. 575 a surety who had paid a judgment was without assignment held to be entitled in administration proceedings to stand in the place of the judgment creditor in priority to unsecured creditors of a deceased co-surety.

Partners. The provisions of the Statute were not intended to embrace the case of partners so as to enable one partner without reference to the state of the partnership accounts to enforce payment by his partner of one half of a partnership debt paid by him. *Scripture v. Gordon* (1877) 7 P. R. 164.

Extent of sureties rights. Where a creditor has proved against the estate of one of the sureties for the full debt and the other sureties subsequently pay the debt, they are entitled to all the remedies which the creditor had for the recovery of the debt, and are therefore entitled to the dividend upon the whole claim not exceeding the proper share for which their co-surety was liable; *Re Parker, Morgan v. Hill* (1894) 3 Ch. 400 and may exercise the creditors' rights; *Greenwood v. Francis* (1899) 1 Q. B. 312.

Costs. The surety is entitled to receive from the debtor the amount of the judgment including costs. *Harper v. Culbert* (1883) 5 O. R. 152; *Victoria Mutual v. Freel* (1883) 10 P. R. 45.

Right of Distress not a Security. The right of distress for rent is not a security, it is a particular remedy which arises on non-payment. The remedies which a surety is, under the statute, entitled to use are confined to proceedings in actions in which, but for the Statute the payment might have been pleaded; *Re Russell, Russell v. Shoolbred* (1885) 29 Ch. D. 254.

Valuing securities. A creditor on proving a claim against the principal's estate may surrender a security so as to prove for the full amount without thereby discharging a surety; *Rainbow v. Juggins* (1880) 5 Q. B. D. 422.

*Attention given out to
proper contractual rights
and liabilities.*

52 VICTORIA (DOMINION).

CHAP. 30.

An Act relating to Bills of Lading.

(Assented to 2nd May, 1889.)

Whereas by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid: therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or indorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

*Rights vested
in consignee
or indorsee*

not act 6.

2. Nothing in this Act contained shall prejudice or affect any right of stoppage in transitu, or any right of an unpaid vendor under the Civil Code of Lower Canada, or any right to claim freight against the original shipper or owner, or liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

*Certain rights
saved.*

Bill of lading
to be evidence
of shipment.

3. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel or train shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board or unless such bill of lading has a stipulation to the contrary; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper, or of the holder, or of some person under whom the holder claims.

not at hand.

NOTES.

Section 5, 6 and 7 of R. S. O., Chapter 145 are taken from Imperial Act 18 and 19 V. c. 111, SS. 1, 2 and 3.

Bill of Lading. A Bill of Lading is :—

- (1) A receipt.
- (2) Evidence of a contract and,
- (3) A symbol of property ;

It embodies an undertaking by a carrier to carry the goods specified on payment of a specified sum.

Includes Railways. In England the term extends only to a bill issued in respect of the carriage of goods by a ship. In Ontario the 7th Section contains the word "train" which is not in the English Act. The Ontario Act therefore, applies to railway carriers as well as to carriers by water. *Royal Canadian Bank v. Grand Trunk Railway* (1873) 23 C. P. 225, and so does s. 3 of the Dominion Act.

Criticisms on words of Act. In *Sewell v. Burdick* (1885) 10 App. Cas. 74 at p. 105, Lord Bramwell said "I think there is some inaccuracy of expression in the Statute. It recites that, 'by the custom of merchants a bill of lading being transferrable by indorsement the property in the goods may thereby pass to the indorsee.' Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading is not indorsed. So if the contract was one of security—what would be a pledge if the property was handed over—a contract of hypothecation, the property would be bound by the contract, at least to all who had notice of it, though the bill of lading was not handed over. There is I think, another inaccuracy in the Statute which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for goods delivered to and received by the ship and therefore excellent evidence of those terms, but it is not a contract." See also *Crooks v. Allen* (1879) 5 Q. B. D. 40.

Where no property passes by indorsement. If a bill of exchange is sent to the consignee to be accepted for the price of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd v. Harrison* (1871) L. R. 5 H. L. 176; *Cahn v. Pockets* *Bristol Channel Packet Co.* (1898) 2 Q. B. 61.

Where "the" property passes. The indorsement and delivery of a bill of lading operates as a symbolical delivery of the cargo. The indorsee to whom the property passes is liable for the freight, and assumes all other obligations of the shipper, as if the contract had been made with him. *The Helene* (1865) B. & L. 415; see 6 Q. B. D. 480, 481. Property in the goods passes by such indorsement, and delivery wherever it is the intention of the parties that the property shall pass, just as under similar circumstances the property would pass by an actual delivery of the goods; *Sanders v. Maclean* (1883) 11 Q. B. D. 327; *Sewell v. Burdick* (1884) 10 App. Cas. 74, 79. An agreement by the indorsee to sell the property without transfer of the bill of lading will not deprive the indorsee of the right to sue upon the contract contained therein, *The Felix* (1868) L. R. 2 A. & E. 273.

The indorsement confers the right to sue for breaches of contract before as well as after the indorsee became the owner of the goods; *Short v. Simpson* (1876) L. R. 1 C. P. 248; *Wilhelm Schmidt* (1871) 25 L. T. 34; *Bristol and West of England Bank v. Midland Ry. Co.* (1891) 2 Q. B. 653. The bill of lading is a living instrument so long as the engagement of the ship owner has not been completely fulfilled; *Barber v. Meyerstein* (1870) L. R. 4 H. L. 317. A transfer of it after it ceased to be in force would not pass the contractual rights or liabilities thereunder; *Pine v. Warden* (1871) 9 Sess. Cas. (3rd) 523.

Where "a" property passes by indorsement. On the indorsement of a bill of lading to a bank or other lender of money thereon, a question arises whether the whole property has passed so as to transfer the liabilities upon the con-

tract or whether merely a special property has passed. If only a special property has passed there is no liability on the contract.

The authorities establish the following;—

- (1) Where the indorsee has taken possession of the goods he is liable for the freight; *Fox v. Nott* (1861) 6 H. & N. 637, and is entitled to the remedies against the shipowner for breach of the contract of carriage; *The Figlia Maggiore* (1868) L. R. 2 A. & E. 106; *The Freedom* (1871) L. R. 3 P. C. 594; the indorsees have then elected to complete their potential and inchoate title by taking possession of the goods; per Lord Selborne 10 App. Cas. 88.
- (2) An indorsee who indorses the bill of lading to the shipper or to a third party, is not liable upon the contract, *Smurthwaite v. Wilkins* (1862) 11 C. E. N. S. 847; *Short v. Simpson* (1866) L. R. 1 C. P. 248, but the shipper and a consignee to whom the property passed continue liable notwithstanding the indorsement; *Fox v. Nott* (1861) 6 H. & N. 637; *Fowler v. Knoop* (1878) 4 Q. B. D. 299; unless the shipowner has accepted and acted upon an order for delivery which requires him to look to the receiving of the goods, *Lewis v. McKee* (1866) L. R. 2 Ex. 37.
- (3) Where the bill of lading is indorsed in blank as security the right of the indorsee under that deposit is (both at law and in equity) special and not general, and the shipper retains the real and substantial property in the goods subject to the security and the indorsee is, if he does not take possession, not liable for the freight; *Sewell v. Burdick* (1884) 10 App. Cas. 74.
- (4) If the effect of the transfer of the bill of lading is to transfer the legal title in the goods subject to a right of redemption, i. e. to make a mortgage as distinguished from a pledge; Lord Blackburn was strongly inclined to hold that there would not have been a transfer of "the" property within the meaning of the Act; 10 App. Cas. at p. 96.
- (5) Altogether independently of the Act an indorsee of a bill of lading will acquire a property in the goods whether as pledgee or owner and will be entitled to maintain an action against any person who, without justification or excuse deprives him of the right to obtain possession from the carrier; *Barber v. Meyerstein* (1867) L. R. 2 C. P. 38, 601, L. R. 4 H. L. 317; *Glyn v. East and West India Dock Co.* (1882) 7 App. Cas. 591; *Bristol and West of England Bank v. Midland Ry. Co.* (1891) 2 Q. B. 653 see 10 App. Cas. 98.
- (6) If the transfer of the bill of lading has been as security only, the shipper will, in the insolvency, retain the right of stoppage in transitu subject to the security, notwithstanding sales of the goods "to arrive" to purchasers. *Westzynthius* (1833) 5 B. & Ad. 817; *Spalding v. Ruding* (1843) 6 Beav. 376; *Kemp v. Falk* (1882) 7 App. Cas. 573.
- (7) An indorsement of the bill of lading will not, in favor of creditors of the indorsee, transfer the property to him free from the equitable right of others to the goods or their proceeds, *Dominion Bank v. Davidson* (1885) 12 A. R. 90; *North Western Bank v. Poynter* (1895) A. C. 56.
- (8) Agents for sale of goods to whom a bill of lading is indorsed have no title to the goods, and are not liable, by reason of the indorsement, for freight; conceded in *White v. Finnis* (1895) A. C. 40 at pp. 43, 49, 53.

Contract contained in the Bill of Lading. The Bill of Lading must be taken to be the contract under which the goods are shipped; *Fraser v. Telegraph Construction Co.* (1872) L. R. 7 C. B. 566, and every assignee thereof must be bound by the terms of the contract therein expressed; *Glyn v. East and West India Docks Co.* (1882) 7 App. Cas. 591. Evidence to show that the shippers of the goods knew at the time when the bill of lading was given that it was intended that the ship should call at a port out of the regular track of the designated voyage is inadmissible; *Leduc v. Ward* (1888) 20 Q. B. D. 475. But where a contract for shipment has been made with the shipowner the acceptance of a formal bill of lading, after the ship had sailed, will not bind the shipper to terms not noticed by him varying from those originally agreed upon; *North-West Transportation Co. v. McKenzie* (1895) 25 S. C. R. 38.

Where there is a Charter-Party. It is usual, although the goods are being carried under a charter-party to give the charterers bills of lading; as between them and the shipowner the bill of lading amounts merely to a receipt and a symbol of property, but does not, *prima facie*, operate as a new contract. *Rodoanachi v. Milburn* (1886) 18 Q. B. D. 67; but as to third parties, the bill of lading is the contract even though they had notice of the charter-party, unless that is incorporated by express terms; *Fry v. Chartered Mercantile Bank* (1866) L. R. 1 C. P. 689. The bill of lading in such cases often contains the clause "all other conditions as per charter-party" which means "conditions which are to be performed by the receiver of the goods"; *Serrano v. Campbell* (1891) 1 Q. B. 292; *Diederichsen v. Farquharson* (1898) 1 Q. B. 150, so that clauses excepting liability for negligence or providing for arbitration would not be incorporated; *Gray v. Carr* (1871) L. R. 6 Q. B. 522, *Russell v. Niemann* (1864) 17 C. B. N. S. 163; *Hamilton v. Mackie* (1889) 5 T. L. R. 677. Where the rate of freight expressed in the bill of lading is smaller than that of the charter-party, the clause will not entitle the shipowner to the larger rate of freight as against the consignee or his indorsee; *Gardner v. Trechmann* (1884) 15 Q. B. D. 154; but liens for freight or demurrage will come within the clause; *Gray v. Carr* (1871) 6 Q. B. 522; *Porteus v. Watney* (1878) 3 Q. B. D. 534; *Neill v. Ridley* (1854) 9 Ex. 677.

"Clean" and "through" Bills of Lading. A "clean" bill of lading is one which acknowledges receipt of the goods in good order and condition. *Restitution S. S. Co. v. Pirie* (1889) 61 L. T. 533. A "through" bill of lading is one where the goods are to be carried by different rails or more than one vessel or partly by rail and partly by water. *Greeves v. West India Co.* (1870) 22 L. T. 615, and it has been doubted whether the act applies thereto, see *Carver on Carriage by Sea* p. 107 n.; and it has been settled that a Canadian Railway Company may, notwithstanding the Railway Act, limit the liability beyond its own line so as not to be responsible for the negligence of another carrier; *Grand Trunk Railway Company v. McMillan* (1889) 16 S. O. R. 543.

Ownership of Goods. Proving that a bill of lading has been indorsed to the plaintiff for value is sufficient *prima facie* evidence of his ownership of the goods; *Dracachi v. Anglo-Egyptian Navigation Co.* (1868) L. R. 3 C. P. 190.

Negotiability. Bills of lading are generally made to "order or assigns" and in the absence of such words they are not negotiable; *Henderson v. Comptoir d'Escompte de Paris* (1873) L. R. 5 P. C. 253. "Negotiability" means here nothing more than transferable by indorsement. The transfer of the bill of lading has no greater effect than the transfer of the possession of goods and can confer no greater title; *Cole v. North Western Bank* (1875) L. R. 10 C. P. 362; *Lutscher v. Comptoir d'Escompte de Paris* (1876) 1 Q. B. D. 709.

Bills drawn in sets. Bills of lading for the carriage of goods by sea are usually drawn in sets of three. The master of the ship, is justified in delivering the goods to the holder of the first bill of lading presented to him if he has no notice of a rival claim under another; *Glyn v. East and West India Dock Co.* (1882) 7 App. Cas. 591 but the property in the goods is in the person who first acquired one of the parts; *Barber v. Meyerstein* (1870) L. R. 4 H. L. 317.

Liability of Consignee for Freight. Where a consignee takes possession on the terms of the bill of lading there is evidence of an implied contract to pay freight and any demurrage which is due, although he is only an agent and the property therefore does not pass to him; *Wegener v. Smith* (1854) 15 C. B. 285, but if he refuses before delivery to pay demurrage there is no evidence of any liability therefor. *S. S. Lancaster v. Sharp* (1889) 24 Q. B. D. 158, see also *Fowler v. Knoop* and *Lewis v. McKee* supra.

Conclusive evidence of Shipment. Sec. 7 of the Ontario Act (3 of Dominion) only makes the bill of lading conclusive against the person by whose authority it was signed; *Jessel v. Bath* (1867) L. R. 2 Ex. 267; *Brown v. Powell Coal Co.* (1875) L. R. 10 C. P. 562.

Authority of Master. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel, *McLean v. Fleming* (1871) L. R. 2 H. L. Sc. 128; *Grant v. Norway* (1851) 10 C. B. 665; *Erb v. Great Western Ry. Co.* (1881) 5 S. C. R. 179, nor for a greater quantity than those on board; *Hubbersty v. Ward* (1853) 8 Ex. 330, but when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can show that the

whole or some part of it was in fact not shipped; *Smith v. Bedouin Steam Navigation Co.* (1896) A. C. 70.

Valuable consideration. A transfer of a bill of lading in consideration of an antecedent debt is a transfer for valuable consideration within the Act; *Chartered Bank of India v. Henderson* (1874) L. R. 5 P. C. 501; *Leask v. Scott* (1876) 2 Q. B. D. 376; *The Emilien Marie* (1875) 44 L. J. Adm. 9.

Bills signed by other Agents. Bills of lading are sometimes signed by the purser; *Royal Canadian Bank v. Carruthers* (1869) 28 U. C. R. 578, 29 U. C. R. 283, or the ship's broker, *Hayn v. Culliford* (1878) 3 C. P. D. 410 or a ship's agent; *Jessel v. Bath* (1867) L. R. 2 Ex. 267. Although they are agents to conduct the business of the shipment, they are not the owner's agents to make an admission contrary to the fact by signing a bill of lading for a quantity they know nothing of; *Jessel v. Bath*, *supra*.

Evidence of extended Authority. Where it was the custom of an agent, to the carriers knowledge, to sign bills of lading before receiving the goods the carriers were held liable on bills for goods not received; *McLean v. Buffalo and Lake Huron Ry. Co.* (1865) 24 U. C. R. 270.

Estoppel. The Act creates no estoppel against the master or other person signing the bill of lading as to the condition of the goods; *Chapman v. Zealand* (1874) 24 C. P. 421; nor in an action for freight as to the weight of the goods, *Blanchet v. Powell's Llantwit Collieries Co.* (1874) L. R. 9 Ex. 74. The bill of lading is conclusive only between the person signing and consignees or indorsees not between the owners of the goods; *Allen v. Chisholm* (1873) 33 U. C. R. 237.

Fraud of Shipper. Where there was evidence that a mistake as to the number of bales put on board was caused by the fraud of the person who put the goods on board, it was held to be evidence that the "misrepresentation was caused wholly by the fraud of the shipper." Those words only mean that the captain or other person on board the ship must not in any way be mixed up with the fraud; *Valieri v. Boyland* (1866) L. R. 1 C. P. 382.

It will be noticed that the words in the Dominion Act are "fault of shipper."

Warehouse Receipts. As to advances upon the security of warehouse receipts, see notes on the Bank Act, *infra*.

CHAPTER 147.

An Act respecting Assignments and Preferences by Insolvent persons.

<p>CONFESSIONS OF JUDGMENT, COGNOVITS, ETC., IN FRAUD OF CREDITORS TO BE VOID, s. 1.</p> <p>ASSIGNMENTS, ETC., IN PREJUDICE OF CREDITORS TO BE VOID, s. 2.</p> <p>RECOVERY OF PROCEEDS WHERE PROPERTY SOLD, s. 10.</p> <p>ASSIGNMENTS FOR BENEFIT OF CREDITORS, ss. 3-6.</p> <p style="padding-left: 20px;">How claims are to rank, s. 7.</p> <p style="padding-left: 20px;">Appointment and rights of assignee, ss. 8-10.</p> <p style="padding-left: 20px;">Assignments to take precedence of executions, s. 11.</p> <p style="padding-left: 20px;">Amendment by Court, s. 12.</p> <p style="padding-left: 20px;">Assignment to be registered and notice thereof published, ss. 13-16.</p>	<p>MEETING OF CREDITORS, ss. 17, 18.</p> <p style="padding-left: 20px;">Voting, ss. 19, 20.</p> <p>PROOF OF CLAIM, s. 21.</p> <p>CONTESTATION, ss. 22, 23.</p> <p>ASSETS TO BE RETAINED IN PROVINCE, s. 24.</p> <p>ACCOUNTS AND STATEMENT, s. 25.</p> <p>SET OFF, s. 26.</p> <p>AFFIDAVITS, s. 27.</p> <p>DIVIDENDS AND DIVIDEND SHEET, ss. 28-30.</p> <p>ASSIGNEE'S REMUNERATION, ss. 31, 32.</p> <p>INSPECTOR'S REMUNERATION, s. 33.</p> <p>EXAMINATION OF ASSIGNOR, ETC., ss. 34-39.</p>
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors, gives a confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment with intent, in giving such confession, *cognovit actionem* or warrant of attorney to confess judgment, to defeat or delay his creditors wholly or in part or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors, or over any one or more of such creditors, every such confession, *cognovit actionem* or warrant of attorney to confess judgment, shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution. R. S. O. 1887, c. 124, s. 1.

2.—(1) Subject to the provisions of section 3 of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat,

Confessions or warrants to confess judgment given by insolvents to defeat or delay creditors or to give one preference over the other to be void.

Gifts, transfers, etc., made by insolvents which defeat or prejudice creditors to be void.

hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(2) Subject to the provisions of section 3 aforesaid, every gift conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(3) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed *prima facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof whether the same be made voluntarily or under pressure.

(4) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of his creditors, be presumed *prima facie* to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure. 54 V. c. 20, s. 1.

"Creditor"
for certain
purposes to
include surety
and endorser.

(5) Where the word "creditor" occurs in the eighth and ninth lines of subsection 2 of this section, and in the second and third lines of subsection 3, and in the second and third lines of subsection 4, such word shall be deemed to include any surety and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such endorsement was given become a creditor of the person giving the preference within the meaning of said subsections. This subsection shall not affect any action, suit or proceeding pending on the 14th day of April, 1892, but the same shall be adjudicated upon and determined as if this subsection had not been passed. 55 V. c. 25, s. 1, 2.

Pending proceedings not affected.

Assignments
for benefit of
creditors and
bona fide sales,
etc., pro-
tected.

3.—(1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or with the consent of a

majority of his creditors having claims of \$100 and upwards computed according to the provisions of section 20, to another assignee resident within the Province of Ontario, for the purpose in each of the said cases of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor, nor to any *bona fide* conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above-mentioned, which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

Proviso.

(2) In case of a valid sale of goods, securities or property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. R. S. O. 1887, c. 124, s. 3 (1, 5).

Transfer to creditor of consideration for sale invalid.

(3) Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions of this Act until and unless a subsequent assignment is executed in accordance with this Act.

General assignment not in accordance with Act, when voidable.

(4) In case a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment, the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of, the return of the payment. R. S. O. 1887, c. 124, s. 3 (2, 3).

Security given up upon void payment to be returned.

(5) Nothing herein contained shall affect *The Act respecting Wages*, or shall prevent a debtor providing for payment of wages due by him in accordance with the provisions of the said Act. Nor shall anything herein contained affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor. Nor to the substitution in good faith of one security for another security for the same debt so far as the debtor's

Rev. Stat. c. 156.

Payment of wages protected.

Exchange of securities protected.

Certain assignments to be valid.

estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full. R. S. O. 1887, c. 124, s. 3 (4); 54 V. c. 20, s. 2.

Assignee must reside in the Province.

4. No person other than a permanent and *bona fide* resident of this Province shall have power to act as assignee under an assignment within the provisions of this Act made after the 23rd day of March, 1889, nor shall any such assignee have power to appoint a deputy or to delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province; and no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bona fide* resident of this Province as aforesaid. 52 V. c. 21, s. 1.

Form of assignment for general benefit of creditors.

5. Every assignment made under this Act, for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say—all my personal property which may be seized and sold under execution and all my real estate, credits and effects—or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment. R. S. O. 1887, c. 124, s. 4.

[As to the preferential lien of a landlord, see Cap. 170, sec. 34.]

All assignments for general benefit of creditors to be subject to this Act.

6. Every assignment hereafter executed for the general benefit of creditors, whether the assignment is or is not expressed to be made under or in pursuance of this Act, and whether the debtor has or has not included all his real and personal estate, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the provisions of this Act shall apply to the assignee named in such assignment. 58 V. c. 23, s. 5.

How claims are to rank where different estates.

7. If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors owes or owe, debts both individually and as a member of a co-partnership, or as a member of different co-partnerships, the

claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full. R. S. O. 1887, c. 124, s. 5.

8.—(1) A majority in number and value of the creditors who have proved claims to the amount of \$100 or upwards, may at their discretion substitute for the sheriff, or for an assignee under an assignment to which subsection 3 of section 3 of this Act applies, a person residing in the county in which the debtor resided, or carried on business at the time of the assignment. An assignee may be removed, and another substituted, or an additional assignee appointed by a Judge of the High Court, or of the County Court where the assignment is registered. R. S. O. 1887, c. 124, s. 6 (1); 53 V. c. 34, s. 1.

Appointment of substituted assignee.

2.1.1-3.

(2) Where a new or additional assignee is appointed the estate shall forthwith vest without a conveyance or transfer, and he shall register an affidavit of his appointment in the office in which the original assignment was filed, such an affidavit may also be registered under *The Registry Act*. The registration of the affidavit under *The Registry Act* shall have the same effect as the registration of a conveyance. R. S. O. 1887, c. 124, s. 6 (2).

Estate to vest in substituted assignee.

Rev. Stat. c. 186.

9.—(1) Except as in this section is hereinafter provided, the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions, made or entered into in fraud of creditors, or made or entered into in violation of this Act.

Rights of assignee.

(2) If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of the Judge authorizing him to take the proceedings in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same for his benefit, but if, before such order is granted, the assignee shall signify to the Judge, his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall belong to the estate. R. S. O. 1887, c. 124, s. 7.

Creditor may proceed in certain cases if assignee refuses.

Judge of Co. Ct.

10.—(1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift, conveyance,

Following proceeds of property fraudulently transferred.

assignment or transfer was made shall have sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but in case there is no such assignment, shall exist in favour of all creditors of such debtor. 58 V. c. 23, s. 1.

Taking proceeds under execution.

(2) Where there has been no assignment for the benefit of creditors, and the proceeds are of a character to be seizable under execution, they may be seized under the execution of any creditor, and shall be distributable amongst the creditors under *The Creditors' Relief Act* or otherwise. 58 V. c. 23, s. 2.

Rev. Stat. c. 78.

Creditor suing on behalf of himself and other creditors.

(3) Where there has been no assignment for the benefit of creditors, and whether the proceeds realized aforesaid are or are not of a character to be seized under execution, an action may be brought therefor by a creditor (whether an execution creditor or not), on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds available for the general benefit of the creditors. 58 V. c. 23, s. 3.

Protection of innocent purchasers.

(4) This section shall not apply as against innocent purchasers of the property. 58 V. c. 23, s. 4.

Assignments to take precedence of judgments and executions.

11. An assignment for the general benefit of creditors under this Act shall take precedence of all attachments, of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands. R. S. O. 1887, c. 124, s. 9; 59 V. c. 31, s. 2.

Amendment of assignment by judge.

12. No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of creditors if the same can be amended or corrected, and any such mistake, defect or imperfection shall be amended by any Judge of the High Court, or of the County Court aforesaid, on application of the assignee or of any creditor of the assignor, on such notice being given to other parties concerned as the Judge shall think reasonable, and the amendment, when made, shall have relation back to the date of the assignment, but so as not to prejudice the rights of innocent purchasers. R. S. O. 1887, c. 124, s. 10; 60 V. c. 3, s. 3.

13.—(1) No assignment made for the general benefit of creditors under this Act shall be within the operation of *The Act respecting Mortgages and Sales of Personal Property*; but a notice of the assignment shall, as soon as conveniently may be, be published at least once in the *Ontario Gazette* and not less than twice in one newspaper at the least, having a general circulation in the county in which the property assigned is situate.

Notice of assignment to be published.
Rev. Stat. c. 148.

(2) A counterpart or copy of every such assignment shall also within five days from the execution thereof be registered, (together with an affidavit of a witness thereto of the due execution of the assignment or of the due execution of the assignment of which the copy filed purports to be a copy), in the office of the clerk of the County Court of the county or union of counties where the assignor, if a resident in Ontario, resides at the time of the execution thereof, or if he is not a resident then in the office of the clerk of the County Court of the county or union of counties where the personal property so assigned is or where the principal part thereof (in case the assignment includes property in more counties than one) is at the time of the execution of such assignment; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments, and be entitled to the same fees for services in the same manner as if such assignments had been registered under *The Act respecting Mortgages and Sales of Personal Property*. R. S. O. 1887, c. 124, s. 12 (1, 2).

Assignment to be registered.

Rev. Stat. c. 148.

(3) In the Districts of Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay and Rainy River, and in any other district which may be hereafter formed, and in the Provisional County of Haliburton the counterpart or copy of the assignment shall be filed in the same office and within the same time respectively as by the law at the time of the assignment in force mortgages and bills of sale of personal property are required to be filed in such districts, and provisional county respectively, and the clerk in whose office the same is filed shall perform the like duties and be entitled to be paid the like fees as clerks acting under the preceding subsection. 59 V. c. 31, s. 1.

Where assignment to be filed in certain districts and in Haliburton.

14.—(1) If the said notice is not published in the regular number of the *Ontario Gazette*, and of such newspaper as aforesaid, which shall respectively be issued first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within five days from the execution thereof, the assignor shall be liable to a penalty of \$25 for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been

Penalty for neglecting publication or registration.

published; and a like penalty for each and every day which shall pass after the expiration of five days from the execution of the assignment by the assignor until the same shall have been registered.

(2) The assignee shall be subject to a like penalty for each and every day which shall pass after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto. The burden of proving the time of such delivery or assent shall be upon the assignee.

(3) Such penalties may be recovered summarily before a Judge of the High Court, or of the County Court of the county in which the assignment ought to be published or registered; one-half of the penalty shall go to the party suing, and the other half for the benefit of the estate of the assignor.

Liability of
sheriff.

(4) In case of an assignment to the sheriff, he shall not be liable for any of the penalties imposed in this section, unless he has been paid or tendered the cost of advertising and registering the assignment, nor shall he be compelled to act under the assignment until his costs in that behalf are paid or tendered to him. R. S. O. 1887, c. 124, s. 13.

Compelling
publication
and
registration.

15. In case the assignment is not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the High Court, or of the County Court aforesaid, to compel the registration of the assignment and publication of such notice; and the Judge shall make his order in that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same. R. S. O. 1887, c. 124, s. 14.

Assignment
not invali-
dated by
omission to
publish, etc.

16. The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment. R. S. O. 1887, c. 124, s. 15.

Assignee to
call meeting
of creditors.

17. It shall be the duty of the assignee immediately to inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him, a circular calling a meeting of creditors to be held in his office or some other convenient place to be named in the notices not later than twelve days after the mailing of such notice, and by advertisement in the *Ontario Gazette*; and all other meetings to be held shall be called in like manner. R. S. O. 1887, c. 124, s. 16.

Meeting of
creditors by
request of
majority
thereof.

18.—(1) In case of a request in writing signed by a majority of the creditors having claims duly proved of \$100 and upwards, computed according to the provisions of section 20 of

this Act, it shall be the duty of the assignee within two days after receiving such request, to call a meeting of the creditors at a time not later than twelve days after the assignee receives the request. In case of default the assignee shall be liable to a penalty of \$25 for every day after the expiration of the time limited for the calling of the meeting until the meeting is called.

(2) In case a sufficient number of creditors do not attend the meeting mentioned in section 17 of this Act, or fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf. R. S. O. 1887, c. 124, s. 17.

19. At any meeting of creditors the creditors may vote in person, or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim stating the amount and nature thereof. R. S. O. 1887, c. 124, s. 18.

20.—(1) Subject to the provisions of section 8, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows :

For every claim of over	\$100, and not exceeding \$200	.. 1 vote.
"	"	\$200 " " \$500 .. 2 votes.
"	"	\$500 " " \$1000 .. 3 votes.
"	additional \$1,000, or fraction thereof 1 vote.

(2) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(3) In case of a tie the assignee, or if there are two assignees, then the assignee nominated for that purpose by creditors, or by the Judge, if none has been nominated by the creditors, shall have a casting vote.

(4) Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon under the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate.

(5) If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall

Judge to give directions in case creditors do not attend.

Voting at meeting.

Scale of votes.

Upon claims acquired after assignment.

Casting vote.

Creditors to value securities.

Right to re-value in certain cases.

be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. R. S. O. 1887, c. 124, s. 19.

When creditor holding security fails to value same.

(6) In case a person claiming to be entitled to rank on the estate assigned holds security for his claim or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, the Judge of the County Court of the county wherein the debtor at the time of making the assignment resided or carried on business, may, upon summary application by the assignee or by any other person interested in the debtor's estate, of which application three days' notice shall be given to such claimant, order that, unless a specified value shall be placed on such security and notified in writing to the assignee within a time to be limited by the order, such claimant shall, in respect of the claim, or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate; and if a specified value is not placed on such security, and notified in writing to the assignee according to the exigency of the said order, or within such further time as the said Judge may be subsequent order allow, the said claim, or the said part, as the case may be, shall be wholly barred as against such estate but without prejudice to the liability of the debtor therefor. 59 V. c. 31, s. 3.

Proof of claim.

21.—(1) Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

Limiting time for proof of claim.

(2) In case a person claiming to be entitled to rank on the estate assigned, does not within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this and the preceding sections of this Act, the Judge of the County Court of the county wherein the debtor at the time of making the assignment resided or carried on business, may, upon a summary application by the assignee or by any other person interested in the debtor's estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid), order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow,

the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor.

(3) The preceding subsection is not intended to interfere with the protection afforded to assignees, by section 38 of *The Trustee Act*. Not to interfere with Rev. Stat. c. 129.

(4) A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due. R. S. O. 1887, c. 124, s. 20 (1-4). Creditor may prove claim not due.

22.—(1) At any time after the assignee receives from any person claiming to be entitled to rank on the estate, proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge of the County Court of the county in which the assignment is registered may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action or summons in case the action is brought in a Division Court shall be served on the assignee; and in default of such action being brought and writ or summons served within the time aforesaid, the claim to rank on the estate shall be forever barred. Contestation of claim.

(2) The notice by the assignee shall contain the name and place of business of one of the solicitors of the Supreme Court of Judicature for Ontario, upon whom service of the writ or summons may be made; and service upon such solicitor shall be deemed sufficient service of the writ. R. S. O. 1887, c. 124, s. 20 (5).

23.—(1) In case the assignee is satisfied with the proof adduced in support of a claim, but the debtor disputes the same, such debtor shall do so by notice in writing to the assignee, stating the grounds upon which he disputes the claim; and such notice shall be given within ten days of such debtor's being notified in writing by the assignee that he is satisfied with the proof adduced as aforesaid, and not afterwards unless by special leave of the said Judge. Procedure where assignee is satisfied with proof of claim and debtor desires to dispute same.

(2) If upon receiving such notice of dispute the assignee does not deem it proper to require the claimant to bring an action to establish his claim, he shall notify the debtor in writing of this fact, and the debtor may thereupon, and within ten days' of his receiving such notice, apply to the said Judge for an order requiring the assignee to serve a notice of contestation. The Judge shall only make such order if after notice to the assignee the Judge is of opinion that there are good grounds for contesting the claim. In case the debtor does not make an application as aforesaid the decision of the assignee shall as against him be final and conclusive.

(3) If upon the application the claimant consents in writing, the Judge may, in a summary manner, decide the question of the validity of the claim.

(4) If an action is brought by the claimant against the assignee the debtor may intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-examining witnesses. 59 V. c. 31, s. 4.

Assets not to be removed out of the Province and moneys to be deposited in a bank.

24.—(1) No property or assets of an estate assigned under the provisions of this Act shall be removed out of the Province without the order of the Judge of the County Court of the county in which the assignment is registered, and the proceeds of the sale of any such property or assets, and all moneys received on account of any estate shall be deposited by the assignee in one of the incorporated banks within this Province, and shall not be withdrawn or removed without the order of such Judge, except in payment of dividends and other charges incidental to the winding up of the estate.

Penalty.

(2) Any assignee or other person acting in his stead or on his behalf violating the provisions of this section shall be liable to a penalty of \$500, which may be recovered summarily before a Judge of the High Court or before the Judge of the County Court of the county in which the assignment is required to be registered; and one-half of the said penalty shall go to the person suing therefor, and the other half shall belong to the said estate; but in default of payment of the said penalty and all costs which may be incurred in any action or proceeding for the recovery thereof, such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues. 52 V. c. 21, s. 2.

Application of section limited.

(3) This section shall not apply to any assignment executed before the 23rd day of March, 1889, or to any proceedings thereunder. 52 V. c. 21, s. 3.

Accounts to be kept accessible.

25. Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare, and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate. R. S. O. 1887, c. 124, s. 21.

Set off.

26. The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions respecting frauds or fraudulent preferences of this or any other Act. R. S. O. 1887, c. 124, s. 23.

Affidavits.

27. Any affidavit authorized, or required, under this Act may be sworn before any person authorized to administer

affidavits in the High Court, or before a Justice of the Peace, or, if sworn out of Ontario, before a Notary Public. R. S. O. 1887, c. 124, s. 24.

28. As large a dividend as can with safety be paid, shall be paid by every assignee under this Act within twelve months from the date of any assignment made thereunder, and earlier if required by the inspectors; and thereafter a further dividend shall be paid every six months, and more frequently if required by the inspectors until the estate is wound up and disposed of. 59 V. c. 31, s. 5.

Dividends when to be paid.

29. So soon as a dividend sheet is prepared, notice thereof shall be given by letter posted to each creditor, inclosing an abstract of receipts and disbursements, shewing what interest has been received by the assignee, for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid. R. S. O. 1887, c. 124, s. 22.

Notice of dividend sheet.

30.—(1) The assignee may, if he deems it advisable so to do, take the proceedings authorized by section 32 of *The Creditors' Relief Act* to be taken by a sheriff, and in that case sections 32 and 33 of the said Act shall apply to proceedings for the distribution of moneys and determination of claims arising under an assignment made under this Act, with the substitution of "assignee" for "sheriff" where it occurs in said section 32; and the substitution of "according to law" for "as directed by this Act," where these words occur in said section 32; but this section shall not be construed to relieve the assignee from mailing to each creditor the abstract and other information required by section 29 of this Act to be sent to creditors, so far as the same is not contained in the list sent by him under section 32 aforesaid.

Distributing moneys and determining claims as provided by Rev Stat. c. 78.

(2) The Judge of the County Court of the county wherein the debtor at the time of the assignment resided or carried on business shall be the Judge to whom applications under this section shall be made. 59 V. c. 31, s. 6.

31. The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or any of the creditors. R. S. O. 1887, c. 124, s. 11 (1).

Remuneration of assignee.

32. In case the remuneration of the assignee has not been fixed under the preceding subsection before the final dividend, the assignee may insert in the final dividend sheet, and retain

Where remuneration not fixed before the final dividend.

as his remuneration, a sum not exceeding five per cent. of the cash receipts, subject to review by the Court or Judge as hereinbefore provided; but no application by the assignee to review the said allowance shall be entertained, unless the question of his remuneration, previous to the preparation of the final dividend sheet has been brought before a meeting of creditors competent to decide the same. 59 V. c. 31, s. 8.

Remuneration
of inspectors.

33. No assignee shall make any payment or allowance to an inspector beyond his actual and necessary travelling expenses in and about his duties as inspector, except under the authority of a resolution of the creditors passed at a meeting regularly called, fixing the amount thereof, and in the notice calling the meeting the fixing of the remuneration of the inspectors shall be specially mentioned as one of the subjects to be brought before the meeting. No inspector shall be allowed more than four dollars a day besides actual travelling expenses, but may be allowed less. 59 V. c. 31, s. 7.

Examination
of a-signor or
employees.

34. Where there has been an assignment for the benefit of creditors the assignee, or assignees, upon resolution passed by a majority vote of the creditors present or represented at a meeting of the creditors of the assignor regularly called, or upon the writte request or resolution of the majority of the inspectors of the estate, may without an order examine the assignor or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath before a master or local master or a special examiner of the Supreme Court of Judicature, or before a local registrar or deputy clerk of the crown of the High Court, or before the Judge of the County Court of the county within which such assignor resides, or before any official referee, or may by the order of the Court or a Judge examine the assignor on oath before any other person to be specially named in such order, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of the debts or liabilities of the assignor existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability and as to any and what debts are owing to him. 58 V. c. 23, s. 6; 59 V. c. 31, s. 9.

Procedure
upon exami-
nation of an
assignor.

35. The rules and procedure from time to time in force in the High Court of Justice for the examination of judgment debtors shall, as far as may be, apply to an examination under this Act of an assignor in all respects as if the assignor were a judgment debtor. 58 V. c. 23, s. 11.

When as-
signor does
not attend or
refuses to
answer ques-
tions.

36. In case such assignor does not attend as required by the said appointment, or appointment and order, as the case may be, and does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions respecting the same, or does not make satisfactory

answers respecting the same, or if it appears from such examination that such assignor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court or Judge may order the assignor to be committed to the common gaol of the county in which he resides, for any term not exceeding twelve months. 58 V. c. 23, s. 10.

37.—(1) Any person liable to be examined under section 34 may be served with an appointment signed by the Judge or officer, or a copy thereof, and where the examination is to take place under an order, also with a copy of the order; such service to be made at least 48 hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness. 58 V. c. 23, s. 8.

Service of appointment.

(2) The examination shall be conducted in the same manner as in the case of an oral examination of an opposite party. 58 V. c. 23, s. 9.

Conduct of examination.

38. Any person liable to be examined under section 34 may be compelled to attend and testify and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness in an action in the High Court of Justice. 58 V. c. 23, s. 7.

Compelling attendance and production of books.

39.—(1) In case any person has or is believed or suspected to have in his possession or power any book, document, or paper of any kind relating in whole or in part to the debtor, his dealings or property, such person may, upon resolution passed by a majority vote of the creditors present or represented at a regularly called meeting of the creditors of the assignor exclusive of such person (if he is a creditor) or upon the written request or resolution of the majority of the inspectors of the estate, be required by the assignee to produce such statement or statements for the information of such assignee.

Calling upon persons having information as to assignor's affairs to give evidence and produce documents, etc.

(2) In case such person fails to produce the said book, document or other paper within four days of his being served with a copy of the said resolution and a request of the assignee in that behalf, or in case the assignee or the majority of the inspectors is or are not satisfied that full production has been made, the assignee may without an order examine the said person before any of the officers mentioned in section 34 of this Act touching any book, document or other paper which he is supposed to have received.

(3) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce in the same manner and subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined as in the case of a witness in an action in the High Court of Justice. 59 V. c. 31, s. 10.

NOTES.

Policy of the Act. This is one of the acts for carrying out the policy of the law that creditors of an insolvent person should share the assets ratably. The Creditors Relief Act provides for a ratable distribution by the Sheriff without the consent of the debtor. This act provides for a distribution only when the debtor conveys his assets over to a trustee for his creditors.

Insolvency. The ordinary legal and commercial meaning of Insolvency is inability to pay debts as they mature. *Parker v. Gossage* (1827) 5 L. J. Ex. 4; *Re Muggeridge* (1858) Johns 625 but insolvency is not shown by proving non-payment on demand of one debt; *Doe d. Galehouse v. Rees* (1837) 4 Bing. N.C. 384.

The expressions contained in the act "insolvent circumstances" or "unable to pay his debts in full", or "knowing himself to be on the eve of insolvency" are all referable to an inability to pay in full if a debtor's property were sold under legal process at a sale fairly and reasonably conducted; *Dominion Bank v. Cowan* (1887) 14 O. R. 465; *Warnock v. Klepfer* (1887) 14 O. R. 288, 15 A. R. 324, 18 S. C. R. 701; but the price actually realized after an assignment is not necessarily the value at the time of the impeached transaction,—any subsequent depreciating circumstances must be considered; *Clarkson v. Sterling* (1887) 14 O. R. 460. A business should be treated as a going concern in testing its solvency; *Stuart v. Thomson* (1893) 23 O. R. 503.

Knowledge of Insolvency. Where a *bona fide* purchase for value is attacked it must be proved that there was a concurrence of fraudulent intent upon the part of the debtor and the purchaser; *Hickerson v. Farrington* (1891) 18 A. R. 635; *Campbell v. Roche* (1891) 18 A. R. 646, 654; and even where the lender of money knew that the money was being borrowed solely for the purpose of giving a creditor a preference the transaction has been sustained; *Johnson v. Hope* (1890) 17 A. R. 10; but if the raising of the money was but a part of a scheme to give a preference, the whole transaction would be avoided; *Burns v. Wilson* (1897) 28 S. C. R. 207.

The rule as to concurrence of intent has been applied to preferential securities given to creditors for antecedent debts; *Burns v. MacKay* (1885) 10 O. R. 167; *McRoberts v. Steinoff* (1886) 11 O. R. 369; *Johnson v. Hope* (1890) 17 A. R. 10. While the law cannot be said to be at all satisfactorily settled, it is perhaps, still necessary to show that a preferred creditor knew at the time of the impeached transaction that the debtor was in insolvent circumstances; *Ashley v. Brown* (1890) 17 A. R. 500; *Gibbons v. McDonald* (1892) 20 S. C. R. 587, unless the transaction was purely voluntary; *Oliver v. McLaughlin* (1893) 24 O. R. 41.

Knowledge of circumstances from which ordinary business men would conclude that the debtor was unable to meet his liabilities is knowledge of insolvency; *National Bank of Australasia v. Morris* (1892) A. C. 287; *Tomkins v. Saffery* (1877) 3 App. Cas. 213, 237.

Collusive Judgments. It is difficult to state with any pretence to accuracy under what circumstances a judgment will be ineffectual owing to the provisions of the act. The doubts are created by the recent decision of the Judicial Committee of the Privy Council in *Edison General Electric Co. v. Westminster Tramway Co.* (1897) A. C. 193. That case was an appeal from British Columbia against a decision on a section exactly identical with s. 1. The defendant in an action entered an appearance and the same day his attorney consented to an order for judgment for the purpose of giving the plaintiffs therein priority over a judgment about to be granted the same day at the suit of another creditor. A similar device had been held in Ontario not to be an infringement on s. 1; *Turner v. Lucas* (1882) 1 O. R. 623. The instruments known as "confession of judgment," "*a cognovit actionem*" and "a warrant of attorney to confess judgment," were well known to the law, and unless the judgment had been obtained by the use of one of them, the course of decision was uniform that the intent to prefer did not render it ineffectual. Neither filing a *relicta verificatione*; *Heaman v. Seale* (1881) 29 Gr. 278, nor withdrawing a defence under s. 118 of the Division Courts Act; *Bailey v. Bank of Hamilton* (1894) 21 A. R. 156, were obnoxious to the section.

It was not (and probably is not) within the section to fail to take advantage of the fact that the term of credit had not expired; *King v. Duncan* (1881) 29 Gr. 113; *MacDonald v. Crombie* (1882) 2 O. R. 243; 10 A. R. 92, 11 S.C.R. 107; *Bowerman v. Phillips* (1888) 15 A. R. 679, nor to put in a defence to one action and allow judgment in another to go by default; *Labatt v. Bixel* (1881) 28 Gr. 593.

The words "by collusion" simply mean "by agreement" or "by acting in concert," and if by agreement with the debtor and by means of some act or consent on his part a judgment is obtained with intent to defeat other creditors, or to give a preference, it is probable that such judgment cannot stand; *Edison General Electric Co. v. Westminster Tramway Co.* (1897) A. C. 193.

The section avoids confessions etc, given either voluntarily or by collusion. Pressure would be an answer to an attack upon a confession upon the ground that it was given voluntarily, but it would be no answer to a case which alleged collusion; *ib.*

Preference. Preferences of one creditor over another are not forbidden either at the common law or under the Statute of Elizabeth; *Wood v. Dixie* (1845) 7 Q. B. 892; *Holbird v. Anderson* (1793) 5 T. R. 235; *McMaster v. Clare* (1859) 7 Gr. 558. The giving of a preference is no offence against the criminal law. *Crim. Code s. 368.*

Conveyances even to a creditor, which are not honestly made for the payment of debts, but for the purpose of defeating, hindering or delaying creditors, are void both at the common law and under the Statute of Elizabeth and the giving of them is punishable as a crime. *Crim. Code s. 369*; *R. v. Henry* (1891) 21 O. R. 113; *Twyne's case* (1601) 1 Sm. L. C. 1, 3 Coke 80, *McDonald v. Cummings* (1895) 24 S. C. R. 321; *Cummings v. Taylor* (1895) 23 S. C. R. 337.

In England conveyances made with the intent of giving a preference were, at an early period, void under the Bankrupt Laws as constituting acts of bankruptcy, and, upon bankruptcy supervening, they might be set aside.

Legislation against preferences was introduced in Ontario in 1858 by the Indigent Debtor's Act 22 Vict. c. 96, ss. 18, 19. Only conveyances of personal property were thereby avoided. The statutes respecting preferences since that time have been (omitting the amendments between the decennial revisions of the Statutes) C. S.U.C., c. 26 ss. 17, 18; R.S.O. (1877) c. 118; R. S.O. (1887) c. 124 and R.S.O. (1897) c. 147. From 1864 to 1880 the legislation was unimportant because of the operation of the then existing Insolvency Acts.

Pressure. A "preference" imports something done voluntarily—*ex mero motu*—not in the ordinary course of business and without any pressure or demand on the part of the creditor. *Nunes v. Carter* (1866) L. R. 1 P. C. 342.

If, therefore, the conveyance is not the voluntary Act of the debtor, but he makes it in compliance with a request from the creditor or from some influence which dominates his will, it is not, strictly speaking, a preference. It is then said to have been made under pressure. A security given under pressure must be attacked within 60 days from the time of giving it, otherwise it cannot be set aside merely upon the ground of preference. S. 2 (4); *Beattie v. Wenger* (1897) 24 A. R. 72.

It is difficult to say what is pressure sufficient after 60 days to maintain a conveyance otherwise invalid. A mere request by the creditor for security has over and over again held to be sufficient. *Brayley v. Ellis* (1882) 1 O. R. 119, 9 A. R. 565; *Totten v. Bowen* (1882) 8 A. R. 602; *Meriden Silver Co. v. Lee* (1882) 2 O. R. 451; *Whitney v. Toby* (1882) 6 O. R. 54; *McCrae v. White* (1883) 9 S.C. R. 22; *Slater v. Oliver* (1884) 7 O. R. 158; *Powell v. Calder* (1885) 8 O. R. 505; *Ivey v. Knox* (1885) 8 O. R. 635; *Davies v. Gillard* (1891) 21 O. R. 431, 435, 436, 19 A. R. 432; *Stephens v. McArthur* (1891) 19 S.C.R. 446; *Webster v. Crickmore* (1898) 25 A. R. 97. But of late years the tendency has been to probe beneath the mere form, and to ascertain if the dominant motive of the debtor was to overcome the pressure or to give a preference; *Ex parte Hall* (1882) 19 Ch. D. 580; *Tomkins v. Saffery* (1877) 3 App. Cas. 213, 225; *Re Bell* (1893) 10 Mor. 15. The doctrine of pressure is not applicable where insolvency exists to the knowledge of both parties. *Breese v. Knox* (1897) 24 A. R. 203.

It may be that the following statement by the late Chief Justice Spragge expresses what the law really is;—"It must of course appear that the pressure is real, not a feigned contrivance between the creditor and debtor to wear the appearance of pressure while the real desire and intention is to give a preference" *Cleimow v. Converse* (1869) 16 Gr. 547, 549.

For a complete brief on pressure see 35 C.L.J. 322.

Motives Negating Intent to Prefer. When a conveyance by an insolvent is attacked,—or he makes an assignment for the benefit of creditors,—within 60 days, the conveyance is presumed to have been made with the obnoxious intent. The presumption is a rebuttable one—the revisers of the Statutes having introduced the words "*prima facie*" into s. 2 (3) (4). Pressure will not sufficiently rebut the presumption because of the concluding words to those sub-sections "whether the same be made voluntarily or under pressure."

The following matters will, it is submitted, still be sufficient to rebut the presumption.

- (1) An agreement to give security; *Clarkson v. Sterling* (1887) 15 A.R. 234; *Embury v. West* (1887) 15 A.R. 357; *Lawson v. McGeoch* (1893) 20 A.R. 464, though insufficient to support an action for specific performance; *Hope v. May* (1897) 24 A.R. 16; *Montgomery v. Corbit* (1897) 24 A.R. 311; but the agreement must be clearly and distinctly made out; *Webster v. Crickmore* (1898) 25 A.R. 97, and the taking of the security must not be deliberately postponed so as to maintain the debtor's credit, or to avoid the statutory presumption; *Ex parte Fisher* (1872) L.R. 7 Ch. 636; *Clarkson v. Sterling* (1887) 15 A.R. 234; *Clarkson v. McMaster* (1895) 25 S.C.R. 96; *Breese v. Knox* (1897) 24 A.R. 203; *Webster v. Crickmore* (1898) 25 A.R. 97, and if it affects Chattels within the Chattel Mortgage Act it must be registered, see R.S.O. c. 148, s. 11 *supra* p. 337; but registration will not necessarily make it valid; *Breese v. Knox* (1897) 24 A.R. 203.
- (2) A conveyance made by a trustee even without the knowledge of his *cestui que trust* to replace trust funds misappropriated by him; *Re New, Prance and Garrard's Trustee v. Hunting* (1897) 1 Q.B. 607, (1897) 2 Q.B. 19; *Ex parte Taylor* (1886) 18 Q.B.D. 295; *Ex parte Stubbins* (1881) 17 Ch. D. 58; *Molsons Bank v. Halter* (1890) 18 S.C.R. 88.
- (3) An assignment made by a solicitor to prevent an order striking him off the roll from being enforced; *Grant v. VanNorman* (1882) 7 A.R. 526.
- (4) A transfer of funds by a Township Treasurer to the Township's account to replace funds which he had converted to his own use; *Halwell v. Wilmot* (Township) (1897) 24 A.R. 628.
- (5) A transfer to escape a criminal prosecution; *De Tastet v. Carroll* (1815), 1 Stark 88. 18 R.R. 748.
- (6) Taking a new chattel mortgage instead of renewing a former one; *Rogers v. Carroll* (1899) 30 O.R. 328.

Don v. Maclean
2 O.R. 466.

Property Within S. 2. S. 2 refers only to exigible property. By this however is not meant such property only as can be reached by a *fieri facias*. All property real and personal, (except money paid to a creditor) which creditors can reach by any process, is within its scope, e. g. Book debts, which can only be reached by garnishment; *Labatt v. Bixel* (1881) 28 Gr. 593; *Warnock v. Kloefer* (1887) 15 A.R. 224; 18 S.C.R. 701; and lands and funds which can be made available only by equitable execution. The cheque of a third person is not money; *Davidson v. Fraser* (1896) 23 A.R. 439; 28 S.C.R. 272.

An assignment of insurance policies after loss has been set aside; *Ivey v. Knox* (1885) 8 O.R. 635.

But an assignment of expected profits out of a pending contract could not be impeached; *Blakely v. Gould* (1897) 24 A.R. 153, 27 S.C.R. 682, nor, it is submitted, an assignment of salary not yet earned; *Holmes v. Millage* (1893) 1 Q.B. 551, nor an assignment of future book debts, nor goods not yet acquired.

Failure by a debtor to accept a legacy is not an act which contravenes the provisions of the Statute; *Bain v. Malcolm* (1887) 13 O.R. 444.

Persons Entitled to the Benefit of the Act. Only creditors and assignees for the benefit of creditors are entitled to impeach transactions, as void under the Act; *Oliver v. McLaughlin* (1893) 24 O.R. 41. After an assignment for the benefit of creditors the right of suing belongs exclusively to the assignee; S. 9.

The Statute 13 Eliz. c. 5 avoids conveyances, etc., contrived to delay, etc., creditors and others of their actions, suits, damages, etc., and is therefore wider.

A plaintiff in an action of tort is not before judgment a creditor, and the act gives him no right to impeach transactions entered into before his recovery of judgment; Cameron v. Cusack (1890) 17 A.R. 489; Ashley v. Brown (1890) 17 A.R. 500; Gurofski v. Harris (1896) 27 O.R. 201, 23 A.R. 717.

A creditor cannot approbate a transaction as by garnishing the proceeds of a transfer and afterwards attack the transfer; Wood v. Reesor (1895) 22 A.R. 57; Beemer v. Oliver (1884) 10 A.R. 636; Rielle v. Reid (1899) 26 A.R. 54.

And a wrongdoer e. g. an auctioneer selling for the mortgagor the goods comprised in a mortgage cannot take advantage of the provisions of the act by setting up the rights of creditors to attack a security; Johnston v. Henderson (1896) 28 O.R. 25.

Transactions not Voidable under the Act. The Act strikes only at gifts, conveyances, transfers, etc., of property of the debtor. Transactions which may have the effect of diminishing the debtor's assets must fall within the prohibited class before they are voidable.

The following are instances of valid transactions :—

- (1) The retention by a chattel mortgagee of the surplus proceeds of sale to apply upon an unsecured debt; Stephens v. Boisseau (1896) 23 A.R. 230, 26 S.C.R. 437.
- (2) Purchasing a debt due by an insolvent creditor and setting it off against the debt due to him; Thibaudeau v. Garland (1896) 27 O.R. 391.
- (3) Making a lease by the debtor to his creditors and allowing the rent to pay the debt; Smith v. Lawrence (1891) 27 C.L.J. 116.
- (4) Making a payment in money to a creditor, whether *bona fide* or for the purpose of preferring him; Campbell v. Roche (1891) 18 A.R. 646. The transfer of a cheque of a third person is not a payment in money; Davidson v. Fraser (1896) 23 A.R. 439; 28 S.C.R. 272, but a payment to a bank by a purchaser from a debtor to the bank of the amount of its debt by means of the purchaser's cheque on the same bank is a payment in money; Gordon v. Union Bank (1899) 19 C.L.T. 131. If the effect of the payment is to revive a Statute barred debt it is nevertheless good; Re Lane (1889) 23 Q.B.D. 74.

The substitution of a purchaser's notes for a vendor's notes in the hands of a banker is a payment; Building and Loan Association v. Palmer (1886) 12 O.R. 1.

- (5) Supplying materials under an agreement that the property is not to pass; Wellbanks v. Heney (1890) 19 O.R. 549.
- (6) Taking possession *in invitum* of chattels covered by a chattel mortgage; Bank of Hamilton v. Tamblin (1888) 16 O.R. 247, but see R.S.O. c. 148, s. 40, p. 346.
- (7) A conveyance made in consideration of a present *bona fide* advance of money or sale of goods or other property, if the consideration be fair and reasonable, s. 3 (1). The words *bona fide* govern this exception, and where a chattel mortgage was given to secure money advanced to pay a creditor's claim, the same solicitor acting for all parties, and the mortgage being part of a scheme to obtain a payment in money to the creditor, the mortgage was set aside; Burns v. Wilson (1897) 28 S.C.R. 207, but see the prior case of Gibbons v. Wilson (1890) 17 A.R. 1. Security given to secure the price of a present sale of goods will generally be upheld; Goulding v. Deeming (1887) 15 O.R. 201. A transaction is not *bona fide* if the transferee knows that a violation of the provisions of the Act is intended; Butcher v. Stead (1875) L.R. 7 H.L. 830. But it is not necessary that the mortgagee or purchaser should actually pay the money into the hands of the debtor—payment of it or a part of it to a creditor by direction of the debtor will be sufficient; Gibbons v. Wilson (1890) 17 A.R. 1; Johnson v. Hope (1890) 17 A.R. 10; Gordon v. Union Bank (1899) 19 C.L.T. 131, and the giving of his own notes by the purchaser or mortgagee would, if *bona fide*, be tantamount to advancing the money; Walker v. Niles (1871) 18 Gr. 210; Building and Loan Association v. Palmer (1886) 12 O.R. 1, 6.

A sale to a creditor who sets off his debt as part payment is good if *bona fide*; *Lewis v. Brown* (1884) 10 A.R. 639; *Bew v. Bill* (1867) 16 W.R. 760. If the conveyance states a false consideration, the onus of proving a valuable consideration is on the transferee; *Gignac v. Iler* (1898) 29 O.R. 147, affirmed on appeal, 25 A.R. 393.

- (8) A sale made *bona fide* in the ordinary course to an innocent purchaser, s. 3 (1). Only the purchaser need act *bona fide*; *Mackintosh v. Pogose* (1895) 1 Ch. 505.
- (9) A debtor may provide for the payment of wages to persons in his employment which would have priority over the claims of other creditors under R.S.O. c. 156 *infra*.
- (10) Where the transaction is a mere substitution of securities, it will be secure from attack unless the debtor's estate has thereby been lessened in value to the other creditors, s. 3 (5).
- (11) Where an advance is made to the debtor by a creditor in the *bona fide* belief that the advance will enable the debtor to continue business and pay his debts in full, a security given for the advance and a pre-existing debt will be unimpeachable, s. 3 (5). *Ex parte King* (1876) 2 Ch. D. 256; *Ex parte Ellis* (1876) 2 Ch. D. 797. It is the belief of the creditor not the uncommunicated intention of the debtor or the result of the loan which is the governing test; *Ex parte Johnson, Re Chapman* (1884) 26 Ch. D. 338. *Ex parte Wilkinson, Re Berry* (1883) 22 Ch. D. 788; *Administrator-General of Jamaica v. Lascelles* (1894) A.C. 135. The belief of the debtor is no factor in determining the validity of the security; *Long v. Hancock* (1885) 12 A.R. 137; 12 S.C.R. 532.

The new advance should be substantial as its smallness would be strong evidence that it was merely a factor in a device to obtain security and that the creditor had no honest belief in its required efficiency. *Tyman v. Cuthbertson* (1886) 10 O.R. 443; *Kalus v. Hergert* (1876) 1 A.R. 75; *Miller v. Reid* (1879) 4 A.R. 479; *Ross v. Dunn* (1889) 16 A.R. 552.

Paying off other claims against the debtor and taking security therefor, and for a pre-existing debt is not such an advance as is protected by the clause under consideration; *Boyd v. Glass* (1883) 8 A.R. 632.

- (12) Failing to accept a legacy; *Bain v. Malcolm* (1887) 13 O.R. 444.
- (13) An assignment in trust to pay all creditors ratably, s. 3 (1). See *infra*.
- (14) Security given or agreed to be given to a surety or endorser at the time of the creation of the latter's obligation; *Kerry v. James* (1894) 21 A.R. 338, unless the becoming surety is a mere device to prefer a creditor; *Powell v. Calder* (1885) 8 O.R. 505. Security given to a surety, except in pursuance of such an agreement, at any other time than when he assumes his obligation, is now subject to the same grounds of attack as if the surety were actually a creditor. Before 1892 this was not so; *Hope v. Grant* (1891) 20 O.R. 623. A payment in money by the debtor to a creditor which has the effect of releasing the surety from his obligation is still effectual; *Harvey v. McNaughton* (1884) 10 A.R. 616.

Giving up Security. Where in consideration of obtaining the impeached security, another security is given up, the creditor is entitled to have the security restored, or its value made good, before or as a condition of setting the security aside, s. 3 (4). But the security to be returned must be one upon the debtor's property such as the creditor would be bound to value, and if the latter, upon receiving the new security should have given up a note of the debtor endorsed by a surety for him, the creditor would not be entitled either to a return of the note, or to another note endorsed by the same surety; *Beattie v. Wenger* (1897) 24 A. R. 72.

Method of Attack. When an assignment is made for the benefit of creditors, the attack upon any transfer must be by the assignee, or in his name. When there is no assignment the attack may be made by an execution creditor, either by a seizure under the execution, or by an action to have the impeached transactions declared void, or the attack may be made by a similar action brought by a simple contract creditor, suing on behalf of himself and all other creditors of the debtor. In the event of his success his costs between solicitor and client will be a first charge on the property recovered; *Macdonald v. McCall* (1887) 12 P. R. 9; *Burns v. Wilson* (1897) 28 S. C. R. 207; *Webster v. Crickmore* (1898) 25 A. R. 97.

An interpleader issue is a proceeding within the meaning of the 60 day limit in s. 2 (3); *Cole v. Porteous* 19 A. R. 111.

The debtor is not a necessary party to an action by an assignee for the benefit of creditors, *Beattie v. Wenger* (1897) 24 A. R. 72, but he has been held to be a necessary party to an action by a simple contract creditor; *Gibbons v. Darvill* (1888) 12 P. R. 478, but whether there is any real distinction upon the point between the two actions seems open to doubt.

Sale by Transferee—Following Proceeds. Although the statute declares that obnoxious transactions shall "be utterly void" the expression means nothing more than "voidable." They are void only as against creditors, and until the creditors elect to avoid them, they remain good; *Meriden Britannia Co. v. Braden* (1894) 21 A. R. 352. A good title may therefore be conferred upon a *bona fide* purchaser from the preferred creditor or other transferee; *Davis v. Wickson* (1882) 1 O. R. 369; *Stuart v. Tremain* (1882) 3 O. R. 190; *Rielle v. Reid* (1899) 26 A. R. 54; *Re Vansittart* (1893) 2 Q. B. 377; *Re Brall, Ex parte Norton* (1893) 2 Q. B. 381; *Re Carter and Kenderline* (1897) 1 Ch. 772. Until recently a preferred creditor was not liable to account for the proceeds except to an assignee for the benefit of creditors; *Robertson v. Holland* (1888) 16 O. R. 532; *Tennant v. Gallow* (1894) 25 O. R. 56, and creditors were therefore without remedy when the debtor made no such assignment; *Stuart v. Tremain* (1882) 3 O. R. 190, but moneys received from the sheriff under an execution were ordered to be paid to an attacking judgment creditor; *Martin v. McAlpine* (1883) 8 A. R. 675, and book debts collected pending an action to set aside a transfer thereof were ordered to be accounted for; *Labatt v. Bixel* (1881) 28 Gr. 593, and where a transfer of property was not made to prefer but to defraud creditors, the transferee was adjudged to hold the proceeds in trust for creditors, and was ordered to account; *Masuret v. Stewart* (1891) 22 O. R. 290.

The proceeds may now be followed in all cases whether an assignment has been made or not, see s. 10. If a number of creditors have been preferred by a transfer to a trustee for them, who has realized and paid over each creditor's share of the money to him, an action may be maintained against each creditor for the money so received without setting aside the transfer; *Beattie v. Holmes* (1898) 29 O. R. 264, and when the amount received is within the jurisdiction of the Division Court the action may be maintained therein, *ib.*

Where no sale has been made, but the transferee has collected book debts, under an assignment which is successfully attacked, he must account for the moneys collected; s. 10; see *Meharg v. Lumbers* (1896) 23 A. R. 51, which has been adopted as law on the revision of the Statutes.

Assignments. An assignment for the benefit of creditors is simply a conveyance of real or personal property, or both, to a trustee upon trust to distribute the proceeds thereof, among the creditors of the assignor. Such assignments were well known at common law; *Atty-Gen for Ontario v. Atty-Gen for Canada* (1894) A. C. 189, and the rules of equity respecting trusts and the enforcement thereof, and the statutory provisions respecting trustees are all applicable to such assignments. The assignments are not, therefore, the creation of the Statute, nor are the rights, obligations or duties of the parties thereto or the *cestui que trust* governed solely thereby. An assignment to be valid as against creditors must be made to a resident within Ontario for the purpose of paying ratably and proportionately, and without preference or priority all the creditors of the debtor their just debts; s. 3 (1). An exception as to priority may be made in respect of such wages due to parties in the employment of the debtor as are entitled to priority; s. 3 (5). When any assignment is made for the authorized purposes, it becomes subject to the act, whether all the property of the debtor is included or not. An assignment may be set aside as invalid if its purpose is to defeat, hinder or delay creditors in the recovery of their debts; *Whitman v. Union Bank of Halifax* (1889) 16 S. C. R. 410; see *Taylor v. Cummings* (1897) 27 S. C. R. 589; *Cummings v. Taylor* (1898) 28 S. C. R. 337. Such purpose may be inferred if it attempts to impose unreasonable conditions or terms upon the creditors—such as a release of the debtor; *Darling v. McIntyre* (1860) 19 U. C. R. 154; *Crappier v. Patterson* (1860) 19 U. C. R. 160; or a direction to carry on business indefinitely; *Gallagher v. Glass* (1882) 32 C. P. 641 but not a mere discretionary power *Alexander v. Wavell* (1884) 10 A. R. 135 and power may be given to the trustee to carry on the business so that it may be sold as a going concern; *O'Brien v. Clarkson* (1884) 10 A. R. 603; *Jennings v. Moss* (1884) 10 A. R. 606; *Slater v. Badenach* (1884) 10 S. C. R. 296 and to sell on reasonable credit; *Ontario Bank v. Lamont* (1883) 6 O. R. 147.

Assent to Assignment. A creditor who accepts payment of a dividend; *Beemer v. Oliver* (1884) 10 A. R. 656, or who attends a meeting called by the assignee, and accepts an appointment as Inspector; *Gardner v. Klepfer* (1884) 7 O. R. 603 cannot succeed in an attack upon the assignment as invalid. But if he should fail in such a proceeding upon the ground of his acquiescence, he will not, because of the attack, lose his right to dividends; *Klepfer v. Gardner* (1886) 10 O. R. 415, 14 A. R. 60, 15 S. C. R. 390.

Defects in Assignments. Power is given to amend any mistake, defect or imperfection in an assignment which is capable of amendment or correction in a summary way; s. 12. When the assignment designedly omitted any reference to real property, it was held that it could not be amended; *Blain v. Peaker* (1889) 18 O. R. 109, and it may be that provisions which would have the effect of invalidating an assignment cannot be struck out unless circumstances can be shewn which would be sufficient in other cases to obtain a reformation of the instrument.

Revocation of Assignments. A debtor cannot be compelled to make an assignment. An assignment which is known of or assented to by a creditor is revocable; *Cooper v. Dixon* (1889) 18 O. R. 50; but as soon as an assignment is made known to a single creditor, communicated to a creditor and not dissented from, it is irrevocable, whether executed by a creditor or not; *Nolan v. Donnelly* (1883) 4 O. R. 440; *Nelles v. Maltby* (1883) 5 O. R. 263; *Re Unitt and Prott* (1892) 23 O. R. 78; except that if the assignment be not made to the proper Sheriff or to an assignee consented to by the required number of the debtor's creditors, it may be superseded by a subsequent assignment to such a person; *Anderson v. Glass* (1885) 16 O. R. 592, unless the consent of the required number of creditors has in the meantime been obtained to the first assignment; *Hall v. Fortye* (1889) 17 O. R. 435.

Position of Sheriff as Assignee. An assignee may refuse to accept an assignment, in which case it would be proper for him to disclaim. But a sheriff, being a public officer, must accept, and cannot disclaim; *Brown v. Grove* (1889) 18 O. R. 311; but he is not compelled to act until his costs are paid or tendered s. 14 (4).

Registration of Assignment. Failure to register an assignment will not affect the title of the assignee to the real or chattel property comprised in it, except that a *bona fide* purchaser for value, without actual notice of the assignment, who registered a conveyance of land before the registration of the assignment, would thereby acquire priority; ss. 5, 13. An assignee who fails to register the assignment in the office of the proper County Court Clerk, or to give proper notice by advertisement thereof is liable to penalties in a summary proceeding; s. 14; but if the assignment is to pay a fixed composition to creditors and the remainder to the debtor it is not within the Act; *Gundry v. Johnston* (1896) 28 O. R. 147.

Description of Property. An assignment containing the words of description mentioned in s. 5 is thereby declared to vest in the assignee all the real and personal estate, rights, property, credits and effect whether vested or contingent, belonging to the assignor, except exemptions. It would seem, however, to be doubtful if it would pass immoveable property out of the province; *MacDonald v. Georgian Bay Lumber Co.* (1878) 2 S. C. R. 364; It would not pass the benefit of a covenant of indemnity where the assignor's estate has suffered no damage; *Ball v. Temant* (1894) 21 A. R. 602; but see *Re Perkins, Poyser v. Beyus* (1893) (2 Ch. 182,) or the interest of the assignor in funds not exigible; *Re Unitt and Prott* (1892) 23 O. R. 78.

The description would carry shares in a joint stock company, or a bank, and also terms of payment. Shares not fully paid up in a Company carry with them a liability for the amount unpaid; shares in a bank, though fully paid, a liability to creditors, in the event of liquidation; and terms of years a liability upon covenants running with the land, including a liability for rent; *White v. Hunt* (1871) L. R. 6 Ex. 32. In well-drawn assignments these things are excepted, and the assignor declares himself trustee thereof for the assignee, and appoints the assignee attorney to sell and transfer them. *Re Hughes, Ex parte Hughes* (1893) 1 Q. B. 595, 601.

Exemptions. For list of exemptions see R. S. O. c. 77 as amended and notes thereon pp. 317, 318, 328.

Possession by Assignee. The assignee should at once take possession of the property assigned. But the property does not thereby become in *custodia*

legis. It may be seized for rent or taxes while on the demised premises; *Eacrett v. Kent* (1887) 15 O. R. 9. The assignment will amount to an alienation within the meaning of the Statutory conditions respecting fire insurance; R. S. O. c. 203 s. 168, and the assignee should therefore re-insure the property, or get the Insurer's consent to the alienation. An assignee who refuses to deliver up possession of chattels which another person is entitled to possession is liable for conversion; *Light v. Hawley* (1897) 29 O. R. 25.

Assignment by Company. A company may assign for the benefit of its creditors without the consent of its shareholders; *Whiting v. Hovey* (1886) 13 A. R. 7, 14 S. C. R. 515, but the assignment is an admission of insolvency, and the ground for the making of a Winding Up Order; R. S. O. c. 129 s. 5 (g) but the Court may refuse in its discretion to make such order; *Wakefield v. Hamilton Whip Co.* (1894) 24 O. R. 107. It would seem, however, that the Company being insolvent, cannot be heard to object to the winding up. The objection must come from the majority of the creditors.

Assignment by Firm. It is not within the implied power of a partner to make an assignment for the benefit of creditors of the firm's assets; *Nolan v. Donnelly* (1883) 4 O. R. 440; *Nelles v. Maltby* (1883) 5 O. R. 263, and if one of the partners be an infant, his share will not pass, though he execute the assignment; *Powell v. Calder* (1885) 8 O. R. 505; *Lovell v. Beauchamp* (1894) A. R. 607. Where the assignment is by partners of "all their estate &c." it comprises the partnership property, and the separate property of each partner; *Nelles v. Maltby* (1883) 5 O. R. 263; *Ball v. Temant* (1894) 21 A. R. 602; 25 O. R. 50. It is only to such cases that s. 7 applies. Where a person who is indebted as a partner, and also separately, makes an assignment of his estate, but there is no assignment by the partnership, the partnership creditors may rank on the estate in the same manner as the separate creditors; *Moorehouse v. Bostwick* (1885) 11 A. R. 76; *Macdonald v. Balfour* (1893) 20 A. R. 404. If on assignment by the firm a partner is indebted to a creditor for the whole or any part of his capital, the creditor cannot rank against the partnership. *Lindley on Partnership* 189, 703. *Re Simmons* (1876) 20 L. C. Jur. 296.

One partner may rank against the separate estate of the other for a balance due him on an adjustment of the partnership accounts; *Re Ruby, Trusts Corporation v. Ruby* (1897) 24 A. R. 509.

Where the partnership and separate estates are being concurrently administered, the partnership creditors cannot resort to the separate estate of either partner until the separate creditors have been paid in full, nor can separate creditors resort to the partnership assets until the partnership creditors have been paid in full.

Where one partner has become a surety for the partnership, proof cannot be made against his separate estate as well as the joint estate. *Re Chaffey* (1870) 30 U. C. R. 64.

Priority Over Executions. An assignment has priority over executions, and attachments not completely executed by payment, s. 11; *Atty-Gen. for Ontario v. Atty-Gen. for Canada* (1894) A. C. 189. When the Sheriff has received the money, the execution is "executed by payment" *Clarkson v. Severs* (1889) 17 O. R. 592. Proof of their claims by execution creditors in a mortgage action does not entitle them to the surplus upon a sale made by the Court after the assignment. The surplus must be paid to the assignee; *Carter v. Stone* (1891) 20 O. R. 340. The first execution creditor having an execution in the Sheriff's hands before the assignment is entitled to a lien for the whole of his costs of suit; *Ryan v. Clarkson* (1889) 16 A. R. 311, 17 S. C. R. 251, and for the Sheriff's fees and poundage *Smith v. Antipitzky* (1890) 10 C. L. T. 368, which must be enforced by the retention of the property or sale thereof, if the lien is not satisfied by the assignee; *Gillard v. Milligan* (1897) 28 O. R. 645. It cannot be enforced as a preference by a claim on the estate *ib.* Where the execution is from a Division Court, the Bailiff has a lien for his fees and disbursements, R. S. O. c. 60 s. 241; *Bicknell & Seager's D.C. Acts* vol. 1 p. 47. A judgment for alimony when registered forms an encumbrance upon lands of the husband in the same way as a life annuity charged thereon, and an assignment, does not take precedence over the same; *Abraham v. Abraham* (1890) 19 O. R. 256, 18 A. R. 436.

It was held in *Wood v. Joselin* (1890) 18 A. R. 59 that the assignment would not take precedence over an attachment of a debt in a garnishee proceeding. Since that decision the words "all attachments" have been inserted

in s. 11. It has recently been held in a Division Court action that an assignment would not take precedence over a judgment against a garnishee and the High Court refused to review the decision on a motion for prohibition; *Re Dyer v. Evans* (1899) 19 C. L. T. 195.

Removal of Assignee. There are two ways of removing an assignee. The creditors themselves may do so at a meeting, or he may be removed by a Court or a Judge.

When it is done at a meeting of creditors, the new assignee must be chosen from the County where the debtor resided or carried on business. On the motion the voting is limited to those who have filed proper proofs of claims for \$100 or over, and it is necessary that a majority in both the number and value of creditors voting, should vote in favor of the motion.

An action may be brought to remove an assignee or he may be removed on summary application. He may be removed for the same causes as any other trustee—such as insolvency, misconduct, permanent absence from the country or for failure to properly discharge his duty towards, or to hold an even hand between his *cestui que trust*.

A summary application is governed by s. 8. Notice must, of course, be given to the assignee. The application may be either to a Judge of the High Court, or to the Judge of the County Court where the assignment is registered. The Judge acts as *persona designata* and there would be no appeal against his decision; *Re Pacquette* (1886) 11 P.R. 463; *Re Young* (1891) 14 P.R. 303; *Re Simpson and Clafferty* (1899) 19 C.L.T. 140. The Judge would have power to award costs R.S.O. c. 76. The order would be enforceable under the last mentioned Statute.

The remuneration of the removed assignee could be fixed, if not under s. 31, by the Court under R.S.O. c. 129, see p. 385.

Where an assignee dies, an appointment may be made by the creditors under s. 8. *Re Williams* (1895) 22 A.R. 196, or the power of appointing a new trustee under R.S.O. c. 129 may be exercised, see p. 373.

Claims of Creditors. A creditor must prove his claim by filing with the assignee an affidavit of himself or his agent, stating the amount and nature thereof. The affidavit may be sworn before any person authorized to administer affidavits in the High Court or before a Justice of the Peace or if sworn out of the Province before a Notary Public, s. 27.

If any person who has a claim refuses or neglects to prove it properly, an application may be made to the Judge for an Order calling on the creditor to prove his claim within a time to be limited, or to stand barred from participating in the estate, s. 21. If such an order is not obtained, the assignee is liable to all creditors of whom he has knowledge, notwithstanding no claim has been filed, and notwithstanding an advertisement for creditors; *Carling Brewing & Malting Co. v. Black* (1882) 6 O.R. 441, see notes to R.S.O. c. 129 p. 395.

Claims in the nature of damages, either for tort or for breach of contract, where no judgment has been obtained up to the time of the assignment cannot be proved, and the claimants are not entitled to rank on the estate, nor are they entitled to take any proceedings permitted to a creditor, such as attacking a fraudulent transaction; *Gurofski v. Harris* (1896) 27 O.R. 201; (1896) 23 A.R. 717; *Grant v. West* (1896) 23 A.R. 533; *Mail Printing Co. v. Clarkson* (1898) 25 A.R. 1; *Magann v. Ferguson* (1898) 29 O.R. 235. A surety having given a limited guarantee for an ultimate balance must pay the amount guaranteed before the creditor proves his claim, or he cannot put in a claim at all; *Martin v. McMullen* (1890) 19 O.R. 230; 20 O.R. 257; 18 A.R. 559; *In re Sass* (1896) 2 Q.B. 12. A solicitor cannot rank on the estate for costs incurred by the debtor after the assignment, though the proceeding was then pending *Re Dumbrell* (1884) 10 P.R. 216.

Valuing Securities. Where the insolvent is secondarily liable in respect of several distinct items, e.g. notes of several customers, each security must be separately valued. The creditor will not be allowed to lump his securities in one valuation. If any such security should be paid in full, any dividend received in respect thereof would have to be refunded; *Re Morris, James v. London & County Banking Co.* (1898) 2 Ch. 413, (1899) 1 Ch. 485; *Young v. Spiers* (1882) 16 O.R. 672.

A creditor must place a value on any security he holds on the estate of the debtor, such as a chattel mortgage or mortgage of real estate owned by the

debtor. The principle is that a man is not allowed to prove against an estate and retain a security which, if given up, would go to augment the estate against which he proves; *Ex parte West Riding Banking Co.*, *Re Turner* (1881) 19 Ch. D. 105, 112.

A security must also be valued if it covers the estate of a third party, for whom the debtor is only secondarily liable—for instance, the debtor may hold a mortgage on the farm of John Doe, and may assign it over to a creditor, who accepts it as payment, on any deficiency being guaranteed by the debtor. Although the creditor is entitled to receive the full amount of the mortgage from John Doe, the debtor is liable to make up whatever amount cannot be recovered from Doe. The party primarily liable to pay that mortgage is the mortgagor, John Doe, and the debtor is only secondarily liable. In all cases in which another person is liable to indemnify the debtor, his liability must be valued. The creditor may be in a position to sue either or both, but that is not the test. It must be looked at as between the parties themselves. Who is the principal debtor? If the insolvent is not a principal debtor, then the liability and any security held therefor must be valued; *Glanville v. Strachan* (1898) 29 O.R. 373, but see *Bell v. Ottawa Trust Co.* (1897) 28 O.R. 518. Negotiable paper, notes and bills of exchange, endorsed by the insolvent, must be valued as regards the makers or acceptor's liability if the claim is made before the paper is due; but if the paper is overdue, the creditor is not called on to value it. If the claim is filed before the paper is due, and the paper is not met at maturity, the claim may be amended by striking out the valuation, s. 20 (6). Securities held upon a joint estate when there is an individual liability of one of the joint debtors need not be valued in proving against the separate estate, and securities held upon the separate estate of a partner need not be valued in proving against the joint estate; *Re Jones* (1878) 2 A.R. 626; *In re Chaffey* (1870) 30 U.C.R. 64; *Re Baker* (1871) 3 Chy. Chamb. R. 499; *Ex parte West Riding Banking Co.*, *Re Turner* (1881) 19 Ch. D. 105.

Where a third party has guaranteed a debt of the insolvents, his liability need not be valued, as the insolvent is primarily liable; *Martin v. McMullen* (1890) 19 O.R. 230; 20 O.R. 257; 18 A.R. 559.

If both guarantor and debtor have assigned, and the creditors seeks to rank on the estate of the guarantor, he must value the debtor's liability, as he is entitled to his dividend from the debtor's estate, and to that extent is secured; *Wyld v. Clarkson* (1886) 12 O.R. 589.

If the claimant will not value his security, an application may be made to a Judge for an order compelling him to value, or to be barred from participating to the face value of his security.

A creditor does not omit to value his security by stating that it is worthless; *Re Piers*, *Ex parte Piers* (1898) 1 Q.B. 627.

Costs reasonably incurred in respect of a security may be deducted in estimating the value of the security; *Ex parte Carr*, *Re Hofmann* (1879) 11 Ch.D. 62.

Preference claims. The following claims are preferential:—

- (1) Rent due to the landlord of the premises where goods of the estate may be distrained to the extent of the realizable value of the goods, see *infra*.
- (2) The assignee's expenses including moneys disbursed in discharging liens or in legal proceedings and the assignee's remuneration, see *infra*.
- (3) Wages due to persons in the employment of the debtor, *R. S. O.* 1897, c. 156, *infra*.

If the assets should be insufficient to discharge all these in full, the rent would appear to take priority, but the assignee's indemnity and remuneration would take priority over the claims for wages, except for costs of litigation or other unusual expenses not assented to. *R.S.O. c. 156, s. 9*.

The assignee must, of course, take the property subject to any incumbrances or liens thereon and can acquire no priority over the same.

Moneys due to a creditor in respect of securities taken over by the creditor thereon, must be paid out of the estate so soon as the security is realized. For such money to the extent of the amount realized on the security less, perhaps, costs of realization, it is submitted the creditor would have priority over other claims, but if the security did not realize sufficient to pay the amount at which it was taken over, it would seem probable that he would have priority only over the general creditors for the deficiency.

The Crown has no priority; *Clarkson v. Atty.-Gen. for Canada* (1889) 16 A. R. 202.

Following trust funds. If funds of which the debtor was a trustee or agent can be traced into specific property, or into a specific fund, or are earmarked in the debtor's hands, the assignee will take the property or money subject to the trust; *Long v. Carter* (1896) 23 A.R. 121; 26 S. C. R. 430, and the *cestui que trust* could replevy the property if it consisted of goods, ib. But if the trust funds cannot be so traced the *cestui que trust* can rank only as an ordinary creditor; *Culhane v. Stuart* (1882) 6 O.R. 97. See 48 Central L. J. 350.

Rent. Section 34 of R.S.O. chapter 170, restricts the preferential claim of the landlord of an insolvent debtor to the arrears for one year previous to, and for three months following the execution of the assignment, and for so long after that period as the assignee retains possession. The landlord's right to a preference depends on whether there is anything distrainable upon the premises. If there is nothing distrainable, the landlord has no preference whatever, for he has given up no advantage over other creditors by consenting to the assignment; *Magann v. Ferguson* (1898) 29 O.R. 235. But actual distress is not necessary to preserve the landlord's right. He is entitled to be paid in full if there were sufficient goods of a distrainable nature upon the premises at the date of the assignment; *Lazier v. Henderson* (1898) 29 O.R. 673.

The three months rent which may be allowed as a preference after the date of the assignment means "rent becoming due within three months next following the date of the assignment," so where the assignment was made thirteen days after a quarter's rent in advance had become due, and within three months thereafter another quarter's rent in advance became due, the preference was held to extend to the whole of the latter quarter's rent; *Lazier v. Henderson* (1898) 29 O.R. 673; *Tew v. Toronto Savings & Loan Co.* (1898) 30 O.R. 76.

But no proviso in a lease can be recognized to accelerate future payments of rent beyond the period of three months from the date of the assignment; *Langley v. Meir* (1898) 25 A.R. 372; see also *Linton v. Imperial Hotel Coy.* (1889) 16 A.R. 337; *Re Hoskins* (1877) 1 A.R. 379.

The limitation of the landlord's lien does not release anyone, but only the estate. The tenant is still liable for any other arrears, so also is a surety for the tenant, also the goods as against a chattel mortgagee in possession before the date of the assignment; *Young v. Snith* (1878) 29 C.P. 109; *Tuck v. Fryson* (1829) 6 Bing. 321; *Brocklehurst v. Law* (1857) 7 E. & B. 176; *Railton v. Wood* (1890) 15 App. Cas. 363, and if there is no surrender or assignment of the lease, and it has become vested in the assignee, he may continue personally liable therefor; *White v. Hunt* (1871) L. R. 6 Ex. 32.

Forfeiture of the term by reason of the assignment cannot be claimed, notwithstanding any power of forfeiture given by the lease itself, if the assignee within one month elects to retain the premises for the whole of the remainder of the term, R. S. O. 170 s. 34 (2); *Munro v. Waller* (1896) 28 O.R. 29; *Mitchell v. Macauley* (1893) 20 A.R. 272.

Suing in Name of Assignee. The assignee is the representative of the body of creditors; *Clarkson v. McMaster* (1895) S.C.R. 96. He is given exclusive right to attack transactions made by the insolvent in fraud of creditors; *Hargrave v. Elliot* (1896) 28 O. R. 152, and to rescind agreements and other instruments entered into by his assignor with that intent. No creditor can bring any such action except in the assignee's name. A Judge may grant leave to sue in the name of the assignee on it appearing that the assignee, under the authority of the creditors or the Inspectors of the estate, refuses or neglects to take the required proceedings. Such an action when brought is at the risk of, and for the benefit of only such creditors who join in the application or action. The order should as a rule be made by the Judge of the County Court; *Re Evans and Clarke* (1897) *Meredith C. J.* (unreported), but it is often made by a Judge of the High Court.

If proceedings were commenced before the assignment, and the assignee refuses to continue them, a similar application may be made; *Gage v. Douglas* (1891) 14 P.R. 126. If not made any benefit derived from the proceedings will go to the estate after payment of costs; *Parks v. St. George* (1822) 2 O.R. 342. Care must be taken to see that the order provides for all the relief which is to be sought in the action; *Campbell v. Hally* (1895) 22 A.R. 217. The order may provide "that the applicants may, and they are hereby authorized, to take and continue proceedings (heretofore commenced) for the purpose of attacking certain instruments (assignments and chattel mortgages), the securi-

29 out-63
30 out-76
Law v. Toronto Savings Co

ties held by one....., and to ask to have same declared void (insert such other relief as it may be intended to seek), such proceedings to be at their own expense and risk, upon giving indemnity to the assignee to his satisfaction against the costs of such proceedings." And should further provide that "all benefit derived from such proceedings, shall belong exclusively to the applicants and such other creditors as may within four days of notice of the order agree and signify their agreement in writing to contribute to the expense and risk of such litigation;" Barber v. Crathern (1897) 28 O.R. 615.

Creditors may, with the assignee's consent, bring action without such an order, but the proceeds recovered belong to the general estate, and not exclusively to the creditors joining in the action; Doull v. Kopman (1895) 22 A.R. 447. A creditor suing in the name of the assignee will be bound by a compromise made by the assignee before the order giving leave to sue was made; Campbell v. Hally (1895) 22 A.R. 217; Keys v. Kirkpatrick (1890) 19 O.R. 572, but not by a final order of foreclosure, made in an action to enforce the impeached security although the assignee was a defendant. Glass v. Grant (1888) 16 O.R. 233, nor by a dismissal of an action impeaching the same security brought by other creditors before the assignment; Smith v. Doyle (1879) 4 A.R. 471.

A creditor who obtains an order to sue in the assignee's name cannot recover by virtue of the proceedings more than the amount of his claim at the time of obtaining the order, and subsequent interest and full costs; McTavish v. Rogers (1896) 23 A.R. 17, adopted as law on the revision of the Statutes.

The creditor who is attacked may join in the indemnity to the assignee and may then in case of his failure to sustain his security share in the fruits of the attack upon himself; Barber v. Crathern (1897) 28 O.R. 615.

Although the assignee's exclusive right of suing extends only to the rescission of agreements, etc., in fraud of creditors, or in violation of the Assignments Act, he, as well as other creditors, may still take advantage of irregularities or defects in the making or renewal of a Chattel Mortgage; Kerry v. James (1894) 21 A.R. 338, see R.S.O. c. 148 pp. 345, 350.

An assignee under the Act, except where expressly given them by Statute, takes no higher rights under the assignment than his assignor had. McCall v. McDonald (1886) 13 S.C.R. 256. He cannot obtain priority over a previous transferee; Thibaudeau v. Paul (1895) 26 O.R. 385, nor can he set up a plea that a bank was acting *ultra vires* in loaning money to the insolvent on securities not mentioned in or allowable by the Act relating to Savings Banks, R.S.C. cap. 122, sec. 20; Rolland v. Caisse d'Economie de Quebec (1895) 24 S.C.R. 405; or under the Bank Act, Conn v. Smith (1897) 28 O.R. 629.

An assignee cannot refuse to carry out an agreement made previously by the debtor, to give to an endorser a chattel mortgage, securing him against liability, unless the same is invalid as against him; Kerry v. James (1894) 21 A.R. 338.

Such an agreement must now be in writing, and filed with the County Court Clerk as provided by The Chattel Mortgage Act, R.S.O. c. 148, s. 11; Hope v. May (1897) 24 A.R. 16.

Renewal of Chattel Mortgages. The assignee may renew a chattel mortgage given to the debtor without the execution and registration of a specific assignment of that mortgage. The renewal statement and affidavit alleging title through the assignment for the benefit of creditors is sufficient; Fleming v. Ryan (1894) 21 A.R. 39. This decision was adopted by a clause inserted in the Chattel Mortgage Act in 1894, now R.S.O. c. 148, s. 22.

Assignee must not profit from his trust. The assignee ought not to purchase the goods of the insolvent, and if he does so, the transaction is scrutinized closely, and even where he purchased at the request of inspectors, and after futile efforts to sell by public auction and by private tender, and after notice of the intended sale to him had been sent to each creditor calling for objections, if any, the sale was set aside on evidence that at the time of completing the purchase the assignee knew of a possible purchaser, to whom he afterwards sold at a large profit, and that he had not disclosed this information to the inspector; Morrison v. Watts (1892) 19 A. R. 622.

An assignee who is a solicitor cannot charge profit costs for professional services; Re Kelly (1897) 17 C. L. T. 65; Re Dickinson (1892) 2 B. C. R. 262, and if he should recover any from an adverse litigant, they would belong to the

estate *Re Corsellia, Lawton v. Elwes* (1887) 34 Ch. D. 675, but would no doubt be considered in fixing his remuneration.

Examination of Assignor. The creditors may resolve at a general meeting, or the inspectors may request in writing, that the Assignee should cause the Assignor, or any clerk of his to, be examined. The examination may be a very comprehensive one, relating back even to the date of the earliest claim existing at the date of the assignment, and be a searching enquiry as to the means the debtor then had, or since acquired, and how he had disposed of them. The examination is of the same nature as the ordinary examination of a judgment debtor. The clerk of a firm lately dissolved, but not continued in the employ of the member continuing the business is examinable; *Re Guinane* (1898) 18 C. L. T. 341, 18 P. R. 208.

A person attending in answer to the appointment, but refusing to be sworn, may be ordered to attend and submit to examination, at his own expense; and on further default, process of contempt may issue; *Uhrig v. Uhrig* (1892) 15 P. R. 53.

A notice of motion to commit for contempt of Court, or for unsatisfactory answers must be served personally on the person whose liberty is at stake; *Mann v. Perry* (1881) 50 L. J. Chy. 251; *Re Harnden, Harnden v. Harnden* (1885) 11 P. R. 35. Motions to Commit must be made before a Judge in Chambers; *Ward v. Ward* (1882) 18 C. L. J. 166; *Royal Canadian Bank v. Lockman* (1877) 7 P. R. 102.

If the examination is before a Judge having power to entertain an application to commit, such an application may be made at once without further notice; *Baird v. Story* (1864) 23 U. C. R. 624; *Ponton v. Bullen* (1864) 2 E. & A. 379.

Satisfactory Answers. A notice of Motion for Committal for unsatisfactory answers should particularize the answers complained of; *Foster v. Van Vormer* (1888) 12 P. R. 597. The broad test to be applied in gauging the character of the answers in order to determine whether they are satisfactory is, having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that a full and true disclosure has been made; *Graham v. Devlin* (1889) 13 P. R. 245. Answers are not unsatisfactory because they do not account for the assets in a proper manner; *Hobbs v. Scott* (1864) 23 U. C. R. 619; *Crooks v. Stroud* (1883) 10 P. R. 131. The debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all; *Lemon v. Lemon* (1874) 6 P. R. 184.

It is the debtor's duty to give such explanation of his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out as best they may; *Foster v. Van Vormer* (1888) 12 P. R. 597; *Peoples Loan and Deposit Co. v. Dale* (1899) 19 C. L. T. 82. A married woman is not exempt from committal; *Metropolitan Loan and S. Co. v. Mara* (1880) 8 P. R. 355.

An application for committal on the ground of concealing or making away with assets is in the nature of a trial for a criminal offence, and must be conducted as strictly, and the debtor is entitled to the benefit of any doubt; *Hobbs v. Scott* (1864) 23 U. C. R. 619; *Lemon v. Lemon* (1874) 6 P. R. 184.

Contestation of Claims. There are three methods provided by the Act for contesting claims of creditors;

- (1) By service of notice of contestation by the assignee, s. 22.
- (2) By a creditor objecting to a dividend sheet, s. 29.
- (3) By the assignee taking proceedings under The Creditors Relief Act, s. 30.

It may be that in a proper case, the estate might be administered by the Court in an action to enforce the trusts, and in such case the claim of any creditor might be attacked.

Where the assignee serves a notice of contestation, the claim of the creditor against the estate is barred, unless an action is commenced within thirty days, or such further time as may be granted under s. 22. An extension should, it seems, be obtained within the thirty days; *Kennedy v. Purcell* (1888) 14 S. C. R. 453; 28 C. L. J. 99. An assignee would be bound by a judgment recovered against the debtor before the assignment, unless it was fraudulent; *Re Hague, Traders' Bank v. Murray* (1887) 13 O. R. 727, but a judgment after the assignment is no evidence against the assignee; *Stewart v. Gage* (1887) 13 O. R. 458. On a contestation, the judgment, if in favor of the creditor,

merely declares his right to rank; *Grant v. West* (1896) 23 A.R. 533. Where the claim is under \$400, the action should be in the County Court; R.S.O. c. 55, s. 23 (14), p. 224. Where a claim appearing on the dividend sheet is objected to, the proper course would appear to be for the assignee to take the proceedings under the Creditors Relief Act. A decision of the County Court Judge on a contestation under s. 30 is not appealable; *Re Simpson and Clafferty* (1899) 19 C.L.T. 140.

Set-off. All rights of set-off existing against a debtor at the time of the assignment are preserved so far as the claim is not affected by provisions of statutes against frauds or fraudulent preferences; *Moody v. Canadian Bank of Commerce* (1891) 14 P.R. 258. And moneys realized by a mortgagee after the assignment may be applied upon and set-off against an unsecured debt due him by the assignor; *Stephens v. Boisseau* (1896) 23 A.R. 230; 26 S.C.R. 437. So may claims purchased before the assignment for the express purpose of setting them off against a debt due to the assignor; *Thibaudeau v. Garland* (1896) 27 O.R. 391, and also claims for unliquidated damages arising out of the same contract as the debt; *Newfoundland (Government of) v. Newfoundland Ry. Co.* (1888) 13 App. Cas. 199; *Mason v. Macdonald* (1880) 45 U.C.R. 113; and a debt due by a mortgagee to a mortgagor may be set-off against the mortgage debt; *Court v. Holland* (1881) 29 Gr. 19; but money payable to an assignee *qua* assignee, and not merely in right of the debtor cannot be reduced by setting off a claim against the assignor e.g. a debt due by the assignor cannot be set-off against purchase money due to the assignee, nor against costs payable to the assignee by an adverse litigant creditor; *Re Rogers and Farewell* (1890) 14 P.R. 38.

Advertisement for Creditors. S. 38 of R.S.O. c. 129, provides the machinery for the protection of an assignee against claims of which he had no notice. See notes to that section, p. 395.

Time for Administration. In analogy to the rules applicable to executors, an assignee has a year from the time of the assignment to wind up the estate; *Ontario Bank v. Lamont* (1882) 6 O.R. 147. A creditor should not, however, without due enquiry commence administration proceedings, although the year may have expired. The assets may be unsaleable, or the assignee may have other good reasons for the failure to wind up the estate. Costs of unnecessary administration proceedings may be imposed on the plaintiff. *Rosebatch v. Parry* (1879) 27 Gr. 193.

Accounts. The assignee should have his accounts ready at all times and should afford all reasonable facilities for their inspection and give all information reasonably required at any time. But he is not bound to render any copy of his accounts to any creditor unless such creditor pays or tenders him reasonable compensation for making the same; *Sandford v. Porter* (1889) 16 A.R. 565.

Indemnity and Remuneration of Assignee. The assignee is entitled to be reimbursed out of the estate, all sums properly expended by him, see R.S.O. c. 129, s. 3 and notes thereon, p. 389. Costs of contesting a creditor's claim under the authority of the inspectors will be allowed; *Smith v. Beal* (1894) 25 O.R. 368. The assignee is personally liable for costs of proceedings to which he is a party; *MacDonald v. Balfour* (1893) 20 A.R. 404; *Smith v. Williamson* (1889) 13 P.R. 126, and will only be allowed to reimburse himself when the proceedings were proper. Where an action was brought to set aside a chattel mortgage without the authority of the creditors or inspector, and was unsuccessful the costs were not allowed the assignee; *Hyman v. Howell* (1887) 13 O.R. 400. The charges of the assignee's solicitor for professional services will be allowed, but they may be taxed at the instance of a creditor; *Sandford v. Porter* (1889) 16 A.R. 565. Costs or expenses incurred before the assignment are not allowable; *Ex parte Lovegrove* (1834) 3 Dea. & Ch. 763, see also notes to R.S.O. c. 129.

There is no hard and fast rule as to the amount of remuneration to be allowed, see notes to R.S.O. c. 129, p. 397. The assignee may call a meeting of the creditors to fix his remuneration. The purpose of the meeting must be expressed in the notice, and the meeting must be called in the manner prescribed by s. 17. If no such meeting is called, or if the remuneration is not fixed thereat, the Inspectors may fix the remuneration. An appeal to the County Judge of the County where the assignment is registered against the amount of the remuneration may be made by the assignee or any of the

creditors. If no allowance is fixed by either the creditors or inspectors the assignee may deduct 5 per cent. of the gross receipts subject to revision by the Judge at the instance of any creditor, or at the instance of the assignee if the question has been properly brought before a meeting of the creditors, s. 32.

The creditors are not personally responsible for the remuneration or disbursements of the assignee, although by resolution they may have instructed proceedings which were unsuccessful and which caused a deficiency in the estate; Johnston v. Dulmage (1899) 30 O.R. 233.

Where all the work is done by the assignee's partner resident out of Ontario he will not be allowed for his services or other expenses; Tennant v. Macewan (1897) 24 A.R. 132.

Inspectors and their Obligations. Inspectors should be appointed at the first meeting of the creditors, and the notice for that meeting should state the appointment as one of the purposes of the meeting. Inspectors will not be allowed to purchase the estate without the consent of the creditors properly given at a properly called meeting; Morrison v. Watts (1892) 19 A.R. 622; Thompson v. Clarkson (1891) 21 O.R. 421, and all the facts must be communicated. The inspectors must make no profit out of their office; Segsworth v. Anderson (1893) 23 O.R. 573, 21 A.R. 241, 24 S.C.R. 699, but one may act as solicitor and receive the proper remuneration; Strachan v. Ruttan (1892) 15 P.R. 109. Inspectors can be paid nothing for loss of time, except under a resolution at a meeting called for the purpose, s. 33. The resolution must not allow more than \$4 a day. Whether this means \$4 for each day upon which one or more meetings of inspectors is held, or \$4 for each day upon which an inspector does anything for the estate pursuant to his duties or instructions, or \$4 for an expenditure in the affairs of the estate of the number of hours time which would be a day's work, or any of these three is a question yet unsolved by judicial decision.

CHAPTER 150.

An Act respecting Contracts in relation to Goods entrusted to Agents.

INTERPRETATION, s. 1.	NOT TO AUTHORIZE LIEN, s. 8.
AGENT ENTRUSTED WITH GOODS TO BE DEEMED OWNER FOR CERTAIN PURPOSES, s. 2.	CONTRACTS WITH AGENTS MUST BE BONA FIDE, s. 9.
AGENT IN POSSESSION TO BE DEEMED ENTRUSTED, s. 3.	BONA FIDE TRANSACTIONS TO BIND OWNERS, s. 10.
AGENT IN POSSESSION OF DOCUMENT OF TITLE DEEMED ENTRUSTED WITH THE GOODS REPRESENTED BY IT, ss. 3, 4.	BONA FIDE LOAN OR ADVANCE WHEN DEEMED MADE ON SECURITY OF GOODS, s. 11.
CONTRACTS FOR PURCHASE, WHEN VALID, s. 5.	CONTRACT WITH SUB-AGENTS WHEN DEEMED MADE WITH AGENTS, s. 12.
CONTRACTS FOR LIEN, ETC., WHEN VALID, s. 6.	PAYMENTS WHEN DEEMED ADVANCES, s. 13.
PLEDGE OF DOCUMENT OF TITLE TO BE DEEMED PLEDGE OF GOODS REPRESENTED BY IT, s. 7.	CIVIL LIABILITY OF AGENT, s. 14.
ANTECEDENT DEBT DUE BY AGENT	CONVICTION FOR THEFT, s. 15.
	OWNER MAY REDEEM GOODS PLEDGED BY AGENT, s. 16.
	REMEDY OF OWNER AGAINST ESTATE OF INSOLVENT AGENT, s. 17.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Where the following words occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

1. "Goods" shall include all personal property of whatever nature or kind soever; Interpretation.

2. "Shipped" shall mean the carriage of goods, whether by land or by water; "Shipped."

3. "Document of title" shall include every bill of lading, warehouse-keeper's or wharfinger's receipt or order for delivery of goods, every bill of inspection of pot or pearl ashes and every other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. "Document of title."

When and to
what extent
agent to be
deemed
owner.

2. Any agent entrusted with the possession of goods or of the documents of title thereto, shall be deemed the owner thereof for the following purposes, that is to say :

1. To make a sale or contract, as in section 5 mentioned ;

2. To entitle the consignee of goods consigned by such agent to a lien thereon for any money or negotiable security advanced or given by him to or for the use of such agent, or received by the agent for the use of the consignee, in like manner as if such agent were the true owner of the goods ;

3. To give validity to any contract or agreement by way of pledge, lien or security *bona fide* made with such agent, as well for an original loan, advance or payment made upon the security of the goods or documents, as for any further or continuing advance in respect thereof ; and

4. To make such contract binding upon the owner of the goods and on all other persons interested therein, notwithstanding the person claiming such pledge or lien had notice that he was contracting only with an agent. R. S. O. 1887, c. 128, s. 2.

Agent in pos-
session to be
deemed en-
trusted.

3. Every agent in possession of goods or documents of title as aforesaid shall, for the purposes of this Act, be taken to have been entrusted therewith by the owner, unless the contrary is shewn in evidence. R. S. O. 1887, c. 128, s. 3.

Agent pos-
sessed of docu-
ment of title to
be deemed en-
trusted with
goods repre-
sented by it.

4. Any agent entrusted as aforesaid and possessed of any document of title, whether derived immediately from the owner of the goods or obtained by reason of the agent having been entrusted with the possession of the goods or of any document of title thereto, shall be deemed to be entrusted with the possession of the goods represented by such document of title. R. S. O. 1887, c. 128, s. 4.

What con-
tracts for
purchase to
be valid.

5. Any person may contract for the purchase of goods with any agent entrusted with the possession thereof, or to whom the same may be consigned, and may receive and pay for the same to such agent ; and such contract and payment shall be binding upon the owner of the goods notwithstanding the purchaser has notice that he is contracting only with an agent. The consideration necessary for the validity of a purchase under this section may be either a payment in cash or the delivery or transfer of other goods, or in part cash and in part the delivery or transfer of other goods. R. S. O. 1887, c. 128, s. 5 ; 57 V. c. 39, s. 1.

What con-
tracts for lien
valid.

6. In case any person has a valid lien and security on any goods or document of title or negotiable security in respect of a previous advance upon a contract with an agent, and in case he delivers up the same to such agent upon a contract for the pledge, lien or security of other goods or of another document

or security by such agent delivered to him in exchange, to be held upon the same lien as the goods, document or security so delivered up—then such new contract, if *bona fide*, shall be deemed a valid contract made in consideration of a present advance of money within this Act, but the lien acquired under such new contract on the goods, document or security deposited in exchange shall not exceed the value of the goods, document or security so delivered up and exchanged. R. S. O. 1887, c. 128, s. 6.

7. All contracts pledging or giving a lien upon any such document of title shall be deemed a pledge of and lien upon the goods to which it relates, and the agent shall be deemed the possessor of the goods or documents of title, whether the same are in his actual custody or are held by any other person for him or subject to his control. R. S. O. 1887, c. 128, s. 7.

Pledge of document of title to be deemed pledge of goods represented by it.

8. No antecedent debt owing from any agent entrusted as aforesaid, shall authorize any lien or pledge in respect of such debt, nor shall it authorize such agent to deviate from any express orders or authority received from his principal. R. S. O. 1887, c. 128, s. 8.

Antecedent debt not to authorize pledge.

9. Such contracts only shall be valid as are herein mentioned, and such loans, advances and exchanges only shall be valid as are made *bona fide* and without notice that the agent making the same has no authority so to do, or that he is acting *mala fide* against the owner of the goods. R. S. O. 1887, c. 128, s. 9.

Contracts must be *bona fide*.

10. All *bona fide* loans, advances and exchanges as aforesaid though made with notice of the agent not being the owner, but without notice of his acting without authority, shall bind the owner and all other persons interested in the goods, document or security, as the case may be. R. S. O. 1887, c. 128, s. 10.

Bona fide transactions with agents to bind owners.

11. Where any loan or advance is *bona fide* made to an agent entrusted with and in possession of goods or documents of title as aforesaid on the faith of any contract in writing to consign, deposit, transfer or deliver such goods or documents of title, and the same are actually received by the person making the loan or advance, either at the time of the contract or at a time subsequent thereto, without notice that the agent is not authorized to make the pledge or security, such loan or advance shall be deemed a loan or advance upon the security of the goods or documents of title within this Act. R. S. O. 1887, c. 128, s. 11.

Bona fide loans or advances when deemed authorized.

12. Every contract, whether made directly with the agent as aforesaid or with any clerk or other person on his behalf, shall be deemed a contract with such agent. R. S. O. 1887, c. 128, s. 12.

What contracts to be considered to be made with agent.

Payments,
when deemed
advances.

13. Every payment, whether made by money, bills of exchange or other negotiable security, shall be deemed an advance within this Act. R. S. O. 1887, c. 128, s. 13.

Other liability
of agents not
to be affected.

14. Nothing herein contained shall lessen, alter or affect the civil responsibility of any agent for the breach of any duty or contract or the non-fulfilment of his orders or authority, in respect of any such contract, agreement, lien or pledge as aforesaid. R. S. O. 1887, c. 128, s. 14.

Conviction for
theft not
admissible in
evidence.

15. The conviction of any agent for theft, stealing or other similar crime shall not be received in evidence in any action against him. R. S. O. 1887, c. 128, s. 15.

Owners may
redeem goods
pledged.

16. Nothing herein contained shall prevent the owner from redeeming any goods or documents of title pledged as aforesaid, at any time before the same have been sold, upon repayment of the amount of the lien thereon or restoration of the securities in respect of which the lien exists, and upon payment or satisfaction to the agent of any sum of money for or in respect of which such agent is entitled to retain the goods or documents, by way of lien against such owner; or shall prevent the owner from recovering from the person with whom any goods or documents have been pledged, or who has any lien thereon, any balance or sum of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of the pledge or lien under the contract. R. S. O. 1887, c. 128, s. 16.

Remedy of
the owner
against the
estate of
insolvent
agent.

17. In case of the insolvency of any such agent, and in case the owner of the goods redeems the same, he shall, in respect of the sum paid by him on account of the agent for such redemption, be held to have paid the same for the use of such agent before his insolvency, or in case the goods have not been so redeemed, the owner shall be deemed a creditor of the agent for the value of the goods so pledged at the time of the pledge, and may in either case prove for or set-off the sum so paid, or the value of such goods, as the case may be. R. S. O. 1887, c. 128, s. 17.

NOTES.

English Law. The Act respecting contracts in relation to goods entrusted to agents is commonly called the Factors Act. It was taken from the English Act, 5 & 6 Vict. c. 39. That Act was amended in several important respects, to remedy defects disclosed by judicial decisions, in 1877 (40 & 41 Vict. c. 39) and was entirely repealed in 1889 by 52 & 53 Vict. c. 45. The law in England is now embodied in the last mentioned Statute. With the exception of the concluding clause of s. 5, none of the provisions of the English Acts of 1877 and 1889 have been re-enacted in Ontario. English decisions since that date and modern English text books do not therefore afford much assistance towards elucidating questions which arise under the Ontario Act.

Factor. A factor is a mercantile agent who in the customary course of his business as such agent is intrusted with the possession or control of goods, wares or merchandise for sale on commission; *Baring v. Corrie* (1818) 2 B. & Ald. 137; 20 R.R. 383; *Ex parte Dixon* (1876) 4 Ch. D. 133, 137; *Stevens v. Biller* (1883) 25 Ch. D. 31.

Object of the Act. "The rule not merely of English Common Law, but I take it of Roman Civil Law, and, I apprehend, of all the old laws of Europe, by which I mean the Laws existing before the *Code Napoleon*, that no man could confer a greater title than he himself had, has been found in modern practice to be inconvenient to its full extent in commercial transactions, especially since the practice of advancing money upon the security of goods and merchandise came to be so important as it is; and I quite agree that there have therefore been modifications of that principle introduced into the law of this country, and into the law of Canada, and I dare say, into the laws of other countries. These modifications were introduced in England by the Factors Acts which define and regulate and show to what extent the modifications are given; they at once modify the law and show how far it is to be modified; per Lord Blackburn; *City Bank v. Barrow* (1880) 5 App. Cas. 664, 677, 678.

The intention of the Factors Act was that where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance; *Cole v. North Western Bank* (1875) L.R. 10 C.P. 354.

Law Before the Act. At common law a person in possession of goods could not confer on another either by sale or by pledge any better title than he himself had. To this general rule there was an exception of sales in market overt of which there were none in Ontario; *Hargreave v. Spink* (1892) 1 Q.B. 25, and an apparent exception where the person in possession had a title defeasible on account of fraud; *White v. Garden* (1851) 10 C.B. 919; *Pease v. Gloahec* (1866) L.R. 1 P.C. 219; *Stoeser v. Springer* (1882) 7 A.R. 497.

But a seller or pledger although not the owner could of course confer a title if he had the authority of the owner to sell or pledge, and if the owner of the goods had so acted as to clothe the seller or pledger with *apparent* authority to sell or pledge, he was at common law precluded as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited; *Cole v. North Western Bank* (1875) L. R. 10, C.P. 354. Such is still the law applicable to all cases in which the Factors Act is not applicable; *Bush v. Fry* (1887) 15 O.R. 122.

Where lead had been sent to a wharfinger who was accustomed to sell lead from his wharf, but had never sold any for the plaintiff, and it appeared that the lead of the plaintiff had been sent to him as wharfinger only, Lord Ellenborough ruled that he had no color of authority to sell the lead and no one could derive title from such a tortious conversion; *Wilkinson v. King* (1809) 2 Camp. 335. But where goods were at plaintiff's request transferred into the name of a person who pursued the public business of a broker and agent for

sale it was held that he had an implied authority to sell; *Pickering v. Busk* (1812) 15 East. 38; 13 R.R. 304. The proper question for the jury, if the question arises upon the evidence, is, did the real owner of the goods by his conduct enable the agent to hold himself forth to the world as having not the possession only, but the property; *Dyer v. Pearson* (1824) 3 B. & C. 38; 27 R.R. 286. The purchaser or pawnee is entitled to protection against him who permits another to deal with his property as if it were his own; *Williams v. Barton* (1825) 3 Bing. 139. There must therefore be that which amounts to an estoppel within the doctrine enunciated in the well known cases of *Pickard v. Sears* (1837) 6 A. & E. 469; *Freeman v. Cook* (1848) 2 Ex. 654; and *Cornish v. Abingdon* (1859) 4 H. & N. 549; and the rules deduced therefrom by Lord Esher in *Carr v. London and North Western Ry. Co.* (1875) L.R. 10 C.P. 316; see 3 C.L.T. 223. In all the cases decided on this principle, in order that a party should be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him; *Johnson v. Credit Lyonnais Co.* (1877) 3 C.P.D. 32, 40. It must be some act, conduct or default in the very transaction in question; *Arnold v. Cheque Bank* (1876) 1 C.P.D. 578, 587; Chief Justice Burton in *Walker v. Hyman* (1877) 1 A.R. 352, said that to make the doctrine applicable, two things must concur, (1) the party must so conduct himself that a reasonable man would consider it in the light of a representation and believe it was meant that he should act upon it, and (2) the party for or to whom it was made must have acted on it as true. A declaration made in general terms, or under such circumstances as to indicate that it was intended to reach or influence a third person may be sufficient, however, to work an estoppel although there was no representation to the party claiming the benefit; *Mason v. Bickle* (1878) 2 A.R. 302. Painting a bailee's name on a safe is not a representation that he is the owner thereof; *Walker v. Hyman* (1877) 1 A.R. 345.

A misrepresentation not meant to and which does not bring about a sale will not work an estoppel; *Freeman v. Cook* (1848) 2 Ex. 654.

An owner who stands by while a third party gives a lien upon his goods will be bound if a third party after reference to the holders of the lien purchases the goods; *Gregg v. Wells* (1839) 10 A. & E. 90.

Returning a note taken for the purchase money on a conditional sale to the owner thereof on receiving a renewal is not a representation that the purchase money is paid; *Mason v. Bickle* (1878) 2 A.R. 302.

Sending certificates of stock with blank transfers to a broker to have a registration made in the names of the brokers of the registered owner, (the blank transfers not being countersigned by the registered owner) is not a representation that the broker has authority to sell or pledge the shares; *Colonial Bank v.ady* (1899) App. Cas. 207.

Where the true owner of goods in a warehouse instructed the warehouseman to transfer them to the order of F, a purchaser from F, was held to have obtained a good title; *Henderson v. Williams* (1895) 1 Q.B. 521. In a previous case it had been decided that a person who, by claiming to represent other persons, had obtained a delivery order for goods could not give a good title to the purchaser as the owner never contracted with him; *K. v. Merry* (1856) 1 H. & N. 503.

Changes affected by the Act The principal points which are under the Act are (1) Is the person under whom title is claimed an "agent" within the meaning of the Act? (2) Is he an agent "entrusted"?

Goods. The definition of "goods" by section 1 (1) is very wide, including "all personal property of whatever nature or kind soever." The original English Factors Act contained no definition of goods. It was held in *Freeman v. Appleyard* (1862) 1 N.R. 30, that shares of stock were not goods under the English Act. It would appear to be doubtful whether such shares would not be "personal property" within the definition of goods under the Act; see *Stroud's Judicial Dictionary* "Personal Estate" p. 586. The sub-sections (2) and (3) of s. 1 would appear to restrict the wide definition in sub-section (1) to such personal property as could be shipped or would be subject to the documents of title therein mentioned. The English Factors Act 1889, enacts "the expression 'goods' shall include wares and merchandise," s. 1 (3).

Document of Title. A document of title is something which represents the goods, and from which either immediately or at some future time the possession of the goods may be obtained. In this way a bill of lading represents the goods while they are at sea, and by which when the goods arrive at the port of desti-

nation the possession of the goods may be obtained. So also a delivery order is an order for the delivery of the goods either immediately or at some future time; generally, immediately on the presentation of the delivery order, the party is entitled to the goods. Therefore it represents the goods; per Mellish *L. J.*, *Gunn v. Bolekow* (1875) *L. R.* 10 Ch. 491, 502.

A wharfinger's certificate that "there are lying at the works of the Bolekow Company, 500 tons of iron rails which are ready for shipment, and which have been rolled under contract between the said Company and the Aberdare Iron Co." was held not to be a document of title; *Gunn v. Bolekow* (1875) *L. R.* 10 Ch. 491; while a warrant as follows:—"The undermentioned iron will not be delivered to any party but the holder of this warrant."

Phoenix Bessemer Steel Company (Limited)

No. 88

Dec. 18, 1874.

"Stacked at the works of the Phoenix Bessemer Steel Company, The Ickles, Sheffield."

"Warrant for 403 tons, 2 qrs., 9 lbs., steel rails, iron, deliverable (f.o.b.) to Messrs. Gilead A. Smith & Co., of London or to their assigns by indorsement thereon" was held to be a document of title; *Merchant Banking Company v. Phoenix Bessemer Steel Co.* (1877) 5 Ch. D. 205.

For the meaning of "every bill of inspection of pot or pearl ashes" see *C.S.C. c. 49, s. 10* (6).

Who is an Agent? From the first it has been understood that the words "agent entrusted with goods" do not apply to every species of agent; *Baines v. Swainson* (1863) 4 B. & S. 270. An agent who can under the Act pledge or sell must be an agent of that class which like factors have a business which when carried to its legitimate result would probably end in selling or in receiving payment for goods. If such a person is "entrusted" and is entrusted in that capacity, then in the absence of bad faith on the part of the pledgee the pledge is good; *City Bank v. Barrow* (1880) 5 App. Cas. 664, 678; *Bush v. Fry* (1887) 15 O. R. 12, 122.

The following persons would not therefore be "agents entrusted" within the act.

A person entrusted as a wharfinger, a carter, a warehouseman, or a packer, even though he may transact business as a factor with some persons; *Monk v. Whittenbury* (1831) 2 B. & Ald. 484; 36 R. R. 637. This decision though before the Factor's Act of 5 & 6 Vict. is still law and unaffected by the Act; *Cole v. North Western Bank* (1874) *L. R.* 9 C. P. 470, 493, 494, 496; (1875) *L. R.* 10 C. P. 354, 369.

A tenant of household furniture even though he may be an auctioneer. The act does not apply to other than mercantile transactions; *Wood v. Rowcliffe* (1846) 6 Hare 183, 191.

A clerk who as such was possessed of delivery orders; *Lamb v. Attenborough* (1862) 1 B. & S. 831; *Jaullery v. Britten* (1838) 4 Bing. N. C. 242.

A servant or caretaker or one who has possession of goods for carriage, safe custody or otherwise as an independent contracting party. The term "Agent" includes only persons whose employment corresponds to that of some known kind of commercial agent, like factors; *Heyman v. Flewker* (1863) 13 C. B. N. s. 519.

A vendee: *Jenkyns v. Usborne* (1844) 7 M. & G. 678; *McEwan v. Smith* (1849) 2 H. L. C. 309. These cases establish that a vendee who sells or pledges a delivery order or other document of title (not being a bill of lading) does not defeat an unpaid vendor's rights.

A person who obtains possession of the goods or documents of title by some trick as distinguished from a person who induces another to transfer the property to him by fraud; *Bush v. Fry* (1887) 15 O. R. 122; *Kingsford v. Merry* (1856) 1 H. & N. 503; *Hardman v. Booth* (1863) 1 H. & C. 803; *Higsons v. Burton* (1857) 26 L. J. Ex. 342.

A vendor who is allowed by the vendee to retain the documents of title; *Johnson v. Credit Lyonnais Co.* (1877) 2 C. P. D.; 3 C. P. D. 32.

A person to whom hides are sent to be tanned, although a dealer in leather; *City Bank v. Barrow* (1880) 5 App. Cas. 664.

Where a person who carries on business in two capacities, viz:—warehouseman and factor, and goods are entrusted to him as a warehouseman, he is not an "agent entrusted"; *Cole v. North Western Bank* (1874) *L. R.* 9 C. P. 470; *L. R.* 10 C. P. 354.

Sales or Pledges Binding on Owner. If a factor, or person carrying on a like commercial business is entrusted as such with the possession of goods, no limitation upon his authority which is not known to a person dealing with him *bona fide* will be of any avail to protect the true owner; *Baines v. Swainson* (1863) 4 B. & S. 270.

An owner who is induced to intrust a factor as such with goods by fraud is bound by a pledge made by him; *Sheppard v. Union Bank of London* (1862) 7 H. & N. 661.

Where a factor and commission merchant obtained possession of goods by fraudulently representing that a certain firm known to be in good standing would purchase them, but fraudulently sold to the defendants who purchased in the ordinary course, *bona fide*, he was held to be an "agent" and to have been "entrusted;" *Baines v. Swainson* (1863) 4 B. & S. 270.

The goods need not be specific. If a person authorizes another from whom he is purchasing a quantity of unappropriated goods to deliver them to an agent for the purpose of carrying out a supposed sale, and the agent wrongfully pledges the goods, the pledge is binding on the principal; *Vickers v. Hertz* (1871) L. R. 2 H. L. Sc. 113.

A person whose ordinary business is not that of a factor or commercial agent, but who is "entrusted" with goods for sale is within the Act, and can sell or pledge the goods; *Heyman v. Flewker* (1863) 13 C.B.N.S. 519, in which case the goods were entrusted to a picture dealer whose ordinary business was not to sell pictures but who was authorized to sell the pictures in question, but instead of so doing pledged them, and the pledge was held to be valid.

Power to Pledge. A power to sell did not, before the act, confer a power to pledge; *Paterson v. Tash* (1743) 2 Str. 1178; *City Bank v. Barrow* (1880) 5 App. Cas. 664. Section 2 (3) confers that power upon an agent having power to sell, but there is no power to pledge where there is no power to sell; *Cole v. North Western Bank* (1875) L. R. 10 C.P. 354, 370. A factor may lawfully pledge the goods to another factor; *Navulshaw v. Brownrigg* (1852) 21 L. J. Ch. 57; 1 Sim. N. S. 573; on appeal 2 DeG. M. & G. 441.

A second advance may be obtained on the security of a pledge of the surplus remaining after satisfying the first pledgee; *Portalis v. Tetley* (1867) L. R. 5 Eq. 140.

Presumption of Entrustment. Section 3 prescribes that by the mere possession of goods or documents of title a presumption shall arise that the agent has been entrusted therewith "unless the contrary is shown in evidence." Lord Blackburn drew attention to the latter words in *Baines v. Swainson* (1863) 4 B. & S. 270, and said "the fact of a person being put in possession of goods, calls upon the person who gave him possession to explain and show that it was not an entrusting" and in *Fuentes v. Montis* (1868) L. R. 3 C. P. 268 at p 281, Willes J. "The inevitable conclusion is that if the contrary can be proved in evidence "an agent in possession as aforesaid of such goods or documents" is not to be taken to be entrusted therewith by the owner thereof."

Document of Title Not Obtained From Principal. Section 4 of the act is from another part of the 4th section of 5 & 6 Vict. c. 39, and was enacted for the purpose of altering the law declared in *Phillips v. Huth* (1839) 6 M. & W. 572, where it was held that to justify a pledge the goods or the document of title actually pledged must have been entrusted to the agent, and that where the agent obtained dock warrants in his own name by surrendering bills of lading entrusted to him a pledge made by him of the dock warrants was not good. This was followed in *Hatfield v. Philips* (1842) 9 M. & W. 647; 14 M. & W. 365; 12 Cl. & F. 343. A pledge of goods will now be good although only a document of title was entrusted and a pledge of a document of title obtained by depositing goods entrusted or goods represented by another document of title entrusted will also be good.

Notice That Vendor Only An Agent. Prior to 5 & 6 Vict. c. 39 an agent entrusted with possession and known to be only an agent had no power to pledge and could only sell and receive payment in the ordinary course of business; *McCombie v. Davies* (1855) 7 East, 5.

The concluding words of section 5 were introduced in 1894 and were taken from The Factor's Act 1889 (52 & 53 Vict. c. 45) s. 5. A person known to be an agent can ordinarily receive payment only in cash; *Fraser v. Gore District Mutual Fire Insurance Co.* (1882), 2 O. R. 416; *Sweeting v. Pearce* (1859) 7

C. B. N. S. 485; *Blumberg v. Life Interests and Reversionary Securities Corporation* (1897) 1 Ch. 171; (1898) 1 Ch. 27; *Donogh v. Gillespie* (1894) 21 A. R. 292.

Exchange of Securities. Section 6 was enacted to alter the law declared in *Taylor v. Kymer* (1832) 3 B. & Ald. 320; 37 R. R. 433; and *Bonzi v. Stewart* (1842) 4 M. & G. 295. To render a pledge good on an exchange of securities it is not necessary that it should have been made in the ordinary course of business or that the goods or securities given up should have belonged to the agent; *Sheppard v. Union Bank of London* (1862) 7 H. & N. 661.

Pledge of Documents of Title. Documents of title are not negotiable instruments; *Taylor v. Kymer* (1832) 3 B. & Ald. 320; 37 R. R. 433.

A bill of lading partakes so much of the character of a negotiable instrument that the endorsement thereof will transfer the goods represented by it and the contract therein contained to the same extent as a transfer of the possession of the goods themselves; see notes to R.S.O. c. 145, ante p. 443. Independently of the Factors Act, therefore a pledge of a delivery order, or dock warrant, would not be a pledge of the goods; see *Blackburn on Sales* 418.

A document of title in the hands of a pledgee is, until his authority is revoked, under the control of the agent who pledged the same, so as to enable him to pledge the surplus; *Portalis v. Tetley* (1867) L. R. 5 Eq. 140.

Antecedent Debts. Goods of a principal coming to the hands of an agent and placed in his warehouse to replace goods sold by him, for which warehouse receipts, had been given, are not, by reason of s. 8, subject to such warehouse receipts, as that would amount to a pledge or transfer for an antecedent debt; *Re Coleman* (1875) 36 U. C. R. 559. A pledge by a factor of a bill of lading to retire a bill of exchange accepted by the factor and held by the pledgee is a pledge for an antecedent debt; *Macnee v. Gorst* (1867) L. R. 4 Eq. 315. A pledge to secure an advance upon bills of lading transferred by a factor is good although the factor may use the proceeds to enable an agent of the factor to carry out purchases made by the agent through the pledgee, who, however, was under no personal liability thereon; *Jewan v. Whitworth* (1866) L. R. 2 Eq. 692.

A broker who in purchasing goods for a factor has made himself responsible to the vendor can make a *bona fide* advance to the factor to enable him to pay for the goods and may accept a pledge within The Factor's Act as security therefor. A lender to be deprived of his pledge, must have *known* when making an advance that it was for an antecedent debt of the pledgor; *Kaltenbach v. Lewis* (1883) 24 Ch. D. 54; 10 App. Cas. 617.

The transaction must, however, have been a real loan. If it is to pay a debt to the lender, or to pay a note upon which the lender and factor are jointly liable it will not be protected; *Learoyd v. Robinson* (1844) 12 M. & W. 745.

Mala Fides of Agent. To bring a case within s. 9 it must be found categorically that the lender had notice of the agent's *mala fides* or want of authority; *Gobind Chunder Sein v. Ryan* (1861) 8 Jur. N. S. 343; *Douglas v. Ewing* (1857) 6 Ir. C. L. R. 395. The equitable doctrines of constructive notice should not be applied to honest mercantile transactions; *Kaltenbach v. Lewis* (1883) 24 Ch. D. 54, 78.

Property received after advance. The words in s. 11 "at any time subsequent thereto" referring to a receipt of the goods or documents of title after the advance, but pursuant to a contract in writing therefor, were said by Wood V. C. in *Portalis v. Tetley* (1867) L. R., 5 Eq. 148 to apply to the case where the factor being advised that the goods were coming forward to him agreed that so soon as he got them and so soon as the bills of lading came to hand he would pledge them.

Redemption of goods pledged. A pledgee cannot, as against the owner retain surplus proceeds of the goods to answer a general balance of account; *Kaltenbach v. Lewis* (1885) 10 App. Cas. 617.

Revocation of Authority. It was held in *Fuentes v. Montis* (1868) L. R. 3 C. P. 268, L. R. 4 C. P. 93, that to entitle a factor to pledge goods he must be "entrusted" at the time of making the pledge, and that where his authority had been revoked no pledge could be made. The English Act of 1877, remedied this defect in the law. In Ontario the act respecting Powers of Attorney (R. S. O. c. 116) would seem to protect the pledgee against such unknown revocation.

CHAPTER 151.

An Act respecting Limited Partnerships.

LIMITED PARTNERSHIPS MAY BE FORMED, s. 1.	CERTIFICATES OF RENEWAL, s. 10.
GENERAL AND SPECIAL PARTNERS, ss. 2-4.	ALTERATIONS, WHEN DEEMED A DISSOLUTION, s. 11.
CERTIFICATE OF SUCH PARTNERSHIP. Contents and form, ss. 5, 6.	PARTNERSHIP NAME, s. 12.
Where to be filed and fees, ss. 7, 8.	LIABILITIES OF GENERAL AND SPECIAL PARTNERS, ss. 13-18.
Partnership not deemed formed until filed, s. 9.	NO PREMATURE DISSOLUTION WITHOUT NOTICE, s. 19.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Limited partnerships may be formed.

1. Limited partnerships for the transaction of any mercantile, mechanical, manufacturing or other business within the Province of Ontario, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities hereinafter mentioned, but the provisions of this Act shall not be construed to authorize any such partnership for the purpose of banking, or the construction or working of railways, or making insurance. R. S. O. 1887, c. 129, s. 1; 55 V. c. 28, s. 1.

Of whom to consist.

2. Such partnerships may consist of one or more persons, who shall be called general partners, and of one or more persons who contribute in actual cash payments a specific sum as capital to the common stock, who shall be called special partners. R. S. O. 1887, c. 129, s. 2.

Liability of general and special partners.

3. General partners shall be jointly and severally responsible as general partners are by law, but special partners shall not be liable for the debts of the partnership beyond the amounts by them contributed to the capital. R. S. O. 1887, c. 129, s. 3.

General partners only to transact business, etc.

4. The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same. R. S. O. 1887, c. 129, s. 4.

Certificate to be signed.

5. The persons desirous of forming such partnership shall make and severally sign a certificate which shall contain—

1. The name or firm under which the partnership is to be conducted ; Contents of.

2. The general nature of the business intended to be transacted ;

3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their usual places of residence ;

4. The amount of capital stock which each special partner has contributed ;

5. The period at which the partnership is to commence and the period at which it is to terminate. R. S. O. 1887, c. 129, s. 5.

6. The certificate shall be in the words or to the effect of the Form of. form given in the Schedule to this Act, and shall be signed by the several persons forming the partnership, before a Notary Public, who shall duly certify the same. R. S. O. 1887, c. 129, s. 6.

7. The certificate so signed and certified shall be filed in the office of the Clerk of the County Court of the county, in which the principal place of business of the partnership is situate, and shall be recorded by him at full length in a book to be kept for that purpose and open to public inspection. R. S. O. 1887, c. 129, s. 7. Where to be filed.

8. For filing and recording each such certificate the Clerk shall be entitled to receive the sum of twenty-five cents, and shall also be entitled to receive from every person searching in the book where such certificate is so recorded the sum of ten cents for each such search. 56 V. c. 25, s. 1. Fees.

9. No such partnership shall be deemed to have been formed until a certificate has been made, certified, filed and recorded as above directed ; and if any false statement is made in such certificate, all the persons interested in the partnership shall be liable for all the engagements thereof as general partners. R. S. O. 1887, c. 129, s. 8. Partnership not formed until certificate filed.

10. Every renewal or continuance of a partnership beyond the time originally fixed for its duration, shall be certified, filed and recorded in the manner herein required for its original formation ; and every partnership otherwise renewed or continued, shall be deemed a general partnership. R. S. O. 1887, c. 129, s. 9. Certificates of continuance.

11. Every alteration made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall What alterations to be deemed a dissolution.

be deemed a dissolution of the partnership, and every such partnership in any manner carried on after any such alteration has been made, shall be deemed a general partnership, unless renewed as a special partnership, according to the provisions of the next preceding section. R. S. O. 1887, c. 129, s. 10.

Partnership
name.

12. The business of the partnership shall be conducted under a name or firm in which the names of the general partners, or some or one of them, only shall be used; and if the name of a special partner is used in such firm with his privity, he shall be deemed a general partner. R. S. O. 1887, c. 129, s. 11.

Liability of
general part-
ners to actions.

13. Actions in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partner. R. S. O. 1887, c. 129, s. 12.

Restrictions
upon stock of
special part-
ners.

14. No part of the sum which a special partner has contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of the capital; and if after the payment of such interest, any profits remain to be divided, he may also receive his portion of such profits. R. S. O. 1887, c. 129, s. 13.

When special
partner liable
to refund.

15. If it appears that by the payment of interest or profits to a special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of the deficient capital, with interest. R. S. O. 1887, c. 129, s. 14.

Privileges of
special part-
ners.

16. A special partner may from time to time examine into the state and progress of the partnership concerns, and may advise as to their management; but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney or otherwise; and if he interferes contrary to these provisions, he shall be deemed a general partner. R. S. O. 1887, c. 129, s. 15.

General part-
ners liable to
account.

17. The general partners shall be liable to account to each other and to the special partners for their management of the concern in like manner as other partners. R. S. O. 1887, c. 129, s. 16.

Creditors
preferred
to special
partners.

18. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be al-

lowed to claim as a creditor until the claims of all the other creditors of the partnership have been satisfied. R. S. O. 1887, c. 129, s. 17.

19. No dissolution of such partnership by the acts of the parties shall take place previous to the time specified in the certificate of its formation or in the certificate of its renewal, until a notice of such dissolution has been filed in the office in which the original certificate was recorded, and has been published once in each week, for three weeks, in a newspaper published in the county or district where the partnership has its principal place of business, and for the same time in the *Ontario Gazette*. R. S. O. 1887, c. 129, s. 18.

No premature
dissolution
without no-
tice, etc.

SCHEDULE.

(Section 6.)

CERTIFICATE OF PARTNERSHIP.

We, the undersigned, do hereby certify that we have entered into co-partnership under the style or firm of (*B. D. & Co.*) as (*Grocers and Commission Merchants*), which firm consists of (*A. B.*) residing usually at _____ and (*C. D.*) residing usually at _____, as General Partners; and (*E. F.*) residing usually at _____, as Special Partners. The said (*E. F.*) having contributed (\$4,000) and the said (*G. H.*) (\$8,000) to the Capital Stock of the said Partnership.

The said Partnership commenced on the _____ day of _____ 18____
and terminates on the _____ day of _____ 18____,

Dated this _____ day of _____ 18____,

(Signed,)

A. B.
C. D.
E. F.
G. H.

Signed in the presence of me, }
 L. M. }
Notary Public. }

R. S. O. 1887, c. 129, Sched.

NOTES.

Limited partnerships were unknown in the Roman Law and are unknown in England. The model of the Act is a Statute of New York which has been adopted in most of the United States.

Object of the Act. The Act is to enable a partnership to be formed in which the liability of one of the partners is to be limited to the capital contributed by him. General partners are jointly liable to all creditors; *Kendall v. Hamilton* (1879) 4 App. Cas. 504. No limitation of liability as between themselves in the articles of partnership would be effective as against creditors. *Lindley on Partnership* 5th Ed. 200, 201. The facility with which a limited liability company may be formed under various Acts has rendered the formation of limited partnerships to a large extent obsolete. There are so many ways in which a limited partner may become liable as a general partner when he would not become liable as a shareholder in a company, so that it is obvious that incorporation is a preferable proceeding.

Requisites of a Limited Partnership. To constitute a limited partnership the following requisites must be observed :—

- (1) There must be a general partner or partners whose liability is unlimited.
- (2) The special partners must make their contributions to the capital *in cash*.
- (3) The name of the partnership must not contain the name of the special partner.
- (4) A certificate of partnership must be filed and the partnership will not be deemed to be formed, so as to limit the liability, until the filing has taken place.
- (5) The certificate must contain no false statement.
- (6) The business of the partnership must be confined to mercantile, mechanical, manufacturing or the like business.
- (7) There must be no alterations in the names of the partners, the nature of the business or the capital in shares thereof, without a new certificate being filed.
- (8) The principal place of business must not be removed out of the original county; *Riper v. Poppenhausen* (1870) 43 N. Y. 68.
- (9) The special partners must not transact any business on account of the partnership or intermeddle with or direct (other than by advice) the affairs thereof nor be employed for that purpose even in the absence of the general partners.
- (10) The partnership must terminate at the time mentioned in the certificate unless renewed by filing a new certificate.
- (11) The failure to observe any one of the foregoing will make the special partner liable as a general partner. See 15 Central Law Journal 442, 462.

In addition to the foregoing the following points must be observed :—

- (1) No profits or interest may be withdrawn by the special partners which will depreciate the original capital.
- (2) The partnership must not be terminated before the time designated in the certificate without the observance of the formalities prescribed by s. 19.

Businesses Within the Act. A partnership formed for the purpose of building and running steamboats is within the Act; *Bowes v. Hall and Holland* (1857) 14 U.C.R. 316.

Cash Payment. The payment must be in cash. A payment by bills of exchange is bad. *Whittemore v. Macdonell* (1857) 6 C.P. 547, and so is a payment by surrendering to the general partner notes held against him; *Benedict v. Van Allen* (1850) 17 U.C.R. 234. An unmarked cheque is insufficient; *Durant v. Abendroth* (1877) 60 N.Y. 148.

Intermeddling. Where there were 83 limited partners who appointed a committee to advise the general partner who interfered in the business of the partnership all the members of the committee were held liable as general partners; *Whittemore v. Macdonell* (1857) 6 C. P. 547; *Bowes v. Hall and Holland* (1857) 14 U.C.R. 316. See *Davis v. Bowes* (1857) 15 U.C.R. 280.

Effect of Becoming General Partners. Once a special partner becomes liable as a general partner he cannot by ceasing his interference, or otherwise, escape liability as such; *Hutchison v. Bowes* (1857) 15 U.C.R. 156.

Representations by Special Partner. A representation to a creditor by the special partner that he is a partner and has an interest in the business will make him liable to the creditor; *Watts v. Taft* (1858) 16 U.C.R. 256.

Rights Inter se. If a special partner becomes chargeable as a general partner by reason of some act of the general partner done without his knowledge or consent he will be entitled to indemnity against liability to the creditors of the partnership; *Patterson v. Holland* (1858) 6 Gr. 414, but if by interference or by not paying the amount of their contribution in cash they become liable as such, the special partners will be liable to contribute ratably as between themselves in the same way as if they were general partners; *Patterson v. Holland* (1858) 6 Gr. 414, 7 Gr. 1.

Selling Goods to Partnership. A special partner should not make any profit by dealing with the partnership; *Patterson v. Holland* (1858) 7 Gr. 1.

CHAPTER 152.

An Act respecting the Registration of Co-Partnerships and Business firms.

DECLARATIONS OF PARTNERSHIP TO BE FILED, s. 1. Form, s. 2. When to be filed, s. 3. Declaration where alteration in partnership, s. 4. Allegations of declarations not controvertible by the signers, s. 5. Signers to be partners until a new declaration filed, s. 7. DECLARATION OF DISSOLUTION, s. 6. ACTIONS AGAINST PARTNERS NOT FILING DECLARATION, s. 8.	DECLARATION BY PERSON TRADING UNDER A BUSINESS NAME NOT HIS OWN, s. 9. Form, s. 10. PENALTY FOR NOT FILING DECLARATION, s. 11. REGISTRATION OF DECLARATIONS, s. 12. Form of index books, ss. 13, 14. Firm index book, s. 14. Individual index book, s. 15. Fees of registrars, s. 16. Furnishing books, s. 17. ACT NOT TO APPLY TO CHEESE MANUFACTURING COMPANIES, s. 18.
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Persons in partnership to deliver a declaration to the Registrar.

1.—(1) All persons associated in partnership for trading, manufacturing or mining purposes, shall cause to be delivered to the registrar of the registry division in which they carry or intend to carry on business, a declaration in writing, signed by the several members of such co-partnership.

When some of the parties are absent.

(2) If, however, any of the said members are absent from the place where they carry or intend to carry on business, at the time of making the declaration, then the declaration shall be signed by the members present in their own names, and also for their absent co-members, under their special authority to that effect, and such special authority shall be at the same time filed with the registrar and annexed to the declaration. R. S. O. 1887, c. 130, s. 1.

Requisites of declaration.

2. The declaration shall be in the form or to the effect of Schedule A to this Act, and shall contain the names, surnames, additions and residences of each and every partner as aforesaid, and the name, style or firm under which they carry on or intend to carry on such business and shall state also the time during which the partnership has existed or is to exist, and

shall declare that the persons therein named are the only members of such co-partnership. R. S. O. 1887, c. 130, s. 2.

3. The declaration shall be filed within six months next after the formation of the partnership. R. S. O. 1887, c. 130, s. 3. Time of filing declaration.

4. A similar declaration shall in like manner be filed when and so often as any change or alteration takes place in the membership of the partnership, or in the name, style or firm under which they intend to carry on business, or in the place of residence of any member of the firm; and every new declaration shall state the alteration in the partnership. R. S. O. 1887, c. 130, s. 4. Declaration where change in partnership

5. The allegations made in the declarations aforesaid shall not be controvertible as against any party by any person who has signed the same, nor as against any party not being a member of the partnership by any person who has signed the same, or who was really a member of the partnership therein mentioned at the time the declarations were respectively made. R. S. O. 1887, c. 130, s. 5. Allegations in the declaration not to be controvertible by parties signing.

6. Upon the dissolution of a partnership, any or all of the persons who composed the partnership may sign a declaration certifying the dissolution of the partnership: such declaration may be in the form of Schedule B to this Act. R. S. O. 1887, c. 130, s. 7. Declaration of dissolution of partnership.

7. Until a new declaration is made and filed by him, or by his co-partners or any of them as aforesaid, no person who shall have signed the declaration filed shall be deemed to have ceased to be a partner; but nothing herein contained shall exempt from liability any person who, being a partner, fails to declare the same as already provided, and such person may, notwithstanding such omission, be sued jointly with the partners mentioned in the declaration, or they may be sued alone, and if judgment is recovered against them, any other partner or partners may be sued jointly or severally in an action on the original cause of action upon which the judgment was rendered; nor shall anything in this Act be construed to affect the rights of any partners with regard to each other, except that no declaration as aforesaid shall be controverted by any person who has signed the same. R. S. O. 1887, c. 130, s. 6. Persons signing declaration to be deemed partners till new declaration is filed. Liability of partners failing to declare the same. Rights of partners between them selves.

8.—(1) If any persons are associated as partners for the purpose of trade, and no declaration is filed under this Act with regard to such partnership, then any action which might be brought against all the members of the partnership may also be brought against any one or more of them, as carrying on or as having carried on business jointly with others, without naming such others in the writ or declaration, under the name and style How actions may be brought against partners in trade not filing declaration.

of their said co-partnership firm; and if judgment be recovered against him or them, any other partner or partners may be sued jointly or severally on the original cause of action on which such judgment is rendered.

When the action is founded on any obligation in writing.

(2) If any such action be founded on any obligation or instrument in writing in which all or any of the partners bound by it are named, then all the partners named therein shall be made parties to such action; and a judgment rendered against any member of such existing co-partnership for a partnership debt or liability, may be executed by process of execution against all and every the partnership stock, property, and effects, in the same manner, and to the same extent as if such judgment had been rendered against such co-partnership. R. S. O. 1887, c. 130, s. 8.

A person whose business style indicates plurality to file a declaration.

9. Every person who is engaged in business for trading, manufacturing, or mining purposes, and who is not associated in partnership with any other person or persons, but who uses as his business style some name or designation other than his own name, or who in such style uses his own name with the addition of "*and Company*," or some other word or phrase indicating a plurality of members in the firm, shall cause to be delivered to the registrar of the registry division in which such person carries on or intends to carry on business, a declaration in writing, signed by such person. R. S. O. 1887, c. 130, s. 9.

Form of declaration.

10. Such declaration shall contain the name, surname, addition, and residence of the person making the same, and the name, style or firm, under which he carries on or intends to carry on business, and shall also state that no other person is associated with him in partnership; and such declaration shall be filed within six months of the time when such style is first used. R. S. O. 1887, c. 130, s. 10.

Penalty for non-compliance.

11. Every member of a partnership or other person required to register a declaration under the provisions of this Act who fails to comply with the requirements of this Act shall forfeit the sum of \$100, to be recovered before any Court of competent jurisdiction, by any person suing as well in his own behalf as on behalf of Her Majesty; and half of such penalty shall belong to the Crown for the uses of the Province, and the other half to the party suing for the same, unless the action is brought, as it may be, on behalf of the Crown only, in which case the whole of the penalty shall belong to Her Majesty for the uses aforesaid. R. S. O. 1887, c. 130, s. 11.

Registrar to record declaration.

12. It shall be the duty of the registrar to enter all declarations made under this Act in the order in which the same are received in a book to be by him kept for that purpose, which

shall at all times during office hours be open to the inspection of the public gratuitously; and for registering each such declaration the registrar shall be entitled to receive from the person filing the same the sum of fifty cents if it does not contain more than two hundred words, and at the rate of ten cents per hundred words for all above the number of two hundred. R. S. O. 1887, c. 130, s. 12.

Registrar's fees for filing.

13. It shall be the duty of each registrar to keep two alphabetical index books of all declarations delivered to him, in pursuance of the provisions of this Act. R. S. O. 1887, c. 130, s. 13.

Registrar to keep two indexes.

14. In one of such books, hereinafter called the "Firm Index Book," the registrar shall enter in alphabetical order the styles of the respective firms, in respect to which declarations have been delivered to him, and shall place opposite each such entry the names of the person or persons composing such firm, and the date of the receipt by him of the declaration, in the manner shewn in the form of "Firm Index Book," given in Schedule C to this Act. R. S. O. 1887, c. 130, s. 14.

Form of "Firm Index Book."

15. In the second of such books, hereinafter called the "Individual Index Book," the registrar shall enter in alphabetical order the names of the respective members of each of such firms, and shall place opposite such entry the style of the firm of which such person is a member, and the date of the receipt of the declaration, in the manner shewn in the form of "Individual Index Book," given in Schedule D to this Act. R. S. O. 1887, c. 130, s. 15.

Form of "Individual Index Book."

16. The registrar shall be entitled to charge for searches the following fees and no more:

Registrar's fees for certain services.

- For searching in Firm Index—each firm ten cents;
- For searching in Individual Index—each name ten cents;
- For each certificate, when required—twenty-five cents.

R. S. O. c. 1887, 130, s. 16.

17. All the books required for the purposes of this Act shall be furnished by the treasurer of the municipality, whose duty it is to furnish registry books (or in case of his default, by the registrar), in the same manner as other registry books. R. S. O. 1887, c. 130, s. 17.

Who to furnish registry books.

18. This Act shall not be construed to apply to associations of individuals for the manufacture of cheese and contributing produce from their dairies for that purpose. R. S. O. 1887, c. 130, s. 18.

Cheese manufacturing Co. excepted.

SCHEDULE A.

(Section 2.)

DECLARATION OF CO-PARTNERSHIP.

Province of Ontario, }
County of }

We of in (occu-
pation) and of in
(occupation), hereby certify

1. That we have carried on and intend to carry on trade and business
as at in partnership, under
the name and firm of (or, I (or we) the
undersigned, of in, hereby certify
that I (or we) have carried on and intend to carry on trade and business
as at in partnership with C. D. of
and E. F. of (as the case may be).

2. That the said partnership has subsisted since the day of
18 .

3. And that we, (or I (or we) and the said C. D. and
E. F.) are and have been since the said day the only members of the
said partnership.

Witness our hands at this day of
18 .

R. S. O. 1887, c. 130, Sched. A.

SCHEDULE B.

(Section 6.)

DECLARATION OF DISSOLUTION OF PARTNERSHIP.

Province of Ontario, } I,
County of } formerly a member of the firm carrying on busi-
ness as

at , in the County of , under
the style of , do hereby certify that the said
partnership was on the day of dissolved

Witness my hand, at , the day of
, 18 .

R. S. O. 1887, c. 130, Sched. B.

SCHEDULE C.

(Section 14.)

FIRM INDEX BOOK.

STYLE OF FIRM.	NAMES OF PERSONS COMPOSING THE FIRM.	DATE OF FILING DECLARATION.
Abbott, Black & Co.	George Abbott, John Black, Edward Cook	10th February, 1871.
Bernard, Green & Jones	John Bernard, Edward Green, John Jones	12th February, 1871.
Cook (Thos.) & Co.	Thomas Cook, James Wilson	14th February, 1871.
Dadson, William	William Dadson, Thomas Jones, Robert Watson, William Wilberforce, James Johnson	14th February, 1871.
Dick & Co.	Richard Dick	15th May, 1872.
Dow (Wm.) & Sons	William Dow	19th May, 1872.

R. S. O. 1887, c. 130, Sched. C.

SCHEDULE D.

(Section 15.)

INDIVIDUAL INDEX BOOK.

NAME OF INDIVIDUAL.	STYLE OF FIRM OF WHICH A MEMBER.	DATE OF FILING DECLARATION.
Abbott, George	Abbott, Black & Co.	10th February, 1871.
Black, John	Abbott, Black & Co.	10th February, 1871.
Bernard, John	Bernard, Green & Jones	12th February, 1871.
Cook, Edward	Abbott, Black & Co.	14th February, 1871.
Cook, Thomas	Thos. Cook & Co.	14th February, 1871.
Dadson, William	William Dadson	14th February, 1871.
Dick, Richard	Dick & Co.	15th May, 1872.
Dow, William	Wm. Dow & Sons	19th May, 1872.

R. S. O. 1887, c. 130, Sched. D.

NOTE. In the above Schedules, surnames having different initial letters are shown together. This is done merely for the purpose of illustrating by means of a number of names, the manner in which the entries should be made. In the index books, surnames having different initial letters should not appear in the first column of either book on the same page, but should be indexed alphabetically, the style of a firm being indexed in the firm index book according to the initial letter of the first surname mentioned. 60 V. c. 15, Sched. A (37).

NOTES.

Object of the Act. The object of the Act was the removal of difficulties which persons having claims against firms bearing a certain designation experienced in ascertaining the correct names and addresses of all whom they were entitled to hold as members, and the protection of creditors from being prejudiced or misled by a change in the membership while the name remained unaltered or by a change in the name without any alteration in the personnel; per *Moss C.J.O., Bank of Toronto v. Nixon* (1879) 4 A.R. 346, 349.

Suing in Partnership Name. The changes in procedure made by and since the Judicature Act enable a partnership to be now sued in the partnership name, and a judgment recovered in such suit will be a judgment against all persons who were actually partners in the firm. Where a firm's name is used it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names, per *Lindley L.J. Western National Bank v. Perez* (1891) 1 Q.B. 304, 314; *Re Sinclair v. Bell* (1897) 28 O.R. 483. But it would not amount to a judgment against a person not actually a partner, who would, however, be liable as a nominal partner by having held himself out as a partner; *Re Young v. Parker* (1888) 12 P.R. 646; *Standard Bank v. Frind* (1893) 15 P.R. 438, and the judgment would destroy all liability of the person who would be liable as a nominal partner; *Scarff v. Jardine* (1882) 7 App. Cas. 345.

Suing Partners Individually. When all the partners are within the jurisdiction and any of them are sued individually, a judgment in an action against one would but for the provisions of the Act be a bar to a subsequent action against the others. *Munster v. Cox* (1885) 10 App. Cas. 680; *King v. Hoare* (1845) 13 M. & W. 494; *Kendall v. Hamilton* (1879) 4 App. Cas. 504; *Toronto Dental Co. v. McLaren* (1890) 14 P.R. 89; and the rule applies where all the partners are originally made defendants to an action, enter appearances in the same action and judgment by consent is obtained against one of them in that action; *McLeod v. Power* (1898) 2 Ch. 295; but *semble* not where judgment is obtained against one before the others by default, *ib.*

The rule is still the same where the partnership is registered.

Where the partnership is not registered the suing and obtaining judgment against one or more partners is not a bar to an action upon the original cause of action against the other partners, *ss. 7 and 8.*

Dissolution. The rearrangement of the 6th and 7th sections of the Act upon the revision in 1897 would appear to make the registration of a certificate of dissolution compulsory. The registration of such a certificate was formerly optional; *Bank of Toronto v. Nixon* (1879) 4 A.R. 346.

There would appear to be nothing in the Statute dispensing with the requirements of the common law as to the notice of dissolution required to be given so as to absolve a retiring partner as against persons who had no notice of the dissolution; see *Wigle v. Williams* (1895) 24 S.C.R. 713.

Public notice of dissolution given by advertisement in the Gazette is sufficient, not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm whether they saw it or not. But an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it; *Lindley on Partnership*, 5th Ed. 222; *Hendry v. Turner* (1886) 32 Ch. D. 355. An advertisement, however, is not indispensable; its place may be supplied by something else. Any notice to old customers and a change of sign or name of firm as to new customers will be sufficient evidence to go to the jury of notice of the dissolution, *ib.* see *Darling v. Magnan* (1855) 12 U.C.R. 471.

Suing for Penalty. Two persons may sue for the penalty and two or more partners may be joined as defendants in the action; *Chaput v. Robert* (1887) 14 A.R. 354. The action must be brought within one year, 31 Eliz. c. 5, s. 5; *Dyer v. Best* (1866) 4 H. & C. 189.

Partnerships Within the Act. The Act extends only to trading, manufacturing and mining partnerships. Associations for the manufacture of cheese from produce contributed from the dairies of the members are excepted, s. 18.

Trading in Firm Name. A man may carry on business in a firm name, but if the name indicated a plurality of members, he must within six months register a declaration that no other person is associated with him or he will be liable to a penalty. A person carrying on business in a firm name must sue in his own name; *Mason v. Mogridge* (1892) 8 T.L.R. 805, but if the name is his own followed by the words "& Co." an amendment striking them out will be granted as of course; *Lang v. Thompson* (1895) 16 P.R. 516. A person carrying on business within Ontario in a name or style other than his own name may be sued in such name or style. C.R. 231.

CHAPTER 156.

An Act respecting Wages.

As amended by 62 V. c. 17.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Application of Act.

1. This Act shall apply to wages or salary whether the employment in respect of which the same shall be payable, be, by the day, by the week, by the job or piece or otherwise. R. S. O. 1887, c. 127, s. 4.

Wages or salaries to have priority on assignments for benefit of creditors.

2. Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims. R. S. O. 1887, c. 127, s. 1.

And in winding up proceedings under Rev. Stat. c. 222.

3. In distributing the assets of a company under the provisions of *The Joint Stock Companies' Winding-up Act*, the liquidator shall pay in priority to the claims of the ordinary or general creditors of the company the wages or salary of all persons in the employment of the company at the time of the making of the winding-up order, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors of the company for the residue, if any, of their claims. R. S. O. 1887, c. 127, s. 2.

And over execution creditors.

Rev. Stat. c. 78

4. All persons who are at the time of the seizure by the Sheriff, or who within one month prior thereto have been in the employment of the execution debtor, and who shall become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of *The Creditors' Relief Act*, shall be entitled to be paid out of such money the wages or salary due to them by the execution debtor, not exceeding three months' wages or salary, in priority to the claims of the other creditors of the execution debtor, and shall be entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims. R. S. O. 1887, c. 127, s. 3; 55 V. c. 27, s. 1.

5. All persons in the employment of an absconding debtor at the time of a seizure by the Sheriff under *The Act respecting Absconding Debtors* or within one month prior thereto, shall be entitled to be paid out of any moneys realized out of the property of such debtor, by such Sheriff the wages or salary due to them by the absconding debtor, not exceeding three months wages or salary, in priority to the claims of the other creditors of the absconding debtor and shall be entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims. 55 V. c. 27, s. 2.

And in case of attachment.

Rev. Stat. c. 79.

6. In the administration of the estate of any person dying on or after the 13th day of April, 1897, any person in the employment of the deceased at the time of his death, or within one month prior thereto, who is entitled to share in the distribution of the estate, shall be entitled to his salary or wages not exceeding three months thereof in priority to the claims of the ordinary or general creditors of the deceased, and such person shall be entitled to rank as an ordinary or general creditor of such deceased person for the residue, if any, of his claim. 60 V. c. 23, ss. 1, 2.

And in administration of estates.

7.—(1) No debt due or accruing to a mechanic, workman, labourer, servant, clerk or employee, for or in respect of his wages or salary, shall be liable to seizure or attachment, unless such debt exceeds the sum of \$25, and then only to the extent of such excess.

Debts due to mechanics, etc for wages, not to be attached, except excess over \$25.

(2) Nothing in the preceding sub-section contained shall affect or impair the right or remedies of any creditor whose debt has been contracted before the first day of October, 1874. R. S. O. 1887, c. 64, s. 8.

Saving clause as to debts created before 1st Oct., 1874

8. This Act is not intended to apply to an assignment made under the provisions of any Act of the Parliament of Canada relating to or respecting bankruptcy or insolvency. R. S. O. 1887, c. 127, s. 5.

Not to interfere with any Dominion Insolvency Act.

[As to wages payable to employees of contractors for public works, see Cap. 155.]

9.—(1) The wages in respect of which priority is hereinbefore in this Act conferred and declared shall become due and be payable by the assignee, liquidator, sheriff, executor, administrator or other person charged with the duty of winding up or distributing the various estates aforesaid within one month from the time when the estate so being wound up or distributed shall have been received by or placed under the control of such assignee, liquidator, sheriff, executor, administrator or other person as aforesaid unless it shall appear to him or them that the said estate is not of sufficient value to pay the claims or charges (if any) thereon having by law priority over the said prior claim for wages, and the ordinary expenses and dis-

When wages to be payable on distribution of estate by assignee, administrator, etc.

bursements of winding up and distributing the said estate; but such ordinary expenses shall not include the cost of litigation or other unusual expenses concerning the estate or any part thereof, unless the person entitled to the said lien for wages shall have consented in writing to such proceedings being taken before they were commenced or shall afterwards have adopted or ratified in writing such proceeding.

Proviso:—
Protection of
assignee, etc.,
paying claims
for wages.

(2) Provided that in the case of such prior claims for wages as aforesaid the said assignee, liquidator, sheriff, executor, administrator or other person engaged in winding up or distributing an estate may forthwith upon such estate coming to his hands, pay the said prior claims for wages without being chargeable in case it shall in the end appear that such estate was insufficient to have justified such payment provided he has acted in good faith and has reasonable grounds to believe that the estate would prove sufficient.

Lien holders
joining in
action for
wages.

(3) Any number of lien holders in respect of such prior claims for wages upon the same estate may join in any action, suit or other proceeding for the enforcement of such claims. 62 V. c. 17.

NOTES.

Who are Entitled to Priority. Priority for wages to the amount limited by the Act is given "to all persons in the employment" of the Company or person whose estate is being administered at the time of the happening of the event which occasions the administration, or within one month prior thereto. It will be noticed that the words "persons in the employment of" are wider than the words of s. 7, exempting wages or salary of "mechanics, workmen, labourers, servants, clerks or employees." Under the latter section a Medical Health Officer is not an employee; *Macfie v. Hutchinson* (1887) 12 P.R. 167; *Forsyth v. Canniff* (1890) 20 O.R. 478. A salary of £200 a year of a Secretary of a Company was held not to be "wages of a servant" within the English Wages Attachment Abolition Act; *Gordon v. Jennings* (1882) 9 Q.B.D. 145.

A person who at a postmaster's request gratuitously assisted him in assorting letters was held to be within the phrase "person employed under the Post Office"; *R. v. Reason* (1854) 22 L.J.M.C. 11. A music master giving lessons twice a week at a school at so much an hour is not a "clerk or servant"; *Ex parte Walker* (1873) L.R. 15 Eq. 412; see also *Ex parte Harcourt* (1875) 31 L.T. 188.

A foreman engaged in hiring and discharging men, paying wages and doing no manual labor is not a "labourer, servant or apprentice" within s. 85 of the Ontario Companies Act, R.S.O. c. 191; *Welch v. Ellis* (1895) 22 A.R. 255.

An auditor is not a "clerk or other person in the employment of a company" within The Winding Up Act, R.S.O. c. 129, s. 56. *Re Ontario Forge and Bolt Co.*; *Townsend's Case* (1896) 27 O.R. 230.

There is no reported case as to the construction of the words "persons in the employment" contained in the Act. It is submitted that the relationship of master and servant must exist to entitle an employee to the priority prescribed.

The services should belong to the master exclusively; *Ex parte Oldham* (1875) 32 L.T. 181; *Ex parte Butler* (1873) 28 L.T. 375.

The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, as it has been put, "retains the power of controlling the work." *Sadler v. Henlock* (1855) 1 E. & B. 570; *Pollock on Torts*, 5th Ed. p. 75; *Yewens v. Noakes* (1880) 6 Q.B.D. 530.

A commercial traveller, *Ex parte Neal* (1827) Mont. & McA. 194; an editor, *Ex parte Chipchase* (1863) 7 L.T. 290; seamen, *Re Dawson* (1850) 1 Fonb. N.R. 229; and persons paid by the piece, *Re Allsop* (1875) 32 L.T. 433; *Ex parte Hollyoak* (1887) 35 W.R. 396, are all servants, but a person paid by commission is not; *Ex parte Simmons* (1874) 30 L.T. 311; *Ex parte Hickin* (1850) 19 L.J. Bank. 8; is not.

53 VICTORIA, CHAP. 33.)
 54-55 VICTORIA, CHAP. 17.) DOMINION.
 60-61 VICTORIA, CHAP. 10.)

An Act relating to Bills of Exchange, Cheques and Promissory Notes.

As amended.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

PART I.

PRELIMINARY.

- Short title. 1. This Act may be cited as "*The Bills of Exchange Act*,
 Imp. Act s. 1 1890."
- Interpretation 2. In this Act, unless the context otherwise requires,—
 Imp. Act s. 2 varied.
- "Acceptance" (a.) The expression "Acceptance" means an acceptance completed by delivery or notification;
- "Action." (b.) The expression "Action" includes counter claim and set off;
- "Bank." (c.) [The expression "Bank" means an incorporated bank or savings bank carrying on business in Canada;]
- "Bearer." (d.) The expression "Bearer" means the person in possession of a bill or note which is payable to bearer;
- "Bill;" (e.) The expression "Bill" means bill of exchange, and
 "Note." "Note" means promissory note;
- "Delivery." (f.) The expression "Delivery" means transfer of possession, actual or constructive, from one person to another;
- "Holder." (g.) The expression "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof;
- "Indorsement." (h.) The expression "Indorsement" means an indorsement completed by delivery;
- "Issue." (i.) The expression "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder;
- "Value." (j.) The expression "Value" means valuable consideration;
- "Defence." (k.) [The expression "Defence" includes counter-claim.]

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

3. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer: Bill of exchange defined Imp. Act s. 3

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange: When instrument is not such bill.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself, or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional: Unconditional order defined.

4. A bill is not invalid by reason—

- (a.) That it is not dated;
- (b.) That it does not specify the value given, or that any value has been given therefor;
- (c.) That it does not specify the place where it is drawn or the place where it is payable.

Bill not invalid for reasons specified.

4. An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within Canada, or (b) drawn within Canada upon some person resident therein. Any other bill is a foreign bill: Inland and foreign bills. Imp. Act s. 4

2. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. If not noted as foreign.

5. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee. If different parties to bill are the same person. Imp. Act s. 5.

2. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or as a promissory note. Option of holder in case specified.

6. The drawee must be named or otherwise indicated in a bill with reasonable certainty: Drawee to be named. Imp. Act s. 6.

2. A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession is not a bill of exchange. If there are more than one.

Certainty required as to payee.

Imp. Act s. 7.
If payable to two or more payees, or to holder of office

7. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty:

2. A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being:

If payee is non-existing.

3. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

Certain bills valid but not negotiable.
Imp. Act s. 8.

Payable to order or bearer.

To bearer.

8. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable:

2. A negotiable bill may be payable either to order or to bearer:

3. A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank:

To order.

4. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable:

Option of payee.

5. Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option.

Sum payable.
Imp. Act s. 9.

9. The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a.) With interest;

(b.) By stated instalments;

(c.) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due;

(d.) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill:

Discrepancy between figures and words.

2. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable:

Interest.

3. Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.

Bill payable on demand.
Imp. Act s. 10
varied.

10. A bill is payable on demand—

(a.) Which is expressed to be payable on demand, or on presentation; or—

(b.) In which no time for payment is expressed :

2. Where a bill is accepted or indorsed when it is overdue, Acceptance, etc., when overdue.
it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

11. A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable— Bill payable at a future time. Imp. Act s. 11 varied.

(a) At sight or at fixed period after date or sight :

(b) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain :

2. An instrument expressed to be payable on a contingency As to contingencies.
is not a bill, and the happening of the event does not cure the defect. 54 and 55 Vic. c. 17, s. 1.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at sight or at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly; Omission of date in bill payable after date. Imp. Act s. 12 varied.

Provided that (a) where the holder in good faith and by mistake inserts a wrong date, and (b) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date. 54 and 55 Vic. c. 17, s. 2. As to wrong date.

13. Where a bill or an acceptance, or any indorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or indorsement, as the case may be : Date prima facie evidence. Imp. Act s. 13 varied.

2. A bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday [or other non-judicial day.] Certain datings not to invalidate.

14. Where a bill is not payable on demand, the day on which it falls due is determined as follows :— Computation of time of payment. Imp. Act s. 14 varied.

(a.) Three days, called days of grace, are, in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace : Provided that— Days of grace.

(1.) Whenever the last day of grace falls on a legal holiday or non-judicial day in the Province where any such bill is payable, then the day next following, not being a legal holiday or non-judicial day in such Province, shall be the last day of grace : Non-judicial days. Not as in Imp. Act.

What shall be such. (2.) In all matters relating to bills of exchange the following and no other shall be observed as legal holidays or non-judicial days, that is to say :

In all Provinces except Quebec. (a.) In all the Provinces of Canada, except the Province of Quebec :—

Not in Imp. Act.

Sundays ;
New Year's day ;
Good Friday ;
Easter Monday ;
Christmas Day ;
Labor Day; the first Monday in September.

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign; and if such birthday is a Sunday, then the following day ;

The first day of July (Dominion Day), and if that is a Sunday, then the second day of July as the same holiday ;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada ; and the day next following New Year's Day and Christmas Day, when those days respectively fall on Sunday ;

In Quebec. Not in Imp. Act.

(b.) And in the Province of Quebec the said days, and also—

The Epiphany ;
The Ascension ;
All Saints' Day ;
Conception Day ;

In every Province. Not in Imp. Act

(c.) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant Governor of such Province for a public holiday, or for a fast or thanksgiving within the same, or being a non-judicial day by virtue of a statute of such Province :

Days to be computed when time begins to run.

3. Where a bill is payable [at sight] or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment :

When time begins to run.

4. Where a bill is payable [at sight] or at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery :

"Months."

5. The term "Month" in a bill means the calendar month :

Reckoning of time. Not in Imp. Act.

6. Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated—unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month—with the addition, in all cases, of the days of grace. 56 Vic. c. 30 ; 57 & 58 Vic. c. 55, s. 2.

15. The drawer of a bill and indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the opinion of the holder to resort to the referee in case of need or not, as he thinks fit.

Case of need.
Imp. Act s. 15

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

Optional
stipulations
by drawer or
indorser.
Imp. Act s. 16.

(a.) Negating or limiting his own liability to the holder ;

(b.) Waiving, as regards himself, some or all of the holder's duties.

17. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer :

Definition of
acceptance
Imp. Act
s. 17 Requi-
sites of
acceptance.

2. An acceptance is invalid unless it complies with the following conditions, namely :—

(a.) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient ;

(b.) It must not express that the drawee will perform his promise by any other means than the payment of money ;

3. Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature.

Not in Imp.
Act.

18. A bill may be accepted—

Time for ac-
ceptance.
Imp. Act s.
18 varied.

(a.) Before it has been signed by the drawer, or while otherwise incomplete ;

(b.) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment :

2. When a bill payable (at sight or) after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance. 54 & 55 Vic. c. 17, s. 3.

Date, in case
of acceptance
after dishonor
varied.

19. An acceptance is either (a) general, or (b) qualified : a general acceptance assents without qualification to the order of the drawer ; a qualified acceptance in express terms varies the effect of the bill as drawn :

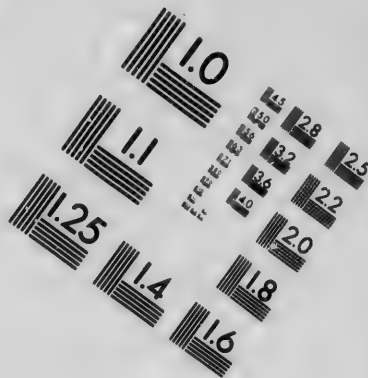
General and
qualified ac-
ceptances.
Imp. Act s. 19.
Varied.

2. In particular, an acceptance is qualified which is —

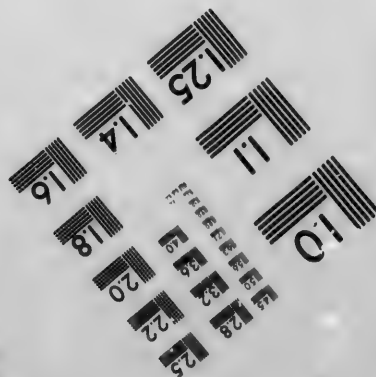
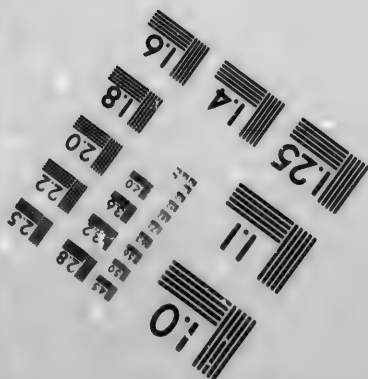
Qualified
acceptance.

(a.) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated ; but an acceptance to pay at a particular specified place is not conditional or qualified.

(b.) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn ;

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- (c.) Qualified as to time;
 (d.) The acceptance of some one or more of the drawees, but not of all.

Inchoate instruments.
 Imp. Act s. 20. Varied.

20. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit:

When to be filled up.

2. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; reasonable time for this purpose is a question of fact:

As to subsequent holder

Provided, that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Contract not complete until delivery.
 Imp. Act s. 21. Exception.

21. Every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto:

Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable:

Requisites as to delivery.

2. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery—

(a.) In order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;

(b.) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill;

When valid delivery presumed.

But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed:

Prima facie evidence.

3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties..

Capacity of parties.
 Imp. Act s. 22. As to corporations.

22. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract:

Provided, that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation :

2. Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Drawing or indorsing by person not competent.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such. Provided that—

Signature essential to liability.

(a.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name ;

Imp. Act s. 23. Exceptions.

(b.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority ;

Forged or unauthorized signature. Imp. Act s. 24, varied.

2. If a bill bearing a forged or unauthorized endorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged or unauthorized endorsement, provided that notice of the endorsement being a forged or unauthorized endorsement is given to each such subsequent endorser within the time and in the manner hereinafter mentioned ; and any such person or endorser from whom said amount has been recovered shall have the like right of recovery against any prior endorser subsequent to the forged or unauthorized endorsement.

Right of recovery by person paying bill bearing forged or unauthorized endorsement. Not in Imp. Act.

Notice of forgery, etc., a condition of such right.

3. The notice of the endorsement being a forged or unauthorized endorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonour of a bill may be given or addressed under this Act. 60 and 61 Vic. c. 10.

Time for and mode of such notice.

Not in Imp. Act.

Procuration
signatures.
Imp. Act
s. 25.

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

Person signing
as agent or in
representative
capacity.
Imp. Act
s. 26.

26. Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability;

Rule for de-
termination
of signature.

2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

Valuable con-
sideration how
constituted.

27. Valuable consideration for a bill may be constituted by—

(a) Any consideration sufficient to support a simple contract;

Imp. Act
s. 27.

(b) An antecedent debt or liability; such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time;

When holder
is holder for
value.

2. Where value has, at any time, been given for a bill, the holder, is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time:

As to lien.

3. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Accommoda-
tion party to
a bill.

Imp. Act
s. 28.

28. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person:

His liability.

2. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due
course.

Imp. Act
s. 29.

29 A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;

(b.) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it ;

2. In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud ;

Title defective
in cases
specified.

3. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Right of sub-
sequent
holder.

30. Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value :

Presumption
of value and
good faith.

2. And every holder of a bill is *prima facie* deemed to be a holder in due course : but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course :

On whom bur-
den of proof
lies.

Imp. Act s. 30.

3. No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract :

Usurious con-
sideration.
Not in Imp.
Act.

4. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "given for a patent right:" and without such words thereon such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration :

Consideration
consisting of
purchase
money of
patent right.
Not in Imp.
Act.

5. The indorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties :

Liability of
transferee.
Not in Imp.
Act.

6. Every one who issues, sells or transfers, by indorsement or delivery, any such instrument not having the words "given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such in-

Penalty.
Not in Imp.
Act.

strument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit.

Negotiation of Bills.

Negotiation of bills.
Imp. Act s. 31. **31.** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill:

- To bearer.** 2. A bill payable to bearer is negotiated by delivery:
- To order.** 3. A bill payable to order is negotiated by the indorsement of the holder completed by delivery:
- Without indorsement.** 4. Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor:
- Personal liability may be avoided.** 5. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Requisites of a valid indorsement.
Imp. Act s. 32. **32.** An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(a.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words is sufficient;

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself;

(b.) It must be an indorsement of the *entire* bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill;

(c.) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others:

Misspelling. 2. Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding his proper signature; or he may indorse by his own proper signature:

Order of indorsement. 3. Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved:

4. An indorsement may be made in blank or special. It may also contain terms making it restrictive. Special indorsement.

33. Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not. Conditional indorsement. Imp. Act s. 33.

34. An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer: Indorsement in blank. Imp. Act s. 34.

2. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable: Special indorsement.

3. The provisions of this Act relating to a payee apply, with the necessary modifications, to an indorsee under a special indorsement: Application of Act to indorsee.

4. Where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person. Conversion of blank indorsement.

35. An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is indorsed "Pay D only," or "Pay D for the account of X," or "Pay D, or order, for collection:" Restrictive indorsement. Imp. Act s. 35.

2. A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so; Right of indorsee thereunder.

3. Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement. If further transfer is authorized.

36. Where a bill is negotiable in its origin, it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment or otherwise; When negotiable bills cease to be so. Imp. Act s. 36.

2. Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can require or give a better title than that which had the person from whom he took it: Negotiation of overdue bill.

3. A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time for this purpose is a question of fact: When bill deemed overdue.

Presumption
as to negotia-
tion.

4. Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue :

Taking bill
subsequent to
dishonor.

5. Where a bill which is not overdue has been dishonored, any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor ; but nothing in this sub-section shall affect the rights of a holder in due course.

Negotiation of
bill to party
already liable
thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable.

Imp. Act s. 37

Rights of the
holder.

38. The rights and powers of the holder of a bill are as follows :—

Imp. Act s. 38

(a) He may sue on the bill in his own name ;

(b) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill ;

(c) Where his title is defective, (1) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (2) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General Duties of the Holder.

When pre-
sentment for
acceptance is
necessary.

39. Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument :

Imp. Act s. 39

Express stipu-
lation as to
presentment.

2. Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment :

No present-
ment in any
other case.

3. In no other case is presentment for acceptance necessary in order to render liable any party to the bill :

Necessary de-
lay for pre-
sentment.

4. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40. Subject to the provisions of this Act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time :

Time for presenting bill payable after sight.

2. If he does not do so, the drawer and all indorsers prior to that holder are discharged :

Imp. Act s. 40 varied.
If not presented.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. 54, 55 Vic. c. 17, s. 5.

As to reasonable time.

41. A bill is duly presented for acceptance which is presented in accordance with the following rules :

Rules as to presentment for acceptance.

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue ;

Imp. Acts, 41 varied.

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only ;

(c) Where the drawee is dead, presentment may be made to his personal representative ;

(d) Where authorized by agreement or usage, a presentment through the post office is sufficient :

Excuses for non-presentment.

2. Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance—

(a) Where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill ;

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected ;

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground :

3. The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment. 54 & 55 Vic. c. 17, s. 6.

When there is no excuse.

42. When a bill is duly presented for acceptance and is not accepted on the day of presentment or within two days thereafter, the person presenting it must treat it as dishonored by non-acceptance ; if he does not, the holder shall lose his right of recourse against the drawer and indorsers.

Non-acceptance.

Imp. Act s. 42, varied.

43. A bill is dishonored by non-acceptance—

Dishonor by non-acceptance and its consequences

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained ; or—

Imp. Act s. 43.

(b) When presentment for acceptance is excused and the bill is not accepted ;

Recourse in
such case.

2. Subject to the provisions of this Act, when a bill is dishonored by non-acceptance an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

As to qualified
acceptances.

Imp. Act
s. 44.

If taken with-
out authority.

44. The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance :

2. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill ;

Partial accept-
ance.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given ; where a foreign bill has been accepted as to part, it must be protested as to the balance :

What shall be
deemed as-
sent.

3. When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

Presentment
for payment.

Imp. Act
s. 45.

Rules as to
presentment.

45. Subject to the provisions of this Act, a bill must be duly presented for payment ; if it is not so presented, the drawer and indorsers shall be discharged :

2. A bill is duly presented for payment which is presented in accordance with the following rules :—

(a) Where the bill is not payable on demand, presentment must be made on the day it falls due ;

(b) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable ;

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case ;

(c) Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place, as hereinafter defined, either to the person designated by the bill as payer or to his representative or some person authorized to pay or refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found ;

(d) A bill is presented at the proper place—

(1) Where a place of payment is specified in the bill or acceptance, and the bill is there presented ;

(2) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;

(3) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known;

(4) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence:

3. Where a bill is presented at the proper place, and, after the exercise of reasonable diligence, no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required:

4. Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all:

5. Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there is, and with the exercise of reasonable diligence he can be found:

6. Where authorized by agreement or usage, a presentment through the post office is sufficient:

7. Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business or known ordinary residence therein, and, if there is no such place of business or residence the bill is presented at the post office, or principal post office in such city, town or village, such presentment is sufficient.

46. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence; when the cause of delay ceases to operate, presentment must be made with reasonable diligence:

2. Presentment for payment is dispensed with —

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment;

(b) Where the drawee is a fictitious person;

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;

Excuse for delay in presentment for payment.

Imp. Act a. 46.

When such presentment is dispensed with.

(d) As regards an endorser, were the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented ;

(e) By waiver of presentment, express or implied.

Dishonor by
non-payment.
Imp. Act s. 47.

47. A bill is dishonored by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid :

Recourse in
such case.

2. Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer, acceptor and indorsers accrues to the holder.

Notice of dishonor and
effect of non-notice.
Imp. Act s. 48.

48. Subject to the provisions of this Act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or endorser to whom such notice is not given is discharged ; Provided that—

(a) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission ;

(b) Where a bill is dishonored by non-acceptance and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment, unless the bill shall in the meantime have been accepted.

Rules as to
notice of
dishonor.
Imp. Act s. 49,
varied.

49. Notice of dishonor, in order to be valid and effectual, must be given in accordance with the following rules :—

(a) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill ;

(b) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party is his principal or not ;

(c) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given ;

(d) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all endorsers subsequent to the party to whom notice is given ;

(e) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonored by non-acceptance or non-payment ;

(f) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor;

(g) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication; a misdescription of the bill shall not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby;

(h) Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf;

(i) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there is and, with the exercise of reasonable diligence, he can be found;

(j) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them unless one of them has authority to receive such notice for the others;

(k) The notice may be given as soon as the bill is dishonored, [and must be given not later than the next following juridical or business day.]

2. Where a bill, when dishonored, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; if he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder:

If dishonored bill is in hands of an agent.

3. Where a party to a bill receives due notice of dishonor, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonor:

Notice to antecedent parties.

4. Notice of the protest or dishonor of any bill payable in Canada shall, notwithstanding anything in this section contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place; and in such latter case such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party is other than either of such above mentioned places; and such notice shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on which such protest or presentment has been made, or on the next following juridical or business day; such notice shall not be invalid by reason of the fact that the party to whom it is addressed is dead:

When notice shall be given.

Miscarriage in
post service.

5. Where a notice of dishonor is duly addressed and posted, as above provided, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post office.

Excuses for
non-notice
and delay.
Imp. Act,
s. 50.

50. Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence: when the cause of delay ceases to operate the notice must be given with reasonable diligence,

When notice
is dispensed
with.

2. Notice of dishonor is dispensed with—

(a.) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged;

(b.) By waiver express or implied: notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice;

(c.) As regards the drawer, in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment;

(d.) As regards the indorser, in the following cases, namely (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or pro-
test of bill.
Imp. Act,
s. 51, varied.

51. Where an inland bill has been dishonored it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment, as the case may be; but, subject to the provisions of this Act with respect to notice of dishonor, it shall not, except in the Province of Quebec, be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser; but in the case of a bill drawn upon any person in the Province of Quebec, or payable or accepted at any place therein, in default of protest for non-acceptance or non-payment, as the case may be, and of notice thereof, the parties liable on the bill other than the acceptor are discharged, subject, nevertheless, to the exceptions in this section hereinafter contained:

Protest of
foreign bill.

2. Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dis-

honored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor, except as in this section provided, is unnecessary :

3. A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment :

4. Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting :

5. Where the acceptor of a bill suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers :

6. A bill must be protested at the place where it is dishonored, [or at some other place in Canada situate within five miles of the place of presentment and dishonor of such bill :] Provided that—

(a.) When a bill is presented through the post office, and returned by post dishonored, it may be protested at the place to which it is returned, [not later than on the day of its return or the next juridical day :]

(b.) Every protest for dishonor, either for non-acceptance or non-payment, may be made on the day of such dishonor at any time after non-acceptance, or in case of non-payment, at any time after three o'clock in the afternoon :

7. A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify—

(a.) The person at whose request the bill is protested ;

(b.) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found :

8. Where a bill is lost or destroyed, or is wrongly [or accidentally] detained from the person entitled to hold it, [or is accidentally retained in a place other than where payable,] protest may be made on a copy or written particulars thereof :

9. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Officer of bank
not to act as
notary.
Not in Imp.
Act.

10. No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed. 54 & 55 Vic. c. 17, s. 7.

Liability of
acceptor as to
presentment.
Imp. Act,
s. 52, varied.

52. [When no place of payment is specified in the bill or acceptance,] presentment for payment is not necessary in order to render the acceptor liable :

2. When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court :

No protest or
notice neces-
sary.

3. In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonor should be given to him :

Presentment
for payment.

4. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

Funds in
hands of
drawer.
Imp. Act s. 53
varied.

53. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.

Liability of
acceptor.
Imp. Act s. 54.

54. The acceptor of a bill, by accepting it—

(a.) Engages that he will pay it according to the tenor of his acceptance ;

(b.) Is precluded from denying to a holder in due course—

(1.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

(2.) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

(3.) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of
drawer.
Imp. Act s. 55.

55. The drawer of a bill, by drawing it—

(a.) Engages that on due presentation it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken ;

(b.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse;

(2.) The indorser of a bill, by indorsing it—

Liability of
indorser.

(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken;

(b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c.) Is precluded from denying to his immediate or a subsequent indorsee that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he had then a good title thereto.

56. Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, [and is subject to all the provisions of this Act respecting indorsers.]

Stranger signing bill, liable as indorser.
Imp. Act s. 56 varied.

57. Where a bill is dishonored, the measure of damages which shall be deemed to be liquidated damages, shall be as follows:—

Measure of damages against parties to dishonored bill.
Imp. Act s. 57 varied.

(a.) The holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(1.) The amount of the bill;

(2.) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

(3.) The expenses of noting [and protest;]

(b.) In the case of a bill which has been dishonored abroad, in [addition to] the above damages, the holder may recover from the drawer or any indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

58. Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferrer by delivery."

Transferrer by delivery.
Imp. Act s. 58.

2. A transferrer by delivery is not liable on the instrument:

Liability.

3. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Warranty.

Discharge of Bill.

Discharge by
payment.
Imp. Acc s. 59.
Payment in
due course.

59. A bill is discharged by payment in due course by or on behalf of the drawee or acceptor:

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective;

Payment by
drawer or
indorser; its
effect.

2. Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an endorser, it is not discharged; but—

(a.) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill;

(b.) Where a bill is paid by an endorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill;

Accommoda-
tion bill.

3. Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged.

Acceptor the
holder at
maturity.
Imp. Act,
s. 61.

60. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Express
waiver.
Imp. Act,
s. 62.

61. When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged: the renunciation must be in writing, unless the bill is delivered up to the acceptor:

The same.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of renunciation.

Cancellation
of bill.
Imp. Act,
s. 63.

62. Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged:

Of any signa-
ture.

2. In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case, any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged:

Erroneous
cancellation.

3. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

63. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers:

Alteration of bill.
Imp. Act, s. 64.

Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor:

Proviso.

2. In particular, the following alterations are material, namely, the alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

What are material alterations.

Acceptance and Payment for Honor.

64. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn:

Acceptance for honor *supra* protest.
Imp. Act, s. 66.

2 A bill may be accepted for honor for part only of the sum for which it is drawn:

In part.

3. An acceptance for honor *supra* protest, in order to be valid, must—

Requirements for validity.

(a) Be written on the bill, and indicate that it is an acceptance for honor;

(b) Be signed by the acceptor for honor:

4. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer:

For whose honor.

5. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honor.

Computation of time.

65. The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts:

Liability of acceptor for honor.
Imp. Act, s. 68.

2. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

To what parties.

Presentment
to acceptor
for honor.
Imp. Act,
s. 67.

66. Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need :

Time for pre-
sentment.

2. Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity ; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him :

Excuses for
non-present-
ment or delay.

3. Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment :

Protest for
non payment.

4. When a bill of exchange is dishonored by the acceptor for honor, it must be protested for non-payment by him.

Payment for
honor *supra*
protest.
Imp. Act,
s. 68.

67. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn :

If more than
one offer to
pay.

2. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference :

Attestation.

3. Payments for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it ;

Basis thereof.

4. The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays ;

Liabilities
and rights in
such case.

5. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party ;

Delivery to
payer for
honor.

6. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. If the holder does not on demand deliver them up, he shall be liable to the payer for honor in damages ;

Effect of re-
fusal to re-
ceive pay-
ment.

7. Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right to recourse against any party who would have been discharged by such payment.

Lost Instruments.

68. Where a bill has been lost before it is overdue, the person who was holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again ;

Holder's right to duplicate of lost bill.

Imp. Act, s. 69.

2. If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so.

If refused.

69. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Action on lost bill.

Imp. Act, s. 70.

Bill in a Set.

70. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill ;

As to bills in sets.

Imp. Act, s. 71.

2. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills ;

If indorsed to different persons.

3. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill ; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him ;

If negotiated to different holders.

4. The acceptance may be written on any part, and it must be written on one part only ;

Acceptance.

5. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill ;

If more than one part is accepted.

6. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof ;

Payment without delivery of proper part.

7. Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Discharge.

Conflict of Laws.

Rules where laws conflict. **71.** Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:—

Validity, how determined.

(a) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:

Proviso.

Provided that—

(1) Where a bill is issued out [of Canada] it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

(2) Where a bill issued out of [Canada] conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in [Canada];

Drawing in-
dorsement,
&c.

(b) Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made:

Proviso.

Provided, that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of [Canada];

Duties of
holder.

(c) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored;

Currency.

(d) Where a bill is drawn out of but payable in [Canada], and the sum payable is not expressed in the currency of [Canada], the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable;

Due date.

(e) Where a Bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Evidence of
protest.
Not in Imp.
Act.

(f) If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonor, and a notarial certificate of the service of such notice shall be received in all courts, as *prima facie* evidence of such protest, notice and service.

PART III.

CHEQUES ON A BANK.

72. A cheque is a bill of exchange drawn on a bank, payable on demand: Cheque defined.
Imp. Act s. 73.

2. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. Certain provisions to apply.

73. Subject to the provisions of this Act—

(a) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid; Presentment of cheque for payment.
Imp. Act s. 74.

(b) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case;

(c) The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

74. The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by— Revocation of bank's authority.
Imp. Act s. 75.

(a) Countermand of payment;

(b) Notice of the customer's death.

CROSSED CHEQUES.

75. Where a cheque bears across its face an addition of— General crossing defined.
Imp. Act s. 76, varied.

(a) The word ["bank"] between two parallel transverse lines, either with or without the words "not negotiable;" or—

(b) Two parallel transverse lines simply, either with or without the words "not negotiable;"

That addition constitutes a crossing, and the cheque is crossed generally;

2. Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank. Special crossing.

Crossing by
drawer or
after issue.
Imp. Act s. 77,
varied.
General or
special.
May be
varied.

76. A cheque may be crossed generally or specially by the drawer :

2. Where a cheque is uncrossed, the holder may cross it generally or specially :

3. Where a cheque is crossed generally, the holder may cross it specially :

Words may be
added.

4. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable:"

Re-crossing
for collection.

5. Where a cheque is crossed specially the bank to which it is crossed may again cross it specially, to another bank for collection :

Crossing by
bank.

6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself :

Uncrossing
crossed
cheque.
Not in Imp.
Act.

7. A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines, and initialling the same, the words "pay cash."

Crossing is a
material part
of cheque
Imp. Act s. 78.

77. A crossing authorized by this Act is a material part of the cheque ; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

Duties of bank
as to crossed
cheques.
Imp. Act s. 79

78. Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof :

Liability for
improper pay-
ment.

2. Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid :

When liability
does not
accrue.

Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be.

79. Where the bank, on which a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Protection to bank and drawer where cheque is crossed.

Imp. Act s. 80.

80. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it.

Effect of crossing on holder.

Imp. Act s. 81.

81. Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Protection to collecting bank.

Imp. Act s. 82.

PART IV.

PROMISSORY NOTES.

82. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer :

Promissory note defined.

Imp. Act s. 83.

2. An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker :

Indorsement by maker.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof :

Collateral pledge does not invalidate.

4. A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note ; any other note is a foreign note.

Inland and foreign.

83. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Delivery necessary.

Imp. Act s. 84.

84. A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor :

Joint and several notes.

Imp. Act s. 85.

As to number. 2. Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note.

Note payable on demand. **85.** Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the indorsement; if it is not so presented, the endorser is discharged; [if however, with the assent of the indorser it has been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security]:

Reasonable time. 2. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case:

Defects without notice. 3. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment of note for payment. **86.** Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place. But the maker is not discharged by the omission to present the note for payment on the day that it matures. But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable:

Liability. 2. Presentment for payment is necessary in order to render the indorser of a note liable:

Place for presentment. 3. When a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

Liability of maker. **87.** The maker of a promissory note, by making it—
Imp. Act s. 88. (a) Engages that he will pay it according to its tenor;
 (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

Application of part II to notes. **88.** Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes:

2. In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order: Corresponding terms.

3. The following provisions as to bills do not apply to notes, namely, provisions relating to— What provisions do not apply.

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra* protest;
- (d) Bills in a set:

4. Where a foreign note is dishonored, protest thereof is unnecessary, except for the preservation of the liabilities of indorsers, As to foreign note. Varied. Not in Imp. Act.

PARV V.

SUPPLEMENTARY.

89. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not. Good faith. Imp. Act s. 90.

90. Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority: Signature. Imp. Act s. 91.

2. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. As to corporations.

91. Where, by this Act, the time limited for doing any act or thing in less than three days, in reckoning time, non-business days are excluded: "non-business days," for the purposes of this Act, mean the days mentioned in the fourteenth section of this Act; any other day is a business day. Computation of time. Imp. Act s. 92, varied.

92. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill or note has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting. When noting is equivalent to protest. Imp. Act s. 93.

Protest when
notary is not
accessible.
Imp. Act s.
94, varied.

93. Where a dishonored bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any justice of the peace resident in the place may present and protest such bill and give all necessary notices, and shall have all the necessary powers of a notary in respect thereto :

Expenses.

2. The expense of noting and protesting any bill or note, and the postage thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon :

Fees charge-
able.

3. Notaries may charge the fees in each Province heretofore allowed them :

Forms.

4. The forms in the first schedule to this Act may be used in noting or protesting any bill or note and in giving notice thereof. A copy of the bill or note and indorsement may be included in the forms, or the original bill or note may be annexed and the necessary changes in that behalf made in the forms :

Evidence of
presentation,
dishonor and
notice.

5. A protest of any bill or note, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *prima facie* evidence of presentation and dishonor, and also of service of notice of such presentation and dishonor as stated in such protest.

Dividend war-
rants may be
crossed.

Imp. Act s. 95.

94. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Repeal.

Imp. Act s. 96.

95. The enactments mentioned in the second schedule to this Act are hereby repealed, as from the commencement of this Act, to the extent in that schedule mentioned :

Proviso.
Varied.

Provided, that such repeal shall not affect anything done or suffered, or any right, title or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest ;

"The Bank
Act," not
affected.

Not in Imp.
Act.

Imperial Acts
15 Geo. III,
c. 51, and 17
Geo. III, c. 30,
not to apply.
Not in Imp.
Act.

2. Nothing in this Act or in any repeal effected thereby shall affect the provisions of "*The Bank Act* :

3. The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III, intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend to or be in force in any Province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders which have been or may be made or uttered therein.

96. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed and shall operate as if it referred to the corresponding provisions of this Act.

Construction with other Acts, &c.
Imp. Act s. 99.

97. This Act shall come into force on the first day of September next.

Commencement of Act.

98. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of the said Act, as hereby amended, shall apply, and shall be taken and held to have applied from the date on which the said Act came into force, to bills of exchange, promissory notes and cheques. 54, 55 Vict. c. 17, s. 8.

Application of Common Law of England.
Imp. Act s. 97 (2), varied.

FIRST SCHEDULE.

FORM A.

NOTING FOR NON-ACCEPTANCE.

(Copy of Bill and Indorsements.)

On the 18 , the above bill was, by me, at the request of the drawee, personally (or, at his residence, office or usual place of business), in the city (town or village) of , and I received for answer, " " ; The said bill is therefore noted for non-acceptance.

A. B.,
Notary Public.

(Date and place.) 18 .

Due notice of the above was by me served upon { A. B., } the { drawer, } personally, on the day of (or, at his residence, office or usual place of business) in , on the day of (or, by depositing such notice, directed to him, at , in Her Majesty's post office in the city [town or village], on the day of , and prepaying the postage thereon.)

A. B.,
Notary Public.

(Date and place.) 18 .

FORM B.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

(Copy of Bill and Indorsements.)

On this day of , in the year 18 , I, A. B., notary public for the Province of , dwelling at , in

the Province of _____, at the request of _____, did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the { drawee } thereof personally (or, at his residence, office or usual place of business) in _____, and, speaking to himself (or his wife, his clerk, or his servant, &c.,) did demand { acceptance } thereof; unto which demand { he } answered: " _____"
 { she }

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (or drawer and indorsers) of the said bill, and other parties thereto or therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of { acceptance } of the said bill.
 { payment }

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
 Notary Public.

FORM C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE
 AT A STATED PLACE.

(Copy of Bill and Indorsements.)

On this _____ day of _____, in the year 18 _____, I, A. B., notary public for the Province of _____, dwelling at _____, in the Province of _____, at the request of _____, did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F. the { drawee } thereof, at _____, being the stated place where the said bill is payable, and there, speaking to _____ did demand { acceptance } of the said bill; unto which demand he answered: " _____"
 { payment }

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (or drawer and indorsers) of the said bill, and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come, for want of { acceptance } of the said bill.
 { payment }

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
 Notary Public.

FORM D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED FOR
 NON-ACCEPTANCE.

If the protest is made by the same notary who noted the bill, it should immediately follow the act of noting and memorandum of service thereof, and begin with the words "and afterwards on, &c.," continuing as in the last preceding form, but introducing between the words "did" and "exhibit," the word "again," and, in a parenthesis, between the words "written" and "unto," the words: "and which bill was by me duly noted for non-acceptance on the _____ day of _____"

But if the protest is not made by the same notary, then it should follow a copy of the original bill and indorsements and noting marked on the bill—and then in the protest introduce, in a parenthesis, between the words "written" and "unto," the words: "and which bill was on the day of , by , notary public for the Province of , noted for non-acceptance, as appears by his note thereof marked on the said bill."

FORM E.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(Copy of Note and Indorsements.)

On this day of , in the year 18 , I A. B.,
notary Public for the Province of , dwelling at ,
in the Province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto , the promisor, personally (or, at his residence, office, or usual place of business), in and speaking to himself (or his wife, his clerk or his servant, &c.), did demand payment thereof; unto which demand { he } answered: " " " "

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.

Notary Public.

FORM F.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A STATED PLACE.

(Copy of Note and Indorsements.)

On this day , in the year 18 , I, A. B.,
notary public for the Province of , dwelling at ,
in the Province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto the promisor, at , being the stated place where the said note is payable, and there, speaking to did demand payment of the said note, unto which demand he answered: " " " "

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All which I attest by my signature.

(Protested in duplicate.)

A. B.,

Notary Public.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR NON-ACCEPTANCE,
OR OF A PROTEST FOR NON-PAYMENT OF A BILL.

(Place and date of Noting or of Protest.)

1st

To P. Q. (the drawer.)

at

Sir,

Your bill of exchange for \$, dated at
the , upon E. F., in favor of C. D., payable days
after { sight, } was this day, at the request of
{ date }
duly { noted } by me for { non-acceptance. }
{ protested } { non-payment. }

A. B.,
Notary Public.

(Place and date of Noting or of Protest.)

2nd.

To C. D. (indorser),
(or F. G.)

at

Sir,

Mr. P. Q.'s bill of exchange for \$, dated at
the , upon E. F., in your favor (or in favor of C. D.),
payable days after { sight, } and by you indorsed, was
{ date, }
this day, at the request of
{ noted } by me for { non-acceptance. }
{ protested } { non-payment. }

A. B.,
Notary Public.

FORM H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

(Place and date of Protest.)

To

at

Sir,

Mr. P. Q.'s promissory note for \$, dated at
, the payable { days }
{ months } after date to
{ on — }
{ you } or order, and indorsed by you, was this day, at the
{ E. F. } request of , duly protested by me for non-
payment.

A. B.,
Notary Public.

FORM I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR OF NON-PAYMENT OF A NOTE (*to be sub-joined to the Protest.*)

And afterwards, I, the aforesaid protesting notary public, did serve due notice, in the form prescribed by law, of the foregoing protest for { non-acceptance } of the { bill } thereby protested upon { P. Q., } { non-payment } { note } { C. D., } the { drawer } personally, on the day of (or, at his residence, office, or usual place of business) in , on the day of ; (or, by depositing such notice, directed to the said { P. Q., } at , in Her Majesty's post office in { C. D., } on the day of , and prepaying the postage thereon).

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,
Notary Public.

FORM J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(*Copy of Bill or Note and Indorsements.*)

On this day of , in the year 18 , I, N. O., one of Her Majesty's justices of the peace for the district (or county, &c.), of , in the Province of , dwelling at (or near) the village of , in the said district, there being no practising notary public at or near the said village (or any other legal cause), did, at the request of and in the presence of well known unto me,

exhibit the original { bill } whereof a true copy is above written unto { note }

P. Q., the { drawer } thereof, personally (or at his residence, office or usual place of business) in , and speaking to himself { acceptor } { promisor }

(his wife, his clerk or his servant, &c.), did demand { acceptance } { payment }

thereof, unto which demand { he } answered : " { she }

Wherefore I, the said justice of the peace, at the request aforesaid, have protested, and by these presents do protest against the

{ drawer and indorsers } of the said { bill } and all other { promisor and indorsers } { note }

{ acceptor, drawer and indorsers } parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of

{ acceptance } of the said { bill } { payment } { note. }

All which by these presents attested by the signature of the said (the witness) and by my hand and seal.

(*Protested in duplicate.*)

(*Signature of the Witness.*)

(*Signature and seal of the J. P.*)

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Province and Chapter.	Title of Act and extent of repeal.
Dominion of Canada : Chap. 123, Revised Statutes.....	An Act respecting Bills of Exchange and Promissory Notes.—The whole Act.
Province of Quebec : Civil Code of Lower Canada.....	Articles 2,279 to 2,354, both inclusive [*].
Nova Scotia : Revised Statutes, third series, chap. 82.....	"Of Bills of Exchange and Promissory Notes." Section 2. The other sections of this chapter have been heretofore repealed.
New Brunswick : Revised Statutes, chap. 116	"Of Bills, Notes and Choses in Action," Section 2. The other sections of this chapter have been heretofore repealed.
30 Vict., 1867, chap. 34	An Act to amend chap. 116 of the Revised Statutes, "Of Bills, Notes and Choses in Action;" also Act 12th Victoria, chapter 39, relating thereto. Section 1.

[*Except in so far as such articles, or any of them, relate to evidence in regard to bills of exchange, cheques and promissory notes.]

NOTES.

Rule for Construction of Act. The Act upon which the Statute is modelled is the English Bills of Exchange Act 1882. That Act was intended to be a code of the law relating to negotiable instruments. The proper course in interpreting the Statute is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. The Act was not intended to be merely a code of the existing law. It was intended to alter and did alter it in certain respects. It is not to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment; per Lord Herschell, *Bank of England v. Vagliano* (1891) A.C. 107, 144, 145.

Purpose of Note. The purpose of the present note is to collect only such decisions as have been made upon the Act itself.

Issue. A cheque is issued although parted with and issued in consequence of fraud practised on the drawer; *Clutton v. Attenborough* (1897) A.C. 90.

Form and Interpretation. A bill payable to "order" is equivalent to "my order" and when endorsed by the drawer is a valid bill; *Chamberlain v. Young* (1893) 2 Q.B. 706.

A condition added to a promissory note that "no time given or security taken" from or composition arrangement entered into with either party hereto shall "prejudice the rights of the holder to proceed against any other party" makes it invalid as a note; *Kirkwood v. Smith* (1896) 1 Q.B. 582, and so does a provision that the title and right to the possession of the property for which the note is given shall remain in the vendor: *Dominion Bank v. Wiggins* (1894) 21 A.R. 275.

A bill containing the words "which you will please charge to my account" and credit according to a registered letter I have addressed to you" is a valid bill; *Re Boyes, Crofton v. Crofton* (1886) 33 Ch. D. 612.

Fictitious Payee. Whenever a name is inserted in a bill as that of payee by way of pretence merely without any intention that payment shall be made in conformity therewith, the payee is fictitious within s. 7 (3). It is not necessary that the acceptor should have been cognizant of the fictitious character of the payee; *Bank of England v. Vagliano* (1891) A.C. 107, nor is it necessary that the drawer of a cheque should be aware that the payee was a fictitious or non-existent person; *Clutton v. Attenborough* (1897) A.C. 90, and where a party was under obligation to make a deposit of a certain amount and obtained a cheque for part of it payable to a person who was not intended to indorse it and the cheque was delivered undorsed as part of the deposit it was held that the payee was fictitious. *Edinburgh Ballarat Gold Quartz Mine Co. v. Sydney* (1891) 7 T. L. R. 656.

Restricting Negotiability. S. 8 (1). If the acceptor of a bill desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not, if he acted reasonably, fail to understand that it was accepted subject to an express qualification. Where above the acceptance the words "in favor of Mr. L. Delobel Flipo only" were written, the acceptance was held to be nevertheless a general acceptance of a negotiable bill; *Meyer v. Decroix* (1891) A.C. 520. Where a note was endorsed by way of security, and bore across the face "not negotiable and given as security" and it was agreed that payment should not be required while certain securities remained in the possession of the payee it was held that an action upon the note, while the payee still retained some of the securities and had not accounted for the others, was not based upon the real contract and that it could not succeed; *Robertson v. Davies* (1897) 27 S. C. R. 571.

S. 8 (4). Bills and notes are now negotiable although the words "or order" or "or bearer" do not follow the name of the payee.

Blank Bill. S. 20. Where a bill is accepted in blank and is filled up within a reasonable time it is valid in the hands of a holder in due course. *Morgan v. Hesketh* (1889) 6 T. L. R. 162.

Fraudulent use of Signature. S. 21. A person who without negligence signs a document in the belief that he is witnessing a deed is not liable even to a holder in due course. *Lewis v. Clay* (1898) 67 L. J. Q. B. 224; *Sanguinetti v. Messiter* (1885) 2 T. L. R. 135.

Unauthorized Acceptance by Partner. S. 23 (b). Where the drawer of a bill had notice that the acceptance of a bill by one partner was a fraud upon the other partner he was held to be disentitled to recover thereon. *Frye v. Ives* (1892) 8 T. L. R. 582.

Forged Endorsements. S. 24 (1). Bankers who obtain payment of or cash and retain a cheque upon which the endorsement of the payee is forged are liable to the true owner for conversion; *Kleinwort v. Comptoir National D'Escompte de Paris* (1894) 2 Q. B. 157; *Lacave v. Credit Lyonnais* (1897) 1 Q. B. 148.

Forged Endorsements. S. 24 (2) (3) enacted in 1897 to a large extent alters the law laid down in *London and River Platte Bank v. Bank of Liverpool* (1896) 1 Q. B. 7. There is no similar section in the English Act. A banker who pays a cheque upon which is a forged endorsement will now be entitled to recover back, from any party liable thereon after the forged endorsement, the amount of the cheque, provided notice of the forgery is given within a reasonable time after he acquires notice thereof. A reasonable time is not capable of exact definition. It must depend upon circumstances. But the party upon whom it is incumbent to do anything within a reasonable time fulfils his obligation notwithstanding protracted delay so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably; *Hick v. Raymond* (1893) A. C. 22, 32.

Infant. A note of an infant even for necessities is void as against him though taken by an indorsee for value without notice of the infancy; *Re Soltyskoff, Ex parte Margrett* (1891) 1 Q. B. 413.

Oral Agreement to Renew. SS. 21 (2b) 29 (2). Evidence of an oral agreement to renew a bill at maturity cannot be received. *New London Credit Syndicate v. Neale* (1898) 2 Q. B. 487.

Oral Agreement as to Method of Payment. SS. 21 (2b) 29 (2). An independent parol agreement that the note shall be satisfied upon certain work or services being done or rendered by the maker, is, when performed, a satisfaction of the note between the original parties; *McQuarrie v. Brand* (1896) 28 O. R. 69.

Endorsement "Per Pro." If an agent has authority to endorse bills for his principal, his abuse of the authority will not affect a *bona fide* holder for value; *Bryant v. Banque du Peuple* (1893) A. C. 170. Cheques endorsed by an agent without authority may be recovered by the true owner. *Employers' Liability Corp. v. Skipper* (1887) 4 T. L. R. 156.

Personal Liability. An assignee for creditors who signs a note "P. L. Assignee" is liable personally thereon under s. 26; *Boyd v. Mortimer* (1899) 30 O. R. 290, and a person who adds "First Minister of Zanzibar Government" is personally liable; *Forwood v. Mathews* (1893) 10 T. L. R. 138.

Consideration. S. 27. Forbearance to sue a principal without any agreement is sufficient consideration to entitle a creditor to recover against a surety; *Carrique v. Beaty* (1897) 24 A. R. 302, 310; *Crears v. Hunter* (1887) 19 Q. B. D. 341. Bankers are holders for value of cheques placed to the credit of a customer's account though it may be overdrawn; *Royal Bank of Scotland v. Tottenham* (1894) 2 Q. B. 715; *Clarke v. London and County Banking Co.* (1897) 1 Q. B. 552. Forbearance to sue a debt believed to be enforceable is a good consideration for a note though no valid debt existed; *Kingsford v. Oxenden* (1890) 7 T. L. R. 13.

Accommodation. S. 28. Evidence of conversations by a third party with the Manager of a Bank, the holders of a note, showing that the same was given for the accommodation of the Bank should be received; *Bank of Nova Scotia v. Fish* (1895) 24 S. C. R. 709. Payment by a drawer to the holder of a bill, accepted for the drawer's accommodation, discharges the holder's claim against the acceptor; *Solomon v. Davis* (1883) 1 C. & E. 83.

Complete Bill. S. 29 (1). A bill without a drawer's name is not complete and regular and a holder cannot recover thereon; *South Wales &c. Coal Co. v. Underwood* (1898) 15 T. L. R. 157.

Holder in due course. A holder in due course is a person to whom after its completion by and between the original parties a note has been negotiated. The payee is not a holder in due course; *Lewis v. Clay* (1898) 67 L. J. Q. B. 224. See s. 21(2).

Presumption of Value. S. 30. The payee of a promissory note given without consideration cannot recover thereon; *Re Whitaker* (1889) 42 Ch. D. 119. Notes which to the knowledge of an executor were given as gifts and not for value should not be paid by him, and he will not be allowed the payment thereof on passing his accounts; *Re Williams* (1896) 27 O. R. 405. Where fraud is proven the onus is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud; *Tatam v. Haslar* (1889) 23 Q. B. D. 345; but the onus of proving value is not shifted to the holder by the fact that the notes were made for the accommodation of others; *Merchants' National Bank v. Ontario Coal Co.* (1894) 16 P. R. 87. The section has no application to proceedings by way of injunction; *Hawkins v. Troup* (1890) 7 T. L. R. 104.

Given for a Patent Right. S. 30 (4). A bill or note for a part interest in a patent is void unless the words "given for a patent right" are written across the face; *Craig v. Samuel* (1895) 24 S. C. R. 278; *Johnson v. Martin* (1892) 19 A. R. 592.

Transfer Without Endorsement. S. 31. A transferee without endorsement becomes upon endorsement a holder of a bill and the bill is then "negotiated" within s. 31 (1); and the endorsement would be a breach of an injunction restraining negotiation notwithstanding that the transfer without endorsement was prior to the injunction; *Day v. Longhurst* (1893) 62 L.J. Ch. 334; (1893) W.N. 3.

A transferee by delivery without endorsement who receives a bill by way of pledge to secure repayment of an advance cannot recover against the maker in the absence of an intention on the part of the transferor to transfer the whole of his rights; *Good v. Walker* (1892) 61 L.J.Q.B. 736.

Restrictive Endorsement. S. 35. An endorsement to a bank for collection gives no right to the bank to sue on the bill; *Williams v. Shadbolt* (1885) 1 T.L.R. 417.

Defect of Title. S. 36 (2). The expression "defect of title" is a phrase introduced in lieu of the old expression "subject to equities" which is an expression not adopted because the Imperial Act applied to Scotland and "subject to equities" was an expression not known to Scottish Law; *Alcock v. Smith* (1892) 1 Ch. 238, 263. The sub-section is only declaratory of the English law where that law applies, and has no application to transactions governed by the law of other countries, e.g., Norway, in which country, under a judicial sale of a bill title was obtained to a bill free from equities; *Alcock v. Smith* (1892) 1 Ch. 238. An agreement between the maker and payee of a note that it shall only be used for a particular purpose constitutes an equity attaching to the note; *MacArthur v. MacDowall* (1893) 23 S.C.R. 571.

Holder in due course. S. 38 (b). An endorsee does not cease to be a holder in due course merely by sending the bills to the drawer who returns them; *Chhn v. Werner* (1891) 8 T.L.R. 11.

Presentment for Payment. S. 45. A holder is entitled to know on the very day on which a bill becomes due whether it is to be paid or dishonored; *London and River Platte Bank v. Bank of Liverpool* (1896) 1 Q.B. 7.

Presentment by sending a cheque by post to the Bank on which it is drawn is a legal and customary mode of presentment; *R. v. Bank of Montreal* (1886) 1 Ex. C.R. 154.

Where a place is specified in a bill as the place of payment the bill must be presented there to charge an endorser, although the acceptance may be "general" within s. 19; *Beirnsstein v. Walker* (1895) 11 T.L.R. 356.

Waiver. S. 46(e). Where a drawer of a bill wrote accepting notice of non-payment and admitting his liability as though notice of dishonor had been given in the usual way, but he did not know that the bill had not been presented for payment, it was held that he had not waived presentment for payment; *Keith v. Burke* (1885) 1 C. & E. 551.

Notice of Dishonor. S. 49. Where a notice was sent in time to the wrong address, viz., to another branch of a bank, and a telegram to the right address was sent on the following morning (which would have been one day late), it was held that the two acts must be treated as one continuing act, and that the notice was in time as being given "within a reasonable time" under s. 49 (12) of the English Act. *Fielding v. Corry* (1898) 1 Q.B. 268. It will be noticed that s. 49 (k) differs from the English section 49 (12) and that in Canada notice must be given on the next juridical or business day.

A notice that a cheque "has not yet been covered" is equivalent to "not paid" and is a sufficient notice of dishonor; *R. v. Bank of Montreal* (1886) 1 Ex. C.R. 154.

A creditor who receives the cheque of a third person must present it without undue delay, and if dishonored give notice thereof, otherwise he will be taken to have accepted the cheque in payment; *Sawyer v. Thomas* (1890) 18 A.R. 129.

Address of Notice. S. 49 (4). The provisions for addressing the notice of dishonor to the place where the bill is dated, unless some other address is designated upon the bill, are not contained in the English Act. The effect of the sub-section is to make a notice of dishonor mailed by the holder in due time to any party to the note at the place where the note is dated unless another place be designated, or mailed to the address of such party, equivalent to the delivery of such notice at the actual residence or domicile of such party; *Cosgrave v. Boyle* (1881) 6 S.C.R. 165, and this is the rule even if the notice is to be given to a person resident in the place where the note is payable; *Merchant's Bank of Halifax v. McNutt* (1883) 11 S.C.R. 126, and a notice addressed to a man who is dead will be good though the holder may know of the death; *Cosgrave v. Boyle* (1881) 6 S.C.R. 165, which decision is confirmed by the concluding clause of s. 49 (4). A notice addressed to "Mr. James Bell, Executor of the Last Will and Testament of Marian A. Bell, Perth," which notice reached the husband of the endorser at her late residence was held to be sufficient; *Merchant's Bank v. Bell* (1881) 29 Gr. 413. An imitation by a notary of the endorser's illegible signature is insufficient if the notice was not really addressed to or did not reach him; the holder should supply the person giving notice of dishonor with all the information he possesses as to the names of the parties; *Baillie v. Dickson* (1882) 7 A.R. 759; see 46 U.C.R. 167. The place to which the notice is to be sent need not be written with the party's own hand; it may be written by another person if that other person had in any manner any kind of authority from the party to write it. Where a place is designated the notice may be addressed to such place, even though it is known not to be the proper address; *Hay v. Burke* (1889) 16 A.R. 463.

Waiver of Notice. 50 (b) A promise to pay a bill is an acknowledgment of liability and is either evidence of the fact of notice or that it had been waived. But a statement by an endorser that he would see the maker about it and a subsequent statement that he had seen the maker who promised to pay as soon as he could with a request not to "crowd the note" are not in themselves sufficient evidence of waiver; *Britton v. Milsom* (1892) 19 A.R. 96. An intimation by the party entitled to notice that he is aware the bill will be dishonored and that he will ultimately be looked to for payment is a sufficient waiver; *Coulcher v. Toppin* (1886) 2 T.L.R. 657.

Protest for Better Security. S. 51 (5) A holder is not bound to protest for better security and the act not only does not give the holder but excludes him from recovering the costs of such a protest; *Re English Bank of the River Plate* (1893) 2 Ch. 438.

Liability of Endorsers. S. 55 (2) Endorsers are discharged if the holder of a note accepts a new debtor in the place of the maker; *Holliday v. Jackson* (1894) 22 S.C.R. 479.

Stranger Signing Bill. S. 56. "A proper endorsement can only be made by one who has a right to the bill and who thereby transmits the right and also incurs certain well-known and well defined liabilities. But it is perfectly consistent with the principles of the law merchant that a person who writes an endorsement with intent to become party to a bill shall be held—notwithstanding he has not and therefore cannot give any right to its contents—to be subject as in a question with *subsequent* holders to all the liabilities of a proper endorser. But to hold that a stranger to the bill who writes his name across the back of it before it has passed out of the hands of the drawer thereby becomes liable to the drawer, failing payment by the drawees, appears to me to be as inconsistent with the principles of the law merchant as to hold that there may be a drawer other than the original drawer and payee or that there may be an acceptor other than the drawee or one who accepts as his agent or for his honour." Per Lord Watson, *Steele v. McKinlay* (1880) 5 App. Cas. 754, 782. The Bills of Exchange Act has not altered the law laid down in *Steele v. McKinlay* and a stranger who endorses a bill payable to the drawers, before they have indorsed it, is not liable as indorser, since at the time he put his name on it, it was not complete and regular on the face of it (as it lacked the drawer's indorsement) nor on a contract of suretyship since the provisions of The Statute of Frauds were not satisfied; *Jenkins v. Coomber* (1898) 2 Q.B. 168; *Singer v. Elliott* (1887) 4 T.L.R. 34, 524. The endorsement must in law be regarded as made for the benefit of the subsequent holders and in an action by subsequent holders it is immaterial when the transfer by the payee was made; *Duthie v. Essery* (1895) 22 A.R. 191. A stranger who places his name on the back of a note is not liable as a maker or guarantor and is discharged if notice of dishonor is not given; *Ayr American Plough Co. v. Wallace* (1892) 21 S.C.R. 356; *London and Southern Counties Co. v. Clamp* (1890) 7 T.L.R. 131; but he is not necessarily an endorser; *Westacott v. Smalley* (1883) 1 C. & E. 124; *Stagg v. Broderick* (1895) 12 T.L.R. 12. If the note is not negotiable no liability is incurred; *Robertson v. Lonsdale* (1891) 21 O.R. 600. In *Robertson v. Davis* (1897) 27 S.C.R. 574, *Sedgwick J.* said *obiter* "Under no circumstances can the payee of a promissory note or the 'drawer of a bill of exchange maintain an action against an indorser where 'the action is founded upon the instrument itself.'"

For a collection of American authorities see 48 Cent. L.J. 311.

Where the payee has endorsed the note without recourse or where it appears from the facts that the stranger indorser could not recover against the payee as a prior endorser by reason of his having endorsed the note as a surety to the payee or otherwise so that there would be no circuitry of action, the payee in his capacity as a subsequent indorsee may recover against the stranger indorser; *Wilkinson v. Unwin* (1881) 7 Q.B.D. 636; *Pegg v. Howlett* (1897) 28 O.R. 473; *Holmes v. Durkee* (1883) 1 C. & E. 23.

Measure of Damages. S. 57. The expense of a protest for better security cannot be included in the damages recoverable on a bill; *Re English Bank of the River Plate* (1893) 2 Ch. 438. Designating the expenses of noting as "bank charges" is a sufficient description thereof in a special endorsement of a writ in an action on the bill; *Dando v. Boden* (1893) 1 Q.B. 318.

The English Act gives as damages when the bill has been dishonored abroad re-exchange "in lieu of" the damages given by sub-sec. (a); *Re Commercial Bank of South Australia* (1887) 36 Ch. D. 522, in which the method of computing re-exchange is pointed out. The Canadian Law gives re-exchange "in addition to" the damages allowed on an inland bill.

Renunciation of Rights. S. 61. The word "acceptor" which is equivalent to "maker" (see sec. 88 (2)) in s. 61 does not extend to his devisees. Therefore a parol renunciation by the holder of a note accompanied by delivery of the note to the devisee of the maker does not operate as a discharge of the note; *Edwards v. Walters* (1896) 2 Ch. 157.

A renunciation in writing must be a record of an absolute and unconditional renunciation of rights and not a memorandum or note of the renunciation or of an intention or desire to renounce; *Re George, Francis v. Bruce* (1890) 44 Ch. D. 627; *Morgan v. Dodson* (1884) 1 T.L.R. 23. The requirement of a writing, when the bill is not delivered up, is a modification of the law merchant; *Edwards v. Walters* (1896) 2 Ch. 157, 166. Where a receipt spoke of a balance then remaining due by the acceptor the receipt did not amount to a renunciation of the rights of the holder; *Day v. Batchelor* (1885) 1 T.L.R. 489.

Cancellation. S. 62. Where a banker is employed to receive payment of a bill from the acceptor and receives payment from him clogged with a condition, without assent to which the holder is not entitled to retain the money paid, the banker is not entitled to treat such conditional payment as if it were an absolute payment and to cancel the bill as paid before he has received the assent to the condition; *Bank of Scotland v. Dominion Bank* (1891) A.C. 592.

Alteration of Bill. S. 63. An alteration in the date of a bill from 17th July to 27th July after the acceptance and without the acceptor's assent discharges him; *Engel v. Stourton* (1889) 53 J.P. 535. The acceptor of a bill is not under a duty to take precautions against fraudulent alterations after acceptance; *Scholfield v. Earl of Lonsborough* (1896) A.C. 514. An alteration is binding upon any party to the bill who has assented to or authorized it and if a party is estopped by negligence from saying he did not authorize the alteration he will be taken to have authorized it, per Lord Watson (1896) A.C. 543; *Carrique v. Beaty* (1897) 24 A.R. 302; see *Sutton v. Blakey* (1897) 13 T.L.R. 441. Where spaces were left in a bill and after acceptance the amount thereof was fraudulently increased it was held that the acceptor had been guilty of no negligence in accepting the bill in that condition; *Scholfield v. Earl of Lonsborough* (1896) A.C. 514.

If the alteration is not "apparent" the holder may recover upon the bill as if it had not been altered, i.e. the bill is not void. Where the name of another person had been added as maker, not by or with the knowledge of the payees, but apparently by some person who without fraud thought he had authority to sign such name, the right to recover against the original maker was upheld; *Cunnington v. Peterson* (1898) 29 O.R. 346; but the addition of another maker will avoid the note as to non-assenting parties in the hands of a holder who allows the alteration without the assent of the other parties; *Carrique v. Beaty* (1897) 28 O.R. 175; 24 A.R. 302.

Denman J., said in *Leeds Bank v. Walker* (1883) 11 Q.B.D. 84, 90, "By the word 'apparent' I do not think it is meant that the holder only should 'not have had the means of detecting the alteration. If the party sought to 'be bound can at once discern by some incongruity on the face of the note 'and point out to the holder that it is not what it was, that is to say, that it 'has been materially and fraudulently altered, I think the alteration is an 'apparent' one, even if it is not an obvious one to all mankind." But this statement was *obiter* and is not to be followed; *Cunnington v. Peterson* (1898) 29 O.R. 346.

Payer for Honor. S. 67 (6). A payer for honor cannot recover as damages a commission for so doing in the absence of express contract; *Re English Bank of the River Plate* (1893) 2 Ch. 438.

Lost Instruments. S. 69. A person suing upon a lost note should before action at the risk of costs, tender an indemnity to the maker; *Banque Jacques Cartier v. Strachan* (1869) 5 P.R. 159. Where the suit is upon the note it should not be a condition of the indemnity that a new note be given. *Orton v. Brett* (1899) 19 C.L.T. 117. The indemnity of the plaintiff alone will not be accepted. There should be a surety and each surety should make a proper affidavit of justification. The sufficiency of the security may be referred by the Court to the Master; *Orton v. Brett* (1899) 19 C.L.T. 117.

Conflict of Laws. S. 71 (2b). Although an indorsement of an inland bill may be invalid by the law of the country where it is made, the acceptor is liable to the indorsee if the indorsement is valid by the laws of Canada; *Lebel v. Tucker* (1867) L.R. 3 Q.B. 77. But this has reference to the rights and liabilities of the payer only and not to the rights of other parties making adverse claims to the bill; *Alcock v. Smith* (1892) 2 Ch. 238.

A bill drawn in France in French language in English form payable in English money in England, may, upon evidence, be treated as governed by English law as regards endorsement; *Re Marseilles Extension Ry. and Land Co.* (1885) 1 T.L.R. 527.

Cheque. S. 72. Notwithstanding the provisions of s. 8 it is doubtful if a cheque can be made not negotiable except by crossing it, under the provisions of ss. 75-81. A cheque payable to M. and crossed "account of M., National Bank, Dublin," which crossing was insufficient under the English Act was held to be negotiable; *National Bank v. Silke* (1891) 1 Q.B. 435.

A cheque drawn to the order of a fictitious or non-existing person is payable to bearer; *Clutton v. Attenborough* (1897) A.C. 90.

A document "Pay A. B. \$ Provided the receipt form at foot hereof is signed and dated," is not a cheque; *Bavins v. London and South Western Bank* (1899) 15 T.L.R. 226.

Certifying a cheque does not make it the equivalent of cash. It merely gives the cheque additional currency; *Gaden v. Newfoundland Savings Bank* (1899) A.C. 281.

A cheque is regular upon its face although post dated; *Carpenter v. Street* (1890) 6 T.L.R. 410.

A cheque operates as conditional payment and the payment relates back to the time when the cheque is given; *Hadley v. Hadley* (1898) 2 Ch. 680.

Countermanding Payment. A drawer of a cheque is not bound to countermand payment thereof because he is served with a garnishee order, of the debt paid thereby, before it is cashed; *Elwell v. Jackson* (1884) 1 C. & E. 362.

Crossed Cheques. 88. 75-81. A cheque crossed, generally, must be paid by the drawee to a Bank, and if crossed specially, to the Bank named in the crossing; unless the drawer uncrosses it by writing between the transverse lines "pay cash" and initials the change. A Bank paying a crossed cheque other than to a Bank will be liable to the true owner for any damages he sustains. The object of the crossing is to protect Banks who in good faith and without negligence pay cheques to other Banks from seeing to the genuineness of the endorsements. A Bank paying an uncrossed cheque cannot charge the drawer therewith if the endorsements are forged. A Bank which collects a crossed cheque and pays the money other than to a customer will be liable to the true owner of the cheque for damages for its conversion; *Klienwort v. Comptoir National d'Escompte de Paris* (1894) 2 Q.B. 157, but if it pays the money or gives credit in its books to a customer (although the customer's account may be overdrawn) it will not be liable, even though the customer has no title to the cheque; *Clarke v. London and County Banking Co.* (1897) 1 Q.B. 552. But a branch of a Bank paying the cheque to another branch cannot be treated as paying the cheque to a Bank, and if the branch from which it has been received paid the money other than to a customer the Bank would be liable to the true owner for conversion; *Lacave v. Credit Lyonnais* (1897) 1 Q.B. 148.

A customer is one who has an account at the Bank; *Matthews v. Brown* (1894) 10 T.L.R. 386; 63 L.J.Q.B. 494, not one who comes to the Bank and employs it to collect a cheque for him; *Lacave v. Credit Lyonnais* (1897) 1 Q.B. 148.

It would seem that, notwithstanding s. 8, a cheque cannot be made non-negotiable except by crossing it; *National Bank v. Silke* (1891) 1 Q.B. 435.

Under s. 81 a person who receives a cheque endorsed by a member of a firm, with notice that it is in fraud of his partner, is liable therefor to his defrauded partner; *Fisher v. Roberts* (1890) 6 T.L.R. 354.

Bankers who received six cheques drawn upon other bankers from the plaintiff's traveller, endorsed by him without authority in the plaintiff's name, "per pro," were held liable to the plaintiff for the proceeds of the cheques which they had placed to the credit of the traveller who had absconded, because they had not received payment "without negligence" within s. 81; *Bissell v. Fox* (1886) 53 L.T. 193.

Should a crossed cheque come to the hands of a payee and be afterwards paid by the Bank to a Bank, or if crossed specially, to the Bank to which it is crossed, the drawer of the cheque will be entitled to credit from the payee for the amount thereof, though the latter's endorsement may have been forged. S. 79.

Promissory Notes. S. 82. A note which provides that "the title and right to possession of the property for which this note is given shall remain in (the payee) until this note is paid" is not an unconditional promise, because it imports that the purchaser is not compellable to pay when the day of payment arrives, unless he at the same time gets the property with a good title; *Dominion Bank v. Wiggins* (1894) 21 A.R. 275.

The provisions of sub.-sec. 3 of s. 82 import that if the document contains something more than a pledge of collateral security with authority to sell or dispose thereof, it will not be valid as a promissory note, and therefore a provision in a note that "No time given to, or security taken from, or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party" is not valid as a note; *Kirkwood v. Smith* (1896) 1 Q.B. 582. See also *Robertson v. Davis* (1897) 27 S.C.R. 571.

A note may be a promissory note although there is no payee; *Daun v. Sherwood* (1895) 11 T.L.R. 211.

Note Payable on Demand. S. 85. An overdue note endorsed by a stranger as further security is a note payable on demand, and may be treated as a continuing security, though there was no binding agreement to give time; *Carrique v. Beaty* (1896) 28 O. R. 175.

Where a note payable on demand as a security was transferred to a *bona fide* holder for value, after the payee had taken a mortgage for the same debt and had transferred the mortgage to a third person, the maker was held to be, nevertheless, responsible to the holder of the note. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been endorsed for value, without knowledge that it has been paid, from suing; *Glasscock v. Balls* (1889) 24 Q. B. D. 13.

A note payable on demand and not delivered as a collateral or continuing security is "at maturity" immediately, notwithstanding no demand has been made; *Re George, Francis v. Bruce* (1890) 44 Ch. D. 627.

Presentment of Note for Payment. S. 86. It is still necessary in order to charge "he endorser" that a note should be presented for payment at the particular place it is payable on the day it falls due; but to charge the maker it is unnecessary that it should be so presented, but it may be presented at any time before action brought, and an action may be brought upon it against the maker, even without any such presentation, at the risk of the plaintiff being obliged to pay the costs in case the maker shews that he had the money at the particular place to answer the note when it fell due, and that he kept it there waiting for it to be called for by the holder of the note; *Merchants' Bank of Canada v. Henderson* (1897) 28 O. R. 360.

Notes Assimilated with Bills. S. 88. The effect of s. 88, combined with s. 8 is to make a note payable to A. B. payable to A. B. or order, and therefore negotiable. This alters the law as it was before the act; *Edwards v. Walters* (1896) 2 Ch. 157. But a note signed "A. B., Manager of C. Co." may be shewn to be the note of the Company; *Fairchild v. Ferguson* (1892) 21 S. C. R. 484.

Application of Common Law. S. 98. S. 98, though in the original bill, was not enacted until 1891. It is substantially similar to s. 97 (2) of the Imperial Act. The section was applied in *Re Gillespie* (1885) 16 Q. B. D. 702; 18 Q. B. D. 286, and a holder of a dishonored foreign bill was held, notwithstanding s. 57, to be entitled to recover such unliquidated damages as he had sustained by the dishonor, being in that case a sum, substituted for re-exchange, which the drawer was liable by the foreign law to pay the holder of the bill. The section was held not to apply to a renunciation by the holder, such being governed by s. 62; *Edwards v. Walters* (1896) 2 Ch. 157, nor to the expenses of an unnecessary protest, e.g. one for better security; *Re English Bank of the River Plate* (1893) 2 Ch. 438.

Suing upon Consideration. It is necessary for a creditor who sues upon the original consideration for a bill to have the bill in his hands at the commencement of the action; if the bill is then outstanding in the hands of a third party it is a good defence, although he obtains possession of it before trial; *Davis v. Reilly* (1898) 1 Q. B. 1.

When Right of Action on Bill Complete. A right of action upon a bill is not complete until the expiration of the last day of grace; *Edgar v. Magee* (1882) 1 O. R. 187; *Kennedy v. Thomas* (1894) 2 Q. B. 759. The plaintiffs must be the lawful holders when the action is brought; *Nash v. De Freville* (1899) 15 T. L. R. 264.

53 VICTORIA (DOMINION).

CHAPTER 31.

An Act respecting Banks and Banking.

(Assented to 16th May, 1890.)

HER MAJESTY by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE.

1. This Act may be cited as "The Bank Act."

Short title.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

Interpreta-
tion.

(a) The expression "the bank" means any bank to which this Act applies;

"The bank."

(b) The expression "Treasury Board" means the Board provided for by section nine of chapter twenty-eight of the Revised Statutes of Canada, or any Act in amendment thereof or substitution therefor;

"Treasury
Board."

(c) The expression "goods, wares and merchandise" includes, in addition to the things usually understood thereby timber, deals, boards, staves, saw-logs and other lumber, petroleum, crude oil and all agricultural produce and other articles of commerce;

"Goods,
wares and
merchandise."

(d) The expression "warehouse receipt" means any receipt given by any person for any goods, wares or merchandise, in his actual, visible and continued possession, as bailee thereof, in good faith and not as of his own property, and includes receipts given by any person who is the owner or keeper of a harbor, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods, wares or merchandise, for goods, wares and merchandise delivered to him as bailee and actually in the place, or in one or more of the places owned or kept by him, whether such person is engaged in other business or not;

"Warehouse
receipt."

(e) The expression "bill of lading" includes all receipts for goods, wares or merchandise, accompanied by an undertaking to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever.

"Bill of
lading."

"Manufacturer."

(f) The word "manufacturer" includes maltsters, distillers, brewers, refiners and producers of petroleum, tanners, curers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process or mechanical means any goods, wares or merchandise.

BUSINESS AND POWERS OF THE BANK.

Branches and agencies.
General powers of bank.

Certain business may not be transacted by the bank.

64. The bank may open branches, agencies and offices, and may engage in and carry on business as a dealer in gold and silver coin and bullion, and it may deal in, discount and lend money and make advances upon the security of, and may take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, foreign and other public securities, and it may engage in and carry on such business generally as appertains to the business of banking; but, except as authorized by this Act, it shall not, either directly or indirectly, deal in the buying, or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever; and it shall not, either directly or indirectly, purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock or the capital stock of any bank; and it shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any land, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

Bank to have lien on debtor's shares.

Sale of such shares.
Notice.

Transfer in case of sale.

65. The bank shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares of its own capital stock and on any unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until such debt is paid; and the bank shall, within twelve months after such debt has accrued and become payable, sell such shares, and notice shall be given to the holder thereof of the intention of the bank to sell the same, by mailing such notice in the post office to the last known address of such holder, at least thirty days prior to such sale; and upon such sale being made the president, vice-president, manager or cashier shall execute a transfer of such shares to the purchaser thereof in the usual transfer book of the bank, which transfer shall vest in such purchaser all the rights in or to such shares which were possessed by the holder thereof, with the same obligation of warranty on his part as if he were the vendor thereof, but without any warranty from the bank or by the officer of the bank executing such transfer.

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66. The stock, bonds, debentures or securities, acquired and held by the bank as collateral security, may, in case of default to pay the debt, for securing which they were so acquired and held, be dealt with, sold and conveyed either in like manner, and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act, or in like manner as and subject to the restrictions under which a private individual might in like circumstances deal with, sell and convey the same, but without obligation to sell the same within twelve months;

Collateral securities may be similarly dealt with.

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2. The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of such stock, bonds, debentures or securities, made at the time such debt was incurred, or if the time of payment of such debt has been extended, then by an agreement made at the time of such extension.

Right to do so may be waived.

67. The bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business, and may sell or dispose of the same, and acquire other property in its stead for the same purpose.

Real estate for occupation.

68. The bank may take, hold and dispose of mortgages and hypothèques upon real or personal, immovable or movable property, by way of additional security for debts contracted to the bank in the course of its business; and the rights, powers and privileges which the bank is by this Act declared to have or to have had in respect of real or immovable property mortgaged to it, shall be held and possessed by it in respect of any personal or movable property which is mortgaged or hypothecated to it.

Mortgages as additional security.

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69. The bank may purchase any lands or real or immovable property offered for sale under execution, or in insolvency, or under the order or decree of a court, as belonging to any debtor to the bank, or offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank or offered for sale by the bank under a power of sale given to it for that purpose, in case, in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may acquire a title thereto as any individual purchasing at sheriff's sale, or under a power of sale, in like circumstances, could do, and may take, have, hold and dispose of the same at pleasure.

Purchase of land under execution, etc.

70. The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the

Absolute title may be acquired.

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*this sec. for ante-
cedent debt*

Proviso ; sale
of property so
acquired.

equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, and may purchase and acquire any prior mortgage or charge on such property ; provided always, that no bank shall hold any real or immovable property, howsoever acquired, except such as is required for its own use, or for any period exceeding seven years from the date of the acquisition thereof.

Title to lands
so acquired ;
power of sale,
etc.

71. Nothing in any charter, Act or law shall be construed as ever having prevented or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged real or immovable property, whatever the value thereof is, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any property so mortgaged.

As to ad-
vances for
building
ships.

72. Every bank advancing money in aid of the building of any ship or vessel shall have the same right of acquiring and holding security upon such ship or vessel, while building and when completed, either by way of mortgage, hypothecation, hypothecation, privilege, or lien thereon, or purchase or transfer thereof, as individuals have in the Province wherein such ship or vessel is being built, and for that purpose may avail itself of all such rights and means of obtaining and enforcing such security, and shall be subject to all such obligations, limitations and conditions as are, by the law of such Province, conferred or imposed upon individuals making such advances.

Warehouse
receipts may
be taken as
collateral
security.

73. The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business ; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank, instead of to the previous holder or owner of such goods, wares and merchandise.

When pre-
vious holder
is an agent.

2. If the previous holder of such warehouse receipt or bill of lading is the agent of the owner of the goods, wares and merchandise mentioned therein, the bank shall be vested with all the right and title of the owner thereof, subject to his right to have the same re-transferred to him, if the debt, as security for which they were held by the bank, is paid ;

Interpretation
of "Agent."

3. In this section the expression "agent" means any person intrusted with the possession of goods, wares and merchandise, or to whom the same are consigned, or who is possessed of any bill of lading, receipt, order or other document used in

the course of business as proof of the possession or control of goods, wares and merchandise, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive the goods, wares and merchandise thereby represented; and such person shall be deemed the possessor of such goods, wares and merchandise, bill of lading, receipt, order, or other document as aforesaid, as well as if the same are held by any person for him or subject to his control as if he is in actual possession thereof

74. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture.

Loans to
wholesale
manufac-
turers.

*see 65 - actual
dist*

2. The bank may also lend money to any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of live stock or dead stock, and the products thereof, upon the security of such products, or of such live stock or dead stock, and the products thereof.

Loans to cer-
tain wholesale
purchasers or
shippers.

*not under value
ref.*

3. Such security may be given by the owner and may be taken in the form set forth in Schedule C to this Act, or to the like effect; and by virtue of such security, the bank shall acquire the same rights and powers in respect to the goods, wares and merchandise, stock or products covered thereby, as if it had acquired the same by virtue of a warehouse receipt.

Form of
security.

def from liability

75. The bank shall not acquire or hold any warehouse receipt or bill of lading or security under the next preceding section to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank, or upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank; but such bill, note or debt may be renewed, or the time for the payment thereof extended, without affecting any such security.

When such
security may
be acquired.

*must quote not
a present right*

2. The bank may, on shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor, or, on the receipt of any goods, wares and merchandise for which it holds a bill of lading or security, as aforesaid, it may surrender such bill of lading or security, store such goods, wares and merchandise, and take a warehouse receipt therefor, or may ship them, or part of them, and take another bill of lading therefor.

Exchange of
warehouse
receipt for
bill of lading
and vice-
versa.

3. Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who wilfully makes any false statement in any warehouse receipt, bill of lading or security, as aforesaid.

Penalty for
making false
statements.

Penalty for alienating goods so secured.

4. Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who, having possession or control of any goods, wares and merchandise covered by any warehouse receipt, bill of lading, or security as aforesaid, and having knowledge of such receipt, bill of lading or security, and without consent of the bank, in writing and before the advance, bill, note or debt thereby secured has been fully paid, wilfully alienates or parts with any such goods, wares or merchandise, or wilfully withholds from the bank possession thereof upon demand after default in payment of such advance, bill, note or debt.

As to goods manufactured from articles pledged.

76. If goods, wares and merchandise are manufactured or produced from the goods, wares and merchandise, or any of them, included in or covered by any warehouse receipt, or security given under section 74 of this Act, while so covered, the bank holding such warehouse receipt or security shall hold or continue to hold such goods, wares and merchandise, during the process and after the completion of such manufacture or production, with the same right and title and for the same purposes and upon the same conditions as it held or could have held the original goods, wares and merchandise.

Prior claim of the bank over unpaid vendor.

77. All advances made on the security of any bill of lading or warehouse receipt, or security given under section 74 of this Act, shall give to the bank making such advances a claim for the repayment of such advances on the goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor; but such preference shall not be given over the claim of any unpaid vendor who had a lien upon such goods, wares and merchandise at the time of the acquisition by the bank of such warehouse receipt, bill of lading or security, unless the same was acquired without knowledge on the part of the bank of such lien.

Sale of goods on non-payment of debt.

78. In the event of the non-payment at maturity of any debt secured by a warehouse receipt or bill of lading, or security given under section 74 of this Act, the bank may sell the goods, wares and merchandise mentioned therein, or so much thereof as will suffice to pay such debt with interest and expenses, returning the overplus, if any, to the person from whom such warehouse receipt, or bill of lading, or security, or the goods, wares and merchandise mentioned therein, as the case may be, were acquired; but such power of sale shall be subject to the following provisions, namely:

Notice to be given before sale of goods pledged.

2. No sale without the consent in writing of the owner of any timber, boards, deals, staves, saw-logs or other lumber, shall be made under this Act until notice of the time and place of such sale has been given by a registered letter, mailed in the post office to the last known address of the pledger

thereof, at least thirty days prior to the sale thereof; and no goods, wares and merchandise, other than timber, boards, deals, staves, saw-logs or other lumber, shall be sold by the bank under this Act without the consent of the owner, until notice of the time and place of sale has been given by a registered letter, mailed in the post office to the last known address of the pledger thereof, at least ten days prior to the sale thereof.

3. Every such sale of any article mentioned in this section, without the consent of the owner, shall be made by public auction, after a notice thereof by advertisement, stating the time and place thereof, in at least two newspapers published in or nearest to the place where the sale is to be made; and if such sale is in the Province of Quebec, then at least one of such newspapers shall be a newspaper published in the English language, and one other such newspaper shall be a newspaper published in the French language.

Sale by
auction after
notice.

79. Every bank which violates any provision contained in any of the sections numbered 64 to 78 (both inclusive) shall incur for each violation thereof a penalty not exceeding five hundred dollars.

Penalty for
contraven-
tion.

SCHEDULE C.

FORM OF SECURITY UNDER SECTION SEVENTY-FOUR.

In consideration of an advance of _____ dollars, made by the (name of bank) to A. B., for which the said bank holds the following bills or notes (describe fully the bills or notes held, if any,) the goods, wares and merchandise mentioned below are hereby assigned to the said bank as security for the payment, on or before the _____ day of _____ of the said advance, together with interest thereon at the rate of _____ per cent per annum from the day of _____ (or, of the said bills and notes, or renewals thereof, or substitutions therefor, and interest thereon, or as the case may be.)

This security is given under the provisions of section seventy-four of "The Bank Act" and is subject to all the provisions of the said Act.

The said goods, wares and merchandise are now owned by _____ and are now in _____ possession, and are free from any mortgage, lien or charge thereon, (or as the case may be) and are in (place or places where goods are) and are the following; particular description of goods assigned.)

Dated at _____

18 _____

NOTES.

Principle of Act. The principle of the Canadian Banking system is to give the greatest possible security to the public, and to provide the best available means to advance the commercial interests of the Country. To effectuate this, banks are confined to the safest lines of investments. They are forbidden to tie up their assets by lending on real estate or by venturing in trade. The prevailing idea is to supply money for the purpose of bringing goods to market, and to enable this to be done, the money must be easily available and the bank's assets of the kind that can be most easily liquidated. Lending upon goods except on their way to market as on goods in transit or in a warehouse or in course of manufacture is prohibited. Securities upon real estate or goods can only be taken for past debts contracted in the ordinary course of business. An apparent exception is created by allowing loans to be made upon stocks, bonds, debentures and obligations of corporations, but such securities are such as are usually of a liquid character, being readily saleable in the open market.

A bank's circulation performs one of the most important functions in the supply of the necessary currency of the country. The notes of a bank when required are part of the currency. When not required their idleness does not diminish the resources of the country.

Constitutionality. The Bank Act is within the constitutional competence of the Dominion Parliament; B. N. A. Act, s. 91 (15). The provisions for taking security by way of warehouse receipts, etc., over-ride, where applicable, the provincial enactments relating to Chattel mortgages; *Tennant v. Union Bank of Canada* (1894) A. C. 31, see *ante* pp. 55-56.

Branches. The position of branch banks is that in principle and in fact they are agencies of one principal banking corporation, notwithstanding that they may be regarded as distinct for special purposes e. g. that of estimating the time at which notice of dishonor should be given, or of entitling a bank to refuse payment of a customer's cheque except at that branch where he keeps his account; *Prince v. Oriental Bank Corporation* (1878) 3 App. Cas. 325.

A bank may set off a debt due by a customer at one branch against a balance in his favor at another branch; *Garnet v. McKewan* (1873) L.R. 8 Ex. 10, see also *Henderson v. Bank of Hamilton* (1894) 25 O. R. 641, 22 A. R. 414.

POWERS OF A BANK.

Negotiable Securities. A bank is authorized to deal in all kinds of negotiable securities. A negotiable instrument payable to bearer is one which by the custom of trade passes from hand to hand by delivery and the holder of which for the time being if he is a *bona fide* holder for value without notice, has a good title notwithstanding any defect of title in the person from whom he took it; *Simmons v. London Joint Stock Bank* (1891) 1 Ch. 270, 294, (1892) A.C. 201. When payable to order it has the same characteristics, but must be endorsed by the person to whose order it is payable. The securities of foreign governments have frequently been held to be negotiable upon evidence being given showing a custom to treat them as such in the market where the same were negotiated. When the effect, not of the instrument transferred, but of the transfer of that instrument in this country, is the thing in controversy, the question is not what is the usage in the country whence the instrument comes, but what is the usage in the country where it is passed; *Lang v. Smyth* (1831) 7 Bing. 284, 33 R.R. 462.

Accordingly the following instruments have been held to be negotiable in addition to bills of exchange and promissory notes:—

Exchequer bills, i. e. a bill issued by the English Government payable to or order for a debt due from the Government; *Wooley v. Pole* (1820) 4 B. & Ald. 1, 22 R.R. 594.

Prussian Bonds, whereby the King of Prussia declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner; *Gorgier v. Mievillie* (1824) 3 B. & C. 44, 27 R.R. 290.

Bonds of a foreign Government; *Atty-Gen. v. Bouwens* (1838) 4M. & W. 171.

Scrip issued by the Russian Government acknowledging the first instalment of 20 per cent. upon £100 stock, and expressed to entitle the bearer on paying the remaining instalments to receive a bond from the Government; *Goodwin v. Roberts* (1876) 1 App. Cas. 476.

Scrip certificates issued by a Banking Company purporting to entitle the bearer upon payment of certain instalments to be registered as holder of ten shares; *Rumball v. Metropolitan Bank* (1877) 2 Q. B. D. 194.

Debenture bonds issued by a Company by which it bound itself to pay the bearer; *Re Imperial Land Co. Ex parte Colborne* (1861) L. R. 11 Eq. 478; *Bechuanaland Exploration Co. v. London Trading Bank* (1898) 2 Q. B. 658; and by R.S.O. c. 119 s. 38 debentures are expressly made transferable see *infra*; *Bank of Toronto v. Cobourg Ry Co.* (1884) 7 O. R. 1.

Municipal debentures are negotiable; R.S.O. c. 223 ss. 429-436, and are valid in the hands of bona fide holders for value without notice of a defect in the prior holder's title; *Trust and Loan Co. v. City of Hamilton* (1858) 7 C. P. 98; *Anglin v. Township of Kingston* (1858) 16 U. C. R. 121; *Crawford v. Town of Cobourg* (1862) 21 U. C. R. 113.

Cedulas, i. e. bonds of the Buenos Ayres Land Mortgage Bank payable to bearer; *Simmons v. London Joint Stock Bank* (1891) 1 Ch. 270, (1892) A. C. 201.

Bonds of an American Railroad Company stated to be secured by mortgage; *Venables v. Baring* (1892) 3 Ch. 527.

Certificates for shares in a company, having endorsed thereon a blank transfer and power of attorney, where it is shown by evidence that such blank transfers readily pass on the market from hand to hand by delivery only, until the documents reach the hands of some holder who desires to be registered; *Colonial Bank v. Hepworth* (1887) 36 Ch. D. 36; *Colonial Bank v. Cady* (1890) 15 App. Cas. 267; *Smith v. Rogers* (1899) 30 O. R. 256; *Hone v. Boyle* (1891) 27 L. R. Ir. 137, 151; *Waterhouse v. Bank of Ireland* (1892) 29 L. R. Ir. at p. 394; but see *Fox v. Martin* (1895) 64 L. J. Ch. 473.

Care must be taken in lending upon securities even if negotiable where an instrument in blank, e.g., a blank transfer of stock executed by a third person is the security. The purchaser will not have the right (unless a mercantile usage is proved) to fill in the blank for purposes foreign to the original contract, and in the absence of proper enquiry he will be limited to the rights of the party from whom he received it, and cannot claim the benefit of being a purchaser for value without notice; *France v. Clark* (1884) 26 Ch. D. 257.

Instruments not negotiable. A post office order is not negotiable; *Fine Art Society v. Union Bank* (1886) 17 Q.B.D. 705. Where bonds of the Neapolitan Government were accompanied by a document called a "bordereau" annexed to which were a series of coupons, and both the bordereau and coupons referred to the bonds, and were never sold in the London market without the bonds, the bordereau and coupons were held to be not negotiable; *Lang v. Smyth* (1831) 7 Bing. 284, 33 R.R. 462.

A bond payable to a particular person or his executors is not negotiable; *Glyn v. Baker* (1811) 3 East 509, 12 R.R. 414.

Though a foreign bond may be negotiable by the law of the country of its issue, it is not negotiable here in the absence of any evidence of a custom of merchants in this country to treat it as negotiable; *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515. A letter of credit issued by a Government to a contractor conditional upon money being voted by the legislature is not a negotiable security upon which a bank is authorized to lend; *Jacques Cartier Bank v. Reg.* (1895) 25 S.C.R. 84.

Deposit receipts. Whether a deposit receipt issued by a bank is negotiable depends upon its terms. Where a receipt was payable to order on fifteen days' notice, but interest was not to run unless the money remained at least three months, the Privy Council thought it had all the essential attributes of a promissory note, and would probably have held it to be negotiable if it had been necessary to decide the point; *Richer v. Voyer* (1874) L.R. 5 P.C. 461, and such a receipt was held to be negotiable in *Re Central Bank, Morton and Block's Claims* (1889) 17 O.R. 574.

In *Saderquist v. Ontario Bank* (1887) 14 O.R. 586, 15 A.R. 609, the Bank agreed "to account for the money to the said S. Saderquist with interest." There

were no words of negotiability, and the receipt was held to be not negotiable. To the same effect is *Mander v. Royal Canadian Bank* (1869) 20 C.P. 125, 21 C.P. 492.

If it be true that such receipt is a promissory note, words of negotiability are not now necessary, see Bills of Exchange Act, s. 8, *ante*, p. 544, and it would probably be necessary to restrict their negotiability by express words. If not negotiable the debt may be assigned; *Re Commercial Bank of Manitoba, Barkwell's Claim* (1897) 11 Man. R. 494.

A condition requiring the receipt to be delivered up on payment does not entitle a bank to retain the money on proof of loss and an offer of indemnity if required; *Bank of Montreal v. Little* (1870) 17 Gr. 685.

Acquisition from agents and brokers. A good title to negotiable instruments may be acquired by a bank from a trustee, broker or other agent, although it knows him to be such, unless it has knowledge of his want of authority. Lord Herschell said in *London Joint Stock Bank v. Simmons* (1892) A.C. 201, 217, "It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself to inquire into the nature of his title or the extent of his authority." Mere negligence will not displace the title, but if the bank knows that the person has no right to act or that the person pledging the securities has only a limited authority to raise money upon them, it cannot retain them; *Earl of Sheffield v. London Joint Stock Bank* (1888) 13 App. Cas. 333.

If negotiable securities require endorsement, the bank must see that the agent has power to endorse them for the purpose they are being used, and where an agent had power to make contracts of sale and purchase, charter vessels, and employ servants, and, as incidental thereto, to do certain specified acts including endorsement of bills and other acts "for the purposes aforesaid" a pledge of bills, payable to the order of his principals, for money borrowed was held invalid; *Bryant v. La Banque du Peuple* (1893) A.C. 170.

Where stock is held "in trust" a transferee from the holder is bound to enquire whether the transfer is authorized by the nature of the trust; *Bank of Montreal v. Sweeny* (1887) 12 App. Cas. 717, 12 S.C.R. 661, but where stock was pledged to a loan company and the transfer was made to "J. T., Manager in trust," the words were held to indicate only that he held in trust for his employers, and were not calculated to suggest that he stood in a fiduciary relation to any other person; *London and Canadian Loan and Agency Co. v. Duggan* (1893) A.C. 506.

DISABILITIES OF A BANK.

Not to engage in trade. A bank cannot be bound by a warranty express or implied, given on a sale of a machine taken by their agent, and finished by the bank, for a debt due the bank; *Radford v. Merchants Bank* (1883) 3 O.R. 529, but a bank may take security on personal property for a debt already incurred, and make such arrangements for its sale and realization as they think proper; *Re Rainy Lake Lumber Co., Stewart v. Union Bank of Lower Canada* (1888) 15 A.R. 749.

Not to Lend on Mortgages or Bank Stocks. A bank is prohibited from lending on mortgages and bank stocks. The authorities contain expressions which are not entirely in unison as to the effect of a violation of this prohibition. A similar prohibition as to lending on the security of merchandise was contained in the charter of an Australian Bank, but a pledge of wool was held, nevertheless, to pass the title to the bank and it successfully maintained an action of trover against the Trustees in Insolvency of the pledgors; *Ayers v. South Australian Banking Co.* (1871) L.R. 3 P.C. 551. Mellish L.J. in delivering the judgment said at p. 559, "Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance. There may be a question whether under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter, but the only point which appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands under a conveyance or instrument which

under the ordinary circumstances of law would pass it." There was, however, no plea of illegality, a fact which is commented on by Ferguson J. in *Grant v. La Banque Nationale* (1888) 9 O.R. 411, 422, and no statutory prohibition, which is the distinction relied on by Strong J. in *Bank of Toronto v. Perkins* (1883) 8 S.C.R. 613. It is clear that if bank stock is assigned to a nominee of the bank as security for an advance in contravention of the prohibition, the Bank cannot rely on the illegality and refuse to return the shares on payment of the loan; *Exchange Bank v. Fletcher* (1890) 19 S.C.R. 278. In the last mentioned case *Patterson J.* at pp. 286-288 relied upon the case before mentioned of *Ayers v. South Australian Banking Co.* (1871) L.R. 3 P.C. 548, and suggested that while a violation of the provision may be an offence against the Bank Act, it did not make the transaction *ultra vires* or prevent the property passing to the Bank. However, in the case of *National Bank of Australasia v. Cherry* (1870) L.R. 3 P.C. 299, Lord Cairns said at p. 307 the object of the legislature was to make it *ultra vires* of the Bank to take, upon the occasion of contracts for advances, securities of the kind mentioned. In Ontario, the authorities have been uniform that the prohibited securities are void, and that the objection need not come from the Crown. In *Commercial Bank v. Bank of Upper Canada* (1859) 7 Gr. 250, 423, a sum of £1,000 lent by a bank was held not to be secured by mortgage of land given at the time, because for all that appeared the mortgagor was at liberty to draw the sum afterwards, and in *Bank of Toronto v. Perkins* (1883) 8 S.C.R. 603, a mortgage as collateral security for a note discounted by the bank, and placed to the mortgagor's credit on the same day was held void. The same view was taken by Ferguson J. in *Grant v. La Banque Nationale* (1885) 9 O.R. 411, where a pledge of timber limits was made to a bank, and by the Manitoba Court in *Bathgate v. Merchants Bank* (1888) 5 Man. L.R. 210 where a chattel mortgage was held to be invalid. The law would in the latter case probably be otherwise if the loan were to a wholesale manufacturer, purchaser or shipper upon goods produced or purchased by him for sale in his business.

The Courts lean towards upholding securities, and where a bank asserted that a mortgage was given for a past debt, while the mortgagor asserted it was given for a present advance, the Court found in favor of the Bank's contention; *Royal Canadian Bank v. Cummer* (1869) 15 Gr. 627. Where a debt was contracted and security given concurrently by deposit of title deeds, and the advance was not accompanied by any promise to give any further or other security at any future time, and afterwards, the borrower being entirely free, either to give or refuse as he thought best, gave a memorandum that the deeds should be held as security, the equitable mortgage was sustained as being given for a past debt; *National Bank of Australasia v. Cherry* (1870) L.R. 3 P.C. 299, and where a bank by virtue of a pledge of timber limits for a present advance afterwards secured the renewal licenses in its own name, it was held to be entitled to retain them as security for the indebtedness; *Grant v. La Banque Nationale* (1885) 9 O.R. 411.

Strictly speaking a Bank may take security on real or personal estate for a debt that had no previous existence, if the debt is contracted in the ordinary course of business e.g. upon a bill of exchange, and the mortgage is really and in truth taken to secure the commercial transaction, and the bill is not created for the mere purpose of upholding and giving colour to the mortgage, but what the real purpose is, is a question of fact for a jury, upon which the conclusion would be so uncertain that it would not be prudent for banks to risk their money, where the nature of the transaction might appear to be at all equivocal, see per Sir J. B. Robinson C.J. *Commercial Bank v. Bank of Upper Canada* (1859) 7 Gr. 430; per Gwynne J. *Bank of Toronto v. Perkins* (1883) 8 S.C.R. 627. Where hiring and sale agreements were accessory to the debts represented by notes, the Bank, which discounted the notes, was held to be entitled to the benefit thereof; *Central Bank v. Garland* (1890) 20 O.R. 142, 18 A.R. 438.

Although a bank is prohibited from lending on its own stock, it has a lien upon the stock of any shareholder for the amount of his indebtedness, under s. 65 of the Act.

In consequence of the inability of banks to hold vessels, unless the transaction is within s. 72, no implied promise can arise against them as ship-owners, nor is any express promise binding, *Lyman v. Bank of Upper Canada* (1852) 8 U.C.R. 354.

The sale, by an officer of the bank, of shares held in trust for the directors, is not an absolute nullity, but at most a matter which the transferee could waive

as voidable, and if a winding-up supervenes the transaction becomes of unimpeachable validity through the transferee and the liquidators; *Re Central Bank, Nasmith's case* (1888) 16 O.R. 293.

Although the security may be invalid, the borrower will be liable for the money loaned; *Rolland v. La Caisse D'Economie de Quebec* (1895) 24 S.C.R. 405.

Taking security for debt contracted. For debts contracted in the ordinary course of business, banks are given express power by s. 68 to take mortgages or hypothecques upon real or personal, immovable or movable property. A chattel mortgage is therefore good; *Bank of Montreal v. McWhirter* (1867) 17 C.P. 606; *Re Rainy Lake Lumber Co., Stewart v. Union Bank of Lower Canada* (1888) 15 A.R. 749, and so is a real estate mortgage, *Merchants Bank v. Bostwick* (1878) 28 C.P. 450, 3 A.R. 24, and the mortgage may cover renewals and substitutions for the bills or notes representing the indebtedness at the time the mortgage is given. And even if the mortgage is given only to secure certain promissory notes, it will not be p by the substitution of renewal notes, though as a matter of book-keeping a bank may treat the first notes and the subsequent substitutionary notes by the application of the proceeds from time to time of the renewals. A whole series of notes and renewals form links in one and the same chain of liability which is secured by the mortgage; *Dominion Bank v. Oliver* (1889) 17 O.R. 402, and even if further advances are made, and the account in respect thereof, and of cash deposits made by the mortgagor, is kept as one open current account against which the mortgagor draws cheques to retire the notes secured by the mortgage as they mature, the mortgage will not be treated as satisfied beyond the amount (if any) by which the indebtedness has actually been reduced; *Cameron v. Kerr* (1878) 3 A.R. 30; *Merchants Bank v. Moffatt* (1883) 5 O.R. 122, 137; *Griffith v. Crocker* (1891) 18 A.R. 370.

A mortgage to secure an endorser against endorsements was assigned to a bank before the endorsements were made, and was held to be valid; *Re Essex Land and Timber Co.* (1891) 21 O.R. 367.

Sale of Collaterals. S. 66 confers upon banks an express power to sell collateral securities. It is not clear whether that power is confined to stocks, bonds, debentures and other securities of that kind, or whether it extends to bills and notes. Contrast the language of s. 64. Where documents are delivered as collateral securities for a debt the transaction is a pledge, and the pledgee has power to sell in default of payment at the time fixed; *Martin v. Reid* (1862) 11 C.B.N.S. 730; *Johnston v. Stear* (1863) 15 C.B.N.S. 330; and may obtain an order for sale by action, but not a judgment for foreclosure; *Carter v. Wake* (1877) 4 Ch. D. 605; *Fraser v. Byas* (1895) 13 R. 452, but if no day is fixed for payment, a demand therefor must be made; *Pigot v. Cubley* (1864) 15 C.B.N.S. 702. A loan of stock is a sale; *Carnegie v. Federal Bank* (1884) 5 O.R. 418. Where security is given by mortgage as distinguished from a pledge, an express power of sale is necessary as the mortgagee must be prepared to restore the mortgaged property upon payment of the debt, unless he has disposed thereof by virtue of some power of sale or otherwise with the consent or authority of the party entitled to redeem; *Gowland v. Garbutt* (1867) 13 Gr. 578; *Lochart v. Hardy* (1846) 9 Beav. 349; *Palmer v. Hendry* (1859) 27 Beav. 349, 28 Beav. 341; *Walker v. Jones* (1866) L.R. 1 P.C. 50; *West London Commercial Bank v. Reliance Permanent Building Society* (1884) 27 Ch. D. 187, 29 Ch. D. 954.

In addition to the powers given by the Act, further powers may be acquired by agreement made at the time of incurring the debt, or at the time, any extension of time for payment is granted; s. 66 (2).

When notice of sale is required, it should be given to all parties interested as assignees or otherwise in the securities of whom the bank has notice, as well as to any surety for the debt. See notes to R.S.O. c. 121 *infra*.

Real Estate for Occupation. To the extent to which a bank is authorized to acquire and hold lands, it is exempt from the provisions of the Statutes of Mortmain, see notes to R.S.O. c. 112 *infra*. There is no limit to the value of lands which may be acquired by a bank, so long as the premises are required for its actual use and occupation, or the management of its business. Lands owned by a bank and not so required can only be forfeited by the Crown, and that only after office found. Until forfeited the title is voidable only; *McDiarmid v. Hughes* (1888) 16 O.R. 570; *Becher v. Woods* (1866) 16 C.P. 29.

Purchase of Land Under Execution, &c. A bank may purchase the real property of any debtor of the bank which is being sold under execution, whether on an execution at the suit of the bank or otherwise, if in that way they wish to acquire an outstanding claim or charge on the property of a debtor of the bank; see *Kingsmill v. Bank of Upper Canada* (1864) 13 C.P. 600, and s. 69, extends the power to all property of a debtor which is being sold *in writum*.

Acquiring Absolute Title. Where the absolute title to real property mortgaged to a bank is acquired by it, the property, unless required for its own use, must be sold within seven years after its acquisition. No reverter of the property to the original owner occurs, if the property is not so sold, such as is provided for in many statutes, nor is any sale by the court provided for as in cases of charitable devises by R.S.O. c. 112. Whether a violation of the section would give a right of forfeiture of the land to the Crown, or whether the charter of the bank might be forfeited, or whether the only penalty is the pecuniary one imposed by s. 79, are questions which have not been decided.

Where it was provided by statute that lands held beyond the prescribed period should revert to the original owner, a *bona fide* contract of sale within the period was held to prevent the title of the company from being defeated, although the sale was not carried out, owing to the purchaser's default; *London and Canadian Loan and Agency Co. v. Graham* (1888) 16 O.R. 329.

No provision is made as to the time within which the title acquired by the mortgagee itself is to be disposed of, and it may be reasonably argued that only the title acquired by foreclosure or release i.e. the equity of redemption could in any event be forfeited, and especially would this be so if the mortgage debt was not merged.

Advances for Building Ships. Advances for building ships are generally secured by an assignment of the contract with the ship-builder to build the ship, and by a bill of sale of the ship, when completed. The contract with the ship-builder usually provides for payment, by instalments, as the work progresses, and that the property in the ship, and the materials prepared or provided, or in the course of preparation for the same, shall pass to the person for whom the ship is being built, to the extent of his advances, subject to the ship-builder's lien for any unpaid instalments. The English decisions of *Woods v. Russell* (1822) 5 B. & Ald. 942, 24 R. R. 621; *Clarke v. Spence* (1836) 4 A. & E. 448, and *Wood v. Bell* (1855) 5 E. & B. 772, 6 E. & B. 355, establish the principle that where it appears to be the intention of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel, as soon as it has reached that stage of completion, will pass to the purchaser, and subsequent additions made thereto will, *accessione*, become his property. Such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage, the execution of the work was regularly inspected by the purchaser or some one on his behalf. But there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the corpus so far as completed, as in part implement of the contract of sale; *Seath v. Moore* (1886) 11 App. Cas. 350, 360, 381; *Ex parte Lambton*; *Re Lindsey* (1875) L. R. 10 Ch. 405, 414. But only the ship, or what is incorporated therein will pass; articles intended for the vessel, such as a rudder and cordage will not pass, without at any rate, an express agreement; *Wood v. Bell* (1856) 6 E. & B. 355; *Tripp v. Armitage* (1839) 4 M. & W. 687; *Seath v. Moore* (1886) 11 App. Cas. 350, 381, 385, disapproving on this point *Woods v. Russell* (1822) 5 B. & Ald. 942, 21 R. R. 621, see also *Mucklow v. Mangles* (1808) 1 Taunt. 318, 9 R. R. 784.

The registration of a ship is obtained on a certificate signed by the builder, containing a true account of the proper denomination, and of the tonnage of the ship, as estimated by him, and of the time when, and the place where she was built, and of the name of the person on whose account the ship was built, and if there has been any sale, the bill of sale under which the ship, or a share therein, has become vested in the applicant for registry; Merchant Shipping Act 1894 s. 10 (1). The signing of that certificate by the builder, has the effect, from the time of registry of the ship, to vest the general property in the

registered owner; *Woods v. Russell* (1822) 5 B. & Ald. 942, 22 R. R. 621, and his title will prevail over a subsequent registration by the builder in his own name; *Read v. Fairbanks* (1853) 13 C. B. 692.

An agreement that a person shall have a lien on a vessel in course of construction for advances, is valid as against an assignee in bankruptcy; *Ex parte Watts, Re Attwater* (1863) 32 L. J. Bank. 35; *Swainston v. Clay* (1863) 4 Giff. 187.

SPECIAL BANKING SECURITIES

Warehouse Receipts; Bills of Lading, Etc. A warehouse receipt is a receipt for goods, wares or merchandise given by a person in possession thereof, as bailee, and by which he agrees to deliver the same to some person or to his order or assigns.

It was formerly necessary that the receipt should be given by one who was in fact a warehouseman; *Milloy v. Kerr* (1878) 43 U. C. R. 78, 3 A. R. 350, 8 S. C. R. 474; *Merchants Bank v. Smith* (1881) 28 Gr. 629, 8 A. R. 15; 3 S. C. R. 512. And such is still the law as to receipts under the Ontario Act, given as security for debts to individuals or corporations other than a chartered bank.

A bill of lading is a receipt by a carrier for goods received by him to be carried. Its characteristics are discussed in the notes to R. S. O. c. 145 and 52 Vict. c. 30 (b); *ante* pp. 441-442.

Goods, wares and merchandise are words of very wide signification, see s. 2 (c). They do not include choses in action; *Humble v. Mitchell* (1340) 9 L. J. Q. B. 30; nor shares in a joint stock Co. *ib.* *Knight v. Barber* (1846) 16 M. & W. 66, or a canal Company; *Latham v. Barber* (1794) 6 T. R. 76, or a railway; *Bowlby v. Bell* (1847) 3 C. B. 284; or a mining company; *Watson v. Spratley* (1855) 10 Ex. 222. Nor do they comprise Bonds, certificates or other securities of a like nature; *Heseltine v. Siggers* (1849) 1 Ex. 856; *Freeman v. Appleyard* (1863) 32 L. J. Ex. 175.

Locality of Goods. The goods comprised in a warehouse receipt must be in some certain place owned or kept by the person giving the same. A receipt for 70,000 logs, which were at the time *in transitu* from the woods, where they were cut, to the mill, and were described as being in Lakes St. John and Couchiching "en route for Bradford Mill" was held bad, even though the logs were confined by booms in those lakes, as the lakes could not be regarded as "places kept" by the signers of the receipt; *Tennant v. Union Bank of Canada* (1892) 19 A. R. 1.

Pledge Receipts. Under s. 74 a bank is enabled to obtain what is virtually a chattel mortgage from a wholesale manufacturer upon the product of his employment, and from a wholesale purchaser of shipper of products in which he deals. The definition of "manufacturer" in s. 2 (f) is very wide.

The point as to who is a wholesale purchaser or shipper arose in *Bank of Hamilton v. Shepherd* (1894) 21 A. R. 156 but was not decided.

Acquisition by Bank. The provisions of the Act as to the acquisition by a bank of a warehouse receipt, bill of lading, or pledge receipt must be strictly observed, otherwise the same will be void. To enable the bank to acquire title to the goods covered thereby, the following points must be observed:—

- (1) the security must be acquired or promised *in writing* when the bill, note or debt secured thereby is negotiated or contracted.
- (2) The money advanced must be at the free disposal of the borrower.
- (3) the goods must be sufficiently described.

Negotiation. The Act contemplates only cash advances, made at the time the securities are acquired, and a renewal of notes is not a negotiation; *Dominion Bank v. Oliver* (1889) 17 O. R. 402. Where a warehouse receipt was acquired by a bank purporting to be in consideration of an advance of \$4,000, but it was shewn that at the time it was taken, no actual advance was made, but that a note made by the borrower collaterally secured by another instrument of the same kind covering other goods, was taken up, and a new note taken, the security was held bad; *Bank of Hamilton v. Shepherd* (1894) 21 A. R. 156. An advance upon a new note upon the understanding that old notes then overdue would be retired, is not a negotiation within the act, being not a present advance, but merely a mode of paying off an already existing debt; *Bank of British North America v. Clarkson* (1869) 19 C. P. 182. An advance by a bank to a manufacturer upon a security under s. 74 represented by a note payable on demand, the proceeds of which were placed to an account

of the borrower, but he was not entitled to draw anything therefrom, unless he brought to the bank, bills drawn on, or notes of, customers for the amount he desired to obtain, is not a negotiation of a note within, s. 75, at the time the security is acquired; *Halsted v. Bank of Hamilton* (1896) 27 O.R. 435, 24 A.R. 152, 28 S.C.R. 235. Where a Company was indebted to the Consolidated Bank in the sum of \$23,000, and warehouse receipts were then obtained, and endorsed to the Standard Bank, as security for an advance of \$23,000, which went to pay the Consolidated Bank, who were aware that the debtors were insolvent, and the evidence showed that the advance by the Standard Bank was not an independent transaction, but was made at the request, and for the benefit of the Consolidated Bank upon its express or implied guarantee of indemnity, it was held that no title passed to the Standard Bank upon the receipt; *Milloy v. Kerr* (1878) 43 U.C.R. 78, 3 A.R. 350, 8 S.C.R. 474.

Promise to give security. A written promise to give the security made at the time of the advance is of the same effect as a present consideration; *Re Central Bank, Canada Shipping Co's. case* (1891) 21 O.R. 515. Formerly the promise was not required to be in writing. In several cases warehouse receipts have been supported by reason of the prior promise; see *Suter v. Merchants Bank* (1876) 24 Gr. 365; *Tennant v. Union Bank of Canada* (1892) 19 A.R. 1; *Re Central Bank, Canada Shipping Co's. case* (1891) 21 O.R. 515.

The promise may be to give a receipt or bill of lading, not then in existence, and for goods not yet manufactured or shipped. The effect of the promise is to give the bank a good equitable title to the goods as they come into existence, or are stored or shipped, which title will be good as against a voluntary assignee and against creditors and persons taking with notice of the bank's rights; *ib.*; *Dominion Bank v. Davidson* (1885) 12 A.R. 90.

The promise should contain such definite description of the goods as will enable them to be identified. Where the promise was of a warehouse receipt for all the goods manufactured at a woollen mill which the borrower could not sell, but the bank was not to advance either to the full capacity of the mill, or to the amount of the unsold goods, the promise was held not to be so vague or uncertain as to prevent the bank from getting security for the advances; *Suter v. Merchants Bank* (1876) 24 Gr. 365; and a promise to give bills of lading and warehouse receipts for coal and stone as received is good, and the transfer of receipts after the arrival of the goods will be upheld; *Royal Canadian Bank v. Ross* (1877) 40 U.C.R. 466. So where the promise was to give receipts upon the product of logs then in transit, receipts for lumber produced therefrom, afterwards given, were upheld, although receipts had been given for the logs, which were invalid; *Tennant v. Union Bank of Canada* (1892) 19 A.R. 1; and where a bank advanced money for the purchase of cattle, and the cattle were delivered to a shipping company where they were to be received for the bank, and bills of lading were to be issued in the bank's name, the title of the bank was held to be better than that of a creditor of the borrower who attached the cattle; *Re Central Bank, Canada Shipping Co's. case* (1891) 21 O.R. 515.

Actual, visible and continued possession. To make a warehouse receipt good, the goods represented thereby must either be in the actual, visible and continued possession of the party giving it as bailee thereof; or such party must be the keeper of a warehouse, or other place for goods in which the goods actually are; *Bank of Hamilton v. Noye Manufacturing Co.* (1885) 9 O.R. 631. The same sort of proof is not required in the case of a warehouseman, granting such documents, as in the case of a mere bailee of the goods; *Re Monteith, Merchant's Bank v. Monteith* (1885), 10 O.R. 529. The party giving the receipts will be estopped from denying that the goods are in his possession during the currency of the receipts, in the absence of any execution creditor intervening; *ib.* at p. 541.

Receipts given by owner. Formerly receipts could be given by the owner of the goods, if he were a wholesale manufacturer or wholesale purchaser or shipper; *Tennant v. Union Bank of Canada* (1892), 19 A.R. 1. Securities under s. 74 (Form C.) are now substituted for receipts given by the owner.

Transfer by third person. The borrower need not be the owner of the goods. A warehouse receipt, and it would seem, a bill of lading, may be given or transferred to the bank by the owner of the goods as security for a present advance to another; *Tennant v. Union Bank of Canada* (1892), 19 A.R. 1, 6.

Transfer by agents. S. 73 (2) (3) gives to a bank the right to acquire from an agent of the owner the title of the owner to goods represented by a warehouse receipt, bill of lading or other document of title. See notes to the Factors Act R.S.O. c. 150, ante pp. 479-483.

Form of Securities under s. 74. Care must be taken in the preparation of securities under s. 74. Literal compliance with the form given in the Statute is not necessary. Any document, which is to the like effect, is sufficient. The document must be,

- (1) An assignment of specific goods;
- (2) To secure a specific advance repayable at or before a certain time;
- (3) Or, to secure specific bills or notes taken in respect of a specific advance and any renewals thereof or substitutions therefor.

Care must be taken in describing the goods. The only safe rule to follow is that laid down in the Bills of Sale Act, R. S. O. c. 148, i.e., to describe the goods so that they may, by the description, be readily known and distinguished; see notes *ante* pp. 353, 354. Such a description as 21 milch cows, 25 boxes of goods, etc., must be avoided; *McCall v. Wolff* (1885) 13 S. C. R. 130; *Carpenter v. Deen* (1889) 23 Q. B. D. 566; *Witt v. Banner* (1888) 20 Q. B. D. 614. The better plan is to assign all the goods in a certain place, or all the logs in a certain boom, etc., and then to add an estimate of quantity, as estimated to contain 1,000,000 feet.

Priority over unpaid vendor. The bank has priority over the lien of an unpaid vendor, unless it acquires the security with notice thereof. A lien on goods is a right to retain possession thereof. A lien of a vendor is lost if he voluntarily parts with the possession of the goods, or the documents of title thereto. *Mason v. Hatton* (1877) 41 U. C. R. 610; per *Holroyd J.*, *Baldev v. Parker* (1823) 2 B. & C. 37, 44; 26 R. R. 260, 263. Where a shipper of goods takes and keeps in his own or his agent's hands a bill of lading making the goods deliverable to his own or his agent's order, that is effectual so far as to preserve him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing, and offers to fulfil these conditions, and demands the bill of lading; *Ogg v. Shuter* (1875) 1 C. P. D. 47. In such a case the vendor, however, retains not only his lien but a power to dispose of the goods on the vendee's default, so long at least as he continues in default *ib.*

Sale of goods. The bank may sell the goods covered by any such security on default. The following provisions must be observed:

- (1) The owner may consent to a disposition at any time and in any manner and without notice. *McCrae v. Molsons Bank* (1878) 25 Gr. 519. It is wise to obtain such consent, as may appear necessary, when the advance is made.
- (2) If the goods are timber, boards, deals, staves, saw-logs or other lumber, the consent to sale without notice, or on shorter notice than thirty days, must be in writing.
- (3) Other goods may, with the consent either verbal or in writing, *McCrae v. Molsons Bank* (1878) 25 Gr. 519, of the owner, be sold without notice. Without such consent ten day's notice is required.
- (4) Except by consent (written or verbal) the sale must be by auction and must be advertised as required by the Act.

There is now no limit of time beyond which a bank may not retain the goods pledged.

Warranty on sale. On a sale of the goods the bank will be held to impliedly warrant a good title thereto unless it expressly negatives such warranty. *Peuchen v. Imperial Bank* (1890) 20 O. R. 325.

Power to retain surplus. Notwithstanding the inability to take the securities except for a present advance, the bank may stipulate that in the event of a sale the surplus shall be applied on any other indebtedness of the borrower, past or future, and such agreement will be valid: *Thompson v. Molsons Bank* (1889) 16 S. C. R. 664. The agreement gives to the bank no further security on the goods and the borrower or any other person having a right to redeem the goods may pay the amount due on the specific advance and put an end to the bank's rights, *ib.* see also *Stephens v. Boisseau* (1896) 26 S. C. R. 437; 23 A. R. 230.

Without such an agreement or without the consent of the owner, the bank should not sell more than sufficient to pay the amount due in respect of the particular advance for which the pledge was made; *Gibbs v. Dominion Bank* (1879) 30 C. P. 36.

Foreign Banks. The provisions of the Act have no application to foreign banks; *Commercial National Bank of Chicago v. Corcoran* (1884) 6 O. R. 327.

Issued Directly to Bank. A warehouse receipt may be issued directly to a bank. Under the original Acts respecting advances on warehouse receipts title could only be acquired by endorsement to the lender, and such is still the law as to advances by private persons; *Bank of British North America v. Clarkson* (1869) 19 C.P. 182; *Royal Canadian Bank v. Miller* (1869) 28 U.C.R. 593, 29 U.C.R. 266. A bill of lading may also be issued directly to a bank; s. 73 (1), see *Re Central Bank, Canada Shipping Co.'s Case* (1891) 21 O.R. 515.

Transfer of Receipts at Common Law. The mere endorsement of a warehouse receipt would not, at common law, pass the property; *Glass v. Whitney* (1863) 22 U.C.R. 290. To effect such a transfer a sale of the goods was necessary and notice to the warehouseman by the purchaser or an attornment by the warehouseman to the purchaser; *Coffey v. Quebec Bank* (1869), 20 C.P. 110, 555. The statute merely authorizes the borrowing of money on warehouse receipts, and the mere endorsement is therefore ineffective for any other purpose; *Glass v. Whitney* (1863), 22 U.C.R. 290.

Endorsement as Indemnity. The endorsement of a warehouse receipt is not a good security to an endorser of a note or other surety, to indemnify him against his liability; *Cockburn v. Sylvester* (1877) 1 A.R. 471.

Endorsement as Continuing Security. The receipts cannot be endorsed as a continuing security for future advances; *Gibbs v. Dominion Bank* (1879) 30 C.P. 36.

Form of Endorsement. It is not necessary that the endorsement should shew that it is made as security for any particular note or debt. An endorsement in blank is sufficient; *Royal Canadian Bank v. Carruthers* (1869) 28 U.C.R. 578, 29 U.C.R. 233; *Bank of Hamilton v. Noye Manufacturing Co.* (1885) 9 O.R. 631.

Re-endorsement of Receipts. Upon the payment of the debt for which the receipt is delivered as security, the original owner is remitted to all his original rights, and is not confined to the rights which the bank had; *Mason v. Great Western Ry. Co.* (1871), 31 U.C.R. 73.

Insurable Interest. The owner of the goods has, notwithstanding the endorsement of the receipt as security, an insurable interest in the goods; *Parsons v. Queen Insurance Co.* (1878) 29 C.P. 188; *McBride v. Gore District Mutual Fire Ins. Co.* (1870) 30 U.C.R. 451.

Negligence of Bank. If the bank has received the written promise of the borrower to give an authorized security, and is guilty of negligence with reference thereto, or the proceeds of the goods, such negligence will discharge a surety for the debt who has not consented thereto, to the extent to which he is damaged; *Molsons Bank v. Girdlestone* (1879) 44 U.C.R. 54.

Admixture of Property. Where the goods embraced in the security are of an indistinguishable character, such as flour, grain or coal, and the person granting the receipt has commingled the same with his own, the holder of the receipt will be entitled to an equivalent quantity; *Bank of Hamilton v. Noye Manufacturing Co.* (1885) 9 O.R. 631; *Clark v. Western Assee. Co.* (1866) 25 U.C.R. 217; *Coffey v. Quebec Bank* (1869) 20 C.P. 110, 555; *Merchants' Bank v. Smith* (1881) 28 Gr. 629; 8 S.C.R. 512, 542; *Great Western Ry. Co. v. Hodgson* (1879) 44 U.C.R. 187. But if the borrower receives goods from the warehouseman covered by the receipt, the bank will have no title as against the true owner to other goods deposited by the borrower with the warehouseman, in the place of the goods so taken; *Llado v. Morgan* (1874) 23 C.P. 517.

The product of the goods covered by the receipt either originally or on the rule as to admixture, such as grain, is the property of the bank, so long as it can be traced, whether it be in flour or in money; *Re Goodfallow, Traders' Bank v. Goodfallow* (1890), 19 O.R. 299. Sec. 76 now declares in express terms the right of a bank to the product of all goods, wares and merchandise covered by any of the securities under discussion, both in their uncompleted and finished state. What the rights would be if other articles not covered by the securities were interwoven in the product is a difficult question, and the question becomes still more difficult if the case be supposed of the title to the other articles being in another bank, under another security of the same class.

Substitution of Securities. A bank cannot acquire a good title to goods covered by the security except for an actual cash advance. The substitution of securities is prohibited. Negotiating a new note and applying the proceeds in

payment of a past debt will not support a security although old securities are at the same time given up; *Bank of Hamilton v. Shepherd* (1884) 21 A.R. 156; *Bank of Hamilton v. Halsted* (1896) 27 O.R. 435, 24 A.R. 152, 28 S.C.R. 235. The contrary decision in *Bank of Hamilton v. Noye Manufacturing Company* (1885), 9 O.R. 631 cannot now be treated as law. But a warehouse receipt may be taken in lieu of a bill of lading of the same goods and, conversely, a bill of lading may be taken in place of a warehouse receipt upon the goods being shipped.

Creditors following Proceeds of Invalid Securities. Although a security may be invalid for non-compliance with the Act, creditors will have no right to recover the proceeds from the bank, if it realizes upon the goods before any execution creditor intervenes, or the rights of other parties, such as purchasers or assignees for creditors accrue; *Re Monteith, Monteith v. Merchants' Bank* (1885) 10 O. R. 529; *Conn v. Smith* (1897) 28 O. R. 629. The invalidation against purchasers, creditors and assignees for creditors of securities given for pre-existing debts in the forms prescribed by the Bank Act occurs by reason of the non-compliance with the provisions of the Acts relating to chattel mortgages and bills of sale in the several provinces. A security in form C, prescribed by s. 74 would be apt to pass the legal property in the goods described therein at common law; *Banque D'Hochelaga v. Merchants' Bank* (1895) 15 C. L.T. 64, 10 Man. L. R. 351. But if not filed as a chattel mortgage, it would be invalid as against creditors and subsequent purchasers and mortgagees. The rights of creditors may in Ontario be asserted under an execution, or by an action on behalf of all creditors, see R.S.O. c. 148, s. 38, *ante* pp. 345, 350. As the transfer of goods in the possession of a carrier or warehouseman does not require registration, *ante* p. 349, there would appear to be little reason for the provision preventing warehouse receipts and bills of lading being taken as security for pre-existing debts, see *Commercial National Bank of Chicago v. Corcoran* (1884) 6 O.R. 527.

WAREHOUSE RECEIPTS, ETC., UNDER ONTARIO ACT.

The scope of the Ontario Act (R. S. O. c. 145, ss. 6-11) *ante* pp. 433-435 cannot well be understood except by comparison with the analogous provisions of the Bank Act, and the decisions thereon. To avoid repetition the notes thereon were not inserted after that Act. The Ontario Act authorizes loans upon warehouse receipts, etc., by private individuals.

Points of difference. (1) The definition of goods, wares and merchandise in the Bank Act includes the same articles as the Ontario Act and adds thereto saw-logs, petroleum, crude oil and all agricultural products and other articles of commerce. It is probable the words themselves are wide enough to include the added particulars.

(2) The Ontario Act covers, (1) four classes of documents, viz.: (a) cover receipts, (b) bills of lading, (c) specifications of timber, and (d) receipts. These must be given by a covekeeper, miller, or the keeper of a warehouse, wharf, yard, harbour or other place for cereal grains, goods, wares or merchandise; (2) bills of lading given by carriers.

The party issuing the receipt must carry on the prescribed business as his calling, e.g., he must be a warehouseman; *Ontario Bank v. Newton* (1869) 19 C. P. 258; *Todd v. Liverpool and London and Globe Insurance Co.* (1870) 20 C. P. 523; *Merchants Bank v. Smith* (1881) 28 Gr. 629; 8 A. R. 15, 8 S. C. R. 512. Whether or not he is a warehouseman is a question of fact, *ib.*

(3) The receipts, etc., may be issued by an owner to himself, i.e., he need not, as under the Bank Act, be a bailee only. But in such cases they must be both signed and endorsed by the issuer. The issuer must be a warehouseman, covekeeper, miller, or keeper of a wharf, yard, harbour or other place for depositing goods.

(4) The receipts, etc., cannot be made in favor of the lender. They must be endorsed to him; *Bank of British North America v. Clarkson* (1869) 19 C.P. 182; *Royal Canadian Bank v. Miller* (1869) 28 U. C. R. 593, 29 U. C. R. 266.

(5) The security must be received at the time of the advance. A prior promise will be insufficient.

(6) Timber, boards, deals, staves and other lumber must be sold within twelve months, and other goods within six months after giving the security. In an action by a lender for conversion of goods not so sold, a defence that the lender is not the owner would be successful. *Royal Canadian Bank v. Miller* (1869) 28 U. C. R. 593. The effect of the expiration of the time without a sale is to re-vest the property in the original owner; see *Royal Canadian Bank v. Ross* (1877) 40 U. C. R. 466, 477.

(7) Thirty day's notice of sale of timber, etc., must be given and an advertisement of sale must be published for eight days consecutively in at least the nearest two daily newspapers to the place of sale, and in every issue of the local paper not a daily, and the sale must be by auction.

(8) Of other goods ten day's notice of sale is required.

(9) The provisions as to notice and method of sale could probably be waived.

(10) The lender takes precedence over any unpaid vendor or other creditor save and except claims for wages of (sic) labour performed in making and transporting timber, etc. Probably the lien in the latter case could be asserted under The Woodmen's Lien for Wages Act, R. S. O. c. 154.

In other respects the authorities under the Bank Act will be applicable.

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PART X.

Real Property

GENERAL OBSERVATIONS.

It would manifestly be impossible to comprise in a work of this nature, exhaustive notes upon the Statutes relating to Real Property. Most of the Statutes are now interwoven in the text books on the modern law of real property. Some of them form the subject of independent treatises. Such notes as are appended to the statutes in this chapter are therefore intended to be auxiliary only to existing text books.

CHAPTER 112.

An Act to amend the law relating to Mortmain and Charitable Uses.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Mortmain and Charitable Uses Act.*" 55 V. c. 20, s. 1. Short title.

2. So far as this Act applies to wills, the same shall only apply to wills of testators dying on or after the 14th day of April, 1892. 55 V. c. 20, s. 2. Application of Act.

3. "Land" in this Act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure; but not money secured on land or other personal estate arising from or connected with land. 55 V. c. 20, s. 3. "Land," meaning of.

4. Land may be devised by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within two years from the death of the testator, or such extended period as may be determined by the High Court or a Judge thereof in Chambers. 55 V. c. 20, s. 4. Land devised to charity to be sold. in 2 yrs

5. So soon as the time limited for the sale of any land under any such devise shall have expired without the completion of the sale of the land, the land shall vest forthwith in the Accountant of the Supreme Court of Judicature for Ontario; and the High Court shall cause the same to be sold, or the sale completed (as the case may be) with all reasonable speed by the administering trustees for the time being thereof; and for this purpose may make orders directing such trustees to proceed with the sale or completion of the sale of such land, or removing such trustees and appointing others, and may provide by any such order or otherwise for the payment of the proceeds of the sale to the said trustees in trust for the charity, and for the payment of the costs and expenses incurred by the said trustees or otherwise in or connected with such sale and proceedings. 55 V. c. 20, s. 5. Where land remains unsold after expiration of two years. note for- with in account

Personal estate directed to be laid out in land.

6. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses, shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no direction to lay it out in the purchase of land. 55 V. c. 20, s. 6.

Power to retain land in certain cases.

7. The High Court, or a Judge thereof sitting in Chambers, if satisfied that land devised by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity, and not as an investment, may by order sanction the retention or acquisition, as the case may be, of such land. 55 V. c. 20, s. 7.

Mortmain Acts not to apply to impure personality.

8. Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the Statutes known as the Statutes of Mortmain or of Charitable Uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date. 55 V. c. 20, s. 8.

Exercise of jurisdiction of High Court.

9. The jurisdiction of the High Court under this Act is to be exercised by a Judge in Chambers or otherwise, and may be exercised in a summary manner so as to avoid all unnecessary expense. 55 V. c. 20, s. 9.

Act to apply only to legacies otherwise void.

10. This Act affects only devises or legacies which prior to the 14th day of April, 1892, would have been void, and shall not be construed as taking away any right prior to that date by statute or otherwise possessed by any corporation; nor shall this Act be construed as expressly or by implication affecting any actions then pending or any question whatever therein 55 V. c. 20, s. 10.

NOTES.

Early Statutes. The early statutes dealing with alienation to corporations are 9 Hen. III. c. 36 (Magna Charta); 7 Edw. I. c. 13 (De Viris Religiosis); 13 Edw. I. c. 32; 15 Rich. II. c. 5, and 23 Hen. VIII. c. 10. Under these acts alienation to corporations, without license in mortmain from the Crown, is a cause of forfeiture to the Crown. The lands can only be forfeited by the Crown and that only after office found; *McDiarmid v. Hughes* (1888) 16 O.R. 570. Until forfeiture, the alienation in mortmain remains good. The right of the Crown to grant a license in mortmain was confirmed by 7 & 8 Wm. III. c. 37. Corporations of various kinds are, chiefly by the Statutes under which they are incorporated, enabled to hold lands without license from the Crown. Foreign corporations cannot hold lands without a license from the Crown; *Chaudière Gold Mining Co. v. Desbarats* (1873) L.R. 5 P.C. 277. Municipal and trading corporations are both within the Statutes of Mortmain; *Brown v. McNab* (1873) 20 Gr. 179; *Chaudière Gold Mining Co. v. Desbarats* (1873) L.R. 5 P.C. 277.

Charitable Uses. The statute of Geo. II. c. 36 is not in strictness a statute of Mortmain; *Leith & Smith* 298. By that Statute it was enacted that no lands, tenements or money to be laid out thereon should be given for or charged with any charitable uses whatever, unless by deed, indented, executed twelve calendar months before the death of the donor, nor unless such gift be made to take effect immediately, and be without power of revocation. All other gifts were void, and therefore the grantor could take advantage of their invalidity. The Statute was passed to prevent the mischief arising from improvident alienations or dispositions to charitable uses by dying or languishing persons; *Shelford on Mortmain* p. 120. Charitable uses are defined by 43 Eliz. c. 4, and embrace relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; education and perfectment of orphans; relief, stock or maintenance of houses of correction; marriages of poor maids; supportations, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners and captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes. Land devised for the erection of a workhouse is devised for a charitable use; *Webster v. Southey* (1887) 36 Ch. D. 9. Many statutes have been passed authorizing particular institutions to accept, by devise, lands and interests therein. By R.S.O. c. 307, s. 24 any religious society or congregation of Christians in Ontario may take or hold lands and interests therein by gift, devise or bequest, if made six months before the death of the donor, subject to restrictions as to the annual value and period of holding.

Object of present Act. The present act is founded upon the English Mortmain and Charitable Uses Acts of 1888 and 1891 (51 & 52 Vict. c. 42 and 54 & 55 Vict. c. 73). Lands may now be devised by will for any charitable use. To the extent which the devise would have been void before the act, the provisions of the act apply, and the land must be sold within the time limited by the act. The charity will in all cases get the benefit of the devise. Moneys charged or secured on land are removed entirely from the operation of the Statutes of Mortmain and Charitable uses. This includes a vendor's lien; *Harrison v. Harrison* (1829) 1 Russ. & Myl. 71. Moneys directed by will to be laid out in land for charitable uses cannot be invested therein without the sanction of the Court.

Application of Act. The act applies to the estates of all testators who have died since 13th April, 1892, although the will may have been made before that date; *Re Bridger, Brompton Hospital v. Lewis* (1894) 1 Ch. 297 (1893) 1 Ch. 44.

Land may be devised in favor of a charity for any estate or interest present or future; *Re Hume, Forbes v. Hume* (1895) 1 Ch. 297, (1895) 1 Ch. 422.

Property within the Act. Land includes tenements and hereditaments, corporeal or incorporeal, of any tenure. This would include leaseholds; *Re Kershaw* (1888) 37 Ch. D. 374.

Devise to a Diocese. A devise to a Bishop in trust for his diocese, is not a devise to a charitable use. Many, but not all, of the objects to which the funds of a diocese are usually devoted may be charitable, but unless there is something in the devise requiring the gift to be devoted to any particular one or more of those objects, it is not a gift to a charitable use, and no order is required under s. 4 to extend the time for sale. *Re McCauley* (1897) 28 O.R. 610.

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CHAPTER 119.

An Act respecting the Law and Transfer of Property.

INTERPRETATION, s. 1.	PAYMENT INTO, AND APPLICATIONS TO COURT, s. 16.
CORPOREAL TENEMENTS TO LIE IN GRANT AS WELL AS LIVERY, s. 2.	IMPLIED COVENANTS, s. 17.
FEOFFMENTS TO BE BY DEED AND INNOCENT, s. 3.	POWERS, MODE OF EXECUTION, ETC., ss. 18-20.
WORDS OF LIMITATION UNNECESSARY, s. 4.	AUCTIONS OF ESTATES, ss. 21-26.
RECEIPT IN DEED SUFFICIENT, s. 5.	RENT CHARGE, EFFECT OF PARTIAL RELEASE, s. 27.
RIGHTS OF PURCHASER AS TO EXECUTION OF DEED, s. 6.	SCINTILLA JURIS NO LONGER NECESSARY, s. 28.
PARTITION, EXCHANGE, ETC., TO BE BY DEED, ss. 7, 10.	CONTINGENT REMAINDER NOT TO BE DEFEATED BY FORFEITURE, SURRENDER OR MERGER OF PRECEDING ESTATE, s. 29.
CONTINGENT INTERESTS, ETC., MAY BE DISPOSED OF BY DEED, ss. 8, 10.	IMPROVEMENTS MADE UNDER MISTAKE OF TITLE, ss. 30-32.
WORDS "GRANT" AND "EXCHANGE;" EFFECT OF, ss. 9, 10.	PURCHASES OF REVERSIONS, ss. 33-35.
GRANTEES ETC., TO TAKE AS TENANTS IN COMMON AND NOT AS JOINT TENANTS, s. 11.	PURCHASER FOR VALUE WITHOUT NOTICE, s. 36.
CONVEYANCE TO INCLUDE WHOLE ESTATE OF GRANTOR, s. 12.	CONVEYANCE BY A PERSON TO HIMSELF OR TO HIS WIFE, ETC., s. 37.
DEEDS OF BARGAIN AND SALE, BY CORPORATIONS, s. 13.	DEBENTURES OF CORPORATIONS, s. 38.
DEEDS OF BARGAIN AND SALE, ENROLMENT UNNECESSARY, s. 14.	FRAUDS IN SALES AND MORTGAGES, s. 39.
PROVISION FOR SALES FREE FROM INCUMBRANCES, s. 15.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears: Interpretation.

1. "Land" shall extend to messuages, lands, tenements and "Land." hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land or of any interest therein.

2. "Mortgage" shall include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth, and to be reconveyed, re-assigned or released on satisfaction of the debt. "Mortgage."

"Mortgagor." 3. "Mortgagor" shall include every person by whom any such conveyance, assignment, pledge or charge as aforesaid is made.

"Mortgagee." 4. "Mortgagee" shall include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred.

"Property." 5. "Property" shall include real and personal property, and any debt, and any thing in action, and any other right or interest.
Imp. Act, 44
45 V. c. 41.
s. 2.

"Conveyance." 6. "Conveyance" shall include feoffment, grant, assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and "convey" shall have a meaning corresponding with that of conveyance.

"Purchaser." 7. "Purchaser" shall include a lessee or mortgagee, and an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and "purchase" shall have a meaning corresponding with that of purchaser; but sale shall mean only a sale properly so called. R. S. O. 1887, c. 100, s. 1.

Corporeal tenements, etc., deemed to lie in grant, etc. 2. All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. R. S. O. 1887, c. 100, s. 2.

Feoffments unless by deed to be void. 3. A feoffment otherwise than by deed shall be void at law, and no feoffment shall have any tortious operation. R. S. O. 1887, c. 100, s. 3.

Words of limitation unnecessary Imp. Act, sec. 61. 4.—(1) In a deed, or other instrument, it shall not be necessary, in the limitation of an estate in fee simple to use the word heirs; or in the limitation of an estate in tail to use the words heirs of the body; or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body, or heirs female of the body.

(2) For the purpose of such limitation it shall be sufficient in a deed, or other instrument, as in a will to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitations intended, or to use any other words sufficiently indicating the limitation intended.

A conveyance without words of limitation passes all the estate, etc. Imp. Act, sec. 63. (3) Where no words of limitation are used, a conveyance shall pass all the estate, right, title, interest, claim and demand, which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. This sub-section shall apply only if and as far as a contrary intention does not appear from the conveyance, and shall have

effect subject to the terms of the conveyance and to the provisions therein contained.

(4) This section shall apply only to conveyances made after the 1st day of July, 1886. R. S. O. 1887, c. 100, s. 4.

5. A receipt for consideration money or securities contained in the body of a conveyance shall be a sufficient discharge to the person paying or delivering the same, without any further receipt being indorsed on the conveyance, and shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. R. S. O. 1887, c. 100, s. 6.

Receipt in deed sufficient.
Imp. Act, ss. 54, 55.

6. On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. R. S. O. 1887, c. 100, s. 7.

Rights of purchaser as to execution of purchase deed.
Imp. Act, s. 8.

7. A partition and an exchange of land, and a lease required by law to be in writing of land, and an assignment of a chattel interest in land, and a surrender in writing of land not being an interest which might by law have been created without writing, shall be void at law, unless made by deed. R. S. O. 1887, c. 100, s. 8.

Partition or exchange of land, etc., unless by deed to be void.

8. A contingent, an executory, and a future interest, and a possibility coupled with an interest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon land, may be disposed of by deed; but no such disposition shall by force only of this Act defeat or enlarge an estate tail. R. S. O. 1887, c. 100, s. 9.

Contingent interests, etc., in land may be disposed of by deed.

9. Neither of the words "grant," or "exchange," in any deed, shall create any warranty or right of re-entry, or covenant by implication except in cases where by any Act in force in Ontario, it is declared that the word "grant" shall have such effect. R. S. O. 1887, c. 100, s. 10.

No implied warranty, etc., to be created by the word "grant" or "exchange."

10. The preceding three sections of this Act shall not extend to any deed, act or thing executed or done, or to any estate, right or interest created before the 1st day of January, 1850, but they shall extend to and have operation and effect on and from that day. R. S. O. 1887, c. 100, s. 11.

Preceding three sections not to extend to deeds, etc., executed before 1st January, 1850

Grantees, devisees, etc., to take as tenants in common unless it appears they are to take as joint tenants.

11. Where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants. R. S. O. 1887, c. 108, s. 20.

Conveyance to include all houses, etc. and the reversion, and all the estate, etc.

12.—(1) Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised, belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances. R. S. O. 1887, c. 100, s. 12 (1); c. 105, s. 4; c. 106, s. 3; c. 107, s. 4.

(2) Except as to conveyances under the former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886. R. S. O. 1887, c. 100, s. 12 (2).

Corporations aggregate may convey by bargain and sale.

13. Any corporation capable of taking and conveying land in Ontario, shall be deemed to have been and to be capable of taking and conveying land by deed of bargain and sale, in like manner as any person in his natural capacity, subject nevertheless to any general limitations or restrictions and to any special provisions as to holding or conveying real estate which may be applicable to such corporation. R. S. O. 1887, c. 100, s. 13.

Enrolment or registration not necessary to validity of deeds of bargain and sale.

This shall not affect priority under Rev. Stat. c. 186.

14. No deed of bargain and sale of land in Ontario, executed subsequently to the 6th day of March, 1834, shall require enrolment or registration to supply the place of enrolment, for the mere purpose of rendering such bargain and sale a valid and effectual conveyance forpassing the land thereby intended to be bargained and sold, but this shall not affect any question of priority under *The Registry Act*, or any Act heretofore in force respecting the registration of instruments relating to real estate. R. S. O. 1887, c. 100, s. 14.

15.—(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the High Court or the Court in which the sale takes place may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court—in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land—of such amount as, when invested in securities approved by the Court, the Court considers will be sufficient by means of the dividends thereof to keep down or otherwise provide for that charge; and—in any other case of capital money charged on the land—of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount.

Provision for sales free from incumbrances. Imp. Act, s. 5.

(2) Thereupon the Court may, if it thinks fit, and either after or without any notice to the incumbrancer as the Court thinks fit, declare the land to be freed from the incumbrance; and make any order for conveyance, or vesting order, proper for giving effect to the sale; and give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof. R. S. O. 1887, c. 100, s. 15.

16.—(1) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

Regulations respecting payments into court and applications. Imp. Act, s. 69.

(2) Every application to the Court shall, except where it is otherwise expressed, be made in chambers, and on notice.

(3) On an application by a purchaser, notice shall be served in the first instance on the vendor.

(4) On an application by a vendor, notice shall be served in the first instance on the purchaser.

(5) On any application, notice shall be served on such persons, as the Court thinks fit.

(6) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges or expenses of all or any of the parties to any application. R. S. O. 1887, c. 100, s. 16.

Covenants to be implied.
Imp. Act,
44-45 V. c. 41,
s. 7.

17.—(1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value by beneficial owner.
Imp. Act, s. 7.

- (a) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person who conveys, and is expressed to convey, as beneficial owner, namely:

Covenants for right to convey;

Quiet enjoyment;

Freedom from incumbrances; and

Further assurance;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to *The Act respecting Short Forms of Conveyances*, and therein numbered 2, 3, 4 and 5, respectively, subject to the directions in the said Schedule contained.

Rev. Stat.
c. 124.

On conveyance of leaseholds for value, by beneficial owner.

- (b) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant, by the person who conveys, and is expressed to convey, as beneficial owner namely;

Validity of lease.

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance.

(c) In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely;

On conveyance by trustee, etc.
Imp. Act, s.

That the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof is, or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance or any part thereof, in the manner in which it is expressed to be conveyed.

Against incumbrances.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

On conveyance by direction of beneficial owner.

(3) Where in a conveyance, a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance.

Where covenants not implied.

(4) The benefit of a covenant, implied as aforesaid, shall be annexed and incident to and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

Enforcing covenants.

(5) A covenant implied as aforesaid, may be varied or extended by deed, and as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied. R. S. O. 1887, c. 100, s. 17.

Variation of covenants.

POWERS.

18. A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds

Mode of executing powers

are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is especially required that a deed or instrument in writing, made in exercise of such power, shall be executed or attested with some additional or other form of execution or attestation or solemnity: but this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power, by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend. R. S. O. 1887, c. 100, s. 18.

Person to whom a power is given may release or contract not to exercise same.

19. A person to whom a power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power, whether the power was created by an instrument heretofore or hereafter coming into operation. R. S. O. 1887, c. 100, s. 19.

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

Imp. Act 22-23 V. c. 35, s. 13.

20. Where, under a power of sale, a *bona fide* sale is made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, is by mistake allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the High Court upon an action brought or upon application made in a summary way, as the case may require or permit, to declare, that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court directs, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties as in the opinion of the Court are entitled thereto, the sale ought to be established; and upon payment and settlement being made accordingly, the Court may declare that the sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the application, as between solicitor and client, shall be paid by the purchaser or the claimant under him. R. S. O. 1887, c. 100, s. 20.

AUCTIONS OF ESTATES.

Construction of particular words.

21. In construing the next succeeding three sections of this Act,

"Auctioneer,"

1. "Auctioneer" shall mean any person selling by public auction;

2. "Puffer" shall mean a person appointed to bid on the "Puffer." part of the seller. R. S. O. 1887, c. 100, s. 21.

22. Unless in the particulars or conditions of sale by auction of any land it is stated that such land will be sold subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed and taken to be without reserve. R. S. O. 1887, c. 100, s. 22.

When sale shall be deemed without reserve.

23. Upon any sale of land by auction, without reserve, it shall not be lawful for a seller or for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any bidding from the seller or from a puffer. R. S. O. 1887, c. 100, s. 23.

Seller not to bid at unreserved sales.

24. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller or any one puffer to bid at such auction, in such manner as the seller may think proper. R. S. O. 1887, c. 100, s. 24.

At reserved sales the seller may bid.

25. Nothing in the next preceding four sections contained shall be taken to authorize any seller to become the purchaser at the sale. R. S. O. 1887, c. 100, s. 25.

Seller not authorized to purchase.

26. The next preceding five sections shall not apply to any sale which took place before the 4th day of March, 1868. R. S. O. 1887, c. 100, s. 26.

Application of ss. 21-25.

RENT-CHARGES.

27. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release. R. S. O. 1887, c. 100, s. 27.

Release of part of land subject to rent-charge not to be an extinguishment of the charge on the rest, etc. Imp. Act 22-23 V. c. 35, s. 10.

FUTURE AND CONTINGENT USES.

28. Where by any instrument any hereditaments are limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere. R. S. O. 1887, c. 100, s. 28.

Limitation to uses, shall take effect as they arise without continued seisin or *scintilla juris* in the persons originally seised. Imp. Act 23-24 V. c. 38, s. 7.

CONTINGENT REMAINDERS.

Certain contingent remainders not to be defeated by forfeiture, surrender or merger of preceding estate.

29. Every contingent remainder existing on the 2nd day of March, 1877, or created since that day or hereafter, shall be, and every contingent remainder, which existed at any time between the 30th day of May, 1849, and the 2nd day of August, 1851, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold. R. S. O. 1887, c. 100, s. 29.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

Persons improving lands to have a lien on lands.

30. In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required, to retain the land if the Court is of opinion or requires that this should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct. R. S. O. 1887, c. 100, s. 30.

As to cases where, from unskilful survey, a person has improved lands afterwards found to belong to his neighbour.
Rev. Stat. c. 181.

31. In case an action for the recovery of land is brought against a person who, after any line or limit has been established according to *The Act respecting the Survey of Lands*, is found, in consequence of unskilful survey, to have improved on lands not his own, the Judge before whom the action is tried shall assess or direct the jury to assess damages for the defendant for any loss he may sustain in consequence of any improvement made before the commencement of the action, and also assess or direct the jury to assess the value of the land to be recovered and if the judgment be for the plaintiff, no writ of possession shall issue until the plaintiff has tendered or paid the amount of such damages, or has offered to release the land to the defendant, provided that the defendant, within one month of the date of the judgment pays or tenders to the plaintiff the value of the land so assessed. R. S. O. 1887, c. 100, s. 31; Rev. Rule 787.

Plaintiff not to have costs from the time defendant offers to give up the lands on receiving the value of his improvements

32. In all cases in which the Judge or the jury before whom such action is tried, assess damages for the defendant as provided in the next preceding section, for improvements made upon land not his own in consequence of unskilful survey, and where it satisfactorily appears that the defendant does not contest the plaintiff's action for any other purpose than to obtain the value of the improvements made upon the land previous to the alteration and establishment of the lines according to law, the Judge before whom the action is tried shall certify such fact upon the record, and thereupon the defendant shall be entitled to the costs of the defence: Provided the

Proviso.

defendant at the time of appearing, gave notice in writing to the plaintiff or his solicitor of the amount claimed for such improvements, and that on payment the defendant or person in possession would surrender the possession to the plaintiff, and that the defendant did not intend at the trial to contest the title of the plaintiff; and if on the trial it be found that notice was not given as aforesaid, or if there is assessed for the defendant a less amount than that claimed, in the notice, or it is found that the defendant had refused to surrender possession of the land after tender made of the amount claimed, then and in such case the Judge shall not certify, and the defendant shall pay costs to the plaintiff; and upon the trial of any action after such notice no evidence shall be required in proof of the title of the plaintiff. R. S. O. 1887, c. 100, s. 32

Unless the improvements are assessed at less than the sum demanded.

When no proof of plaintiff's title required.

PURCHASES OF REVERSIONS.

33. In the succeeding two sections the word "Purchase" shall mean any kind of contract, conveyance or assignment, under or by which any kind of property may be acquired. R. S. O. 1887, c. 100, s. 33.

"Purchase"—what it shall mean.

34. In case any purchase made before the 4th day of March, 1868, of any reversionary interest in real or personal estate is sought to be opened or set aside on the ground of undervalue, the onus of proving undervalue shall lie upon the person seeking to open or set aside the same. R. S. O. 1887, c. 100, s. 34.

Onus probandi

35. No purchase made after the said date *bona fide*, and without fraud, of any reversionary interest in real or personal estate, shall be opened or set aside on the ground of undervalue. R. S. O. 1887, c. 100, s. 35.

Purchases after March 4, 1868 not affected by undervalue.

PURCHASER FOR VALUE WITHOUT NOTICE.

36. It shall in no case be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money, or any part thereof. R. S. O. 1887, c. 100, s. 36.

Proof of payment of purchase money unnecessary.

ASSIGNMENT TO ASSIGNOR AND ANOTHER OR TO ASSIGNOR'S WIFE.

37. Any property, real or personal, may be conveyed or assigned by a person to himself jointly with another person, by the like means by which it might be conveyed or assigned by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, and by a wife to her husband alone or jointly with another person. R. S. O. 1887, c. 100, s. 5; c. 122, s. 8.

Assignment of property to wife or self and others. Imp. Act. s. 50.

DEBENTURES OF CORPORATIONS TRANSFERABLE.

38.—(1) The bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may

Bonds and debentures of corporations

be transferred by delivery, and if payable to any person or order shall (after general indorsation thereof by such person) be transferable by delivery from the time of the indorsation.

Holder may maintain action.

(2) Any such transfer shall vest the property of such bonds or debentures in the holder thereof to enable him to maintain an action thereon in his own name. R. S. O. 1887, c. 122, s. 9.

[For Assignments of Choses in Action, see Cap. 51, sec. 58 (5).]

FRAUDS IN SALES OR MORTGAGES OF PROPERTY.

Liability of vendor or mortgagor for fraudulent concealment of deeds, etc. or falsifying pedigree.
Imp. Acts 22-23 V., c. 35, s. 24, and 23-24 V. c. 38, s. 8.

39. If any seller or mortgagor of land, or of any chattels real or personal, or *choses in action* conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, such seller, mortgagor, solicitor or agent shall, irrespective of any criminal liability he may thereby incur, be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate is recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land. R. S. O. 1887, c. 100, s. 37.

SCHEDULE.

FORM OF CONVEYANCE BY BENEFICIAL OWNER UNDER SECTION 17.

This Indenture made the _____ day of _____, one thousand eight hundred and _____

Between (here insert names of parties and recitals, if any,) Witnesseth, that in consideration of _____ dollars, of lawful money of Canada, now paid by the said grantee to the said grantor (the receipt whereof is by him acknowledged,) he, the said grantor, as beneficial owner, doth convey unto the said grantee in fee simple, (or otherwise as the case may be) all, etc., (parcels).

In Witness Whereof, the said parties hereto have hereunto set their hands and seals.

R. S. O. 1887, c. 100, Sched.

NOTES.

Corporeal Hereditaments Lie in Grant. At common law, corporeal hereditaments were transferred by feoffment, accompanied by delivery of possession of the land. By the Statute of Frauds, s. 1, all leases, estates, interests of freehold or terms of years or any uncertain interest in lands made or created by livery and seisin only, or by parol and not put in writing, were declared to have the force and effect of leases and estates at will only. S. 3 of the present statute now requires a feoffment to be made by deed. Incorporeal hereditaments being such things whereof no livery could be had, were said to lie in grant. Various devices were resorted to in order to overcome the necessity of livery of seisin or actual delivery of possession of corporeal hereditaments, and land was more often conveyed by a conveyance operating under the statute of uses, known as a bargain and sale, whereby the vendor stood seised of the land to the use of the purchaser. After their invention, the legislature required such conveyances to be enrolled, and other devices, such as a lease and release, were substituted. Upon a common law conveyance, uses could be engrafted whereby successive estates could be limited by way of use, but a conveyance by way of bargain and sale or other conveyance without livery of seisin exhausted the Statute of uses and the persons in whose favor estates were intended to arise in the future did not acquire any legal estate in the land, but had to resort to the doctrines of the Court of Chancery to enforce trusts. By the enactment that corporeal hereditaments shall now lie in grant, a common law conveyance may be made upon which future estates may be limited by way of use, and the persons to take in succession become entitled, upon their rights arising, to an actual legal transmissible estate in the land. Formerly a feoffment of a larger estate than the feoffor had would work a forfeiture, but now a feoffment has no tortious operation,

Words of Limitation Unnecessary. Prior to 1886 a conveyances of land otherwise than by will were insufficient to pass estates of inheritance unless the word "heirs" was used in limiting the estate to the grantee. A grant to a man "in fee simple" would have conveyed only a life interest. In limiting estates tail, it was necessary that the words "heirs of his body" should be used. Consequently conveyances frequently failed to carry out the intention of the parties, see *Armstrong v. Harrison* (1898) 29 O. R. 174. In wills, a devise, in the absence of a contrary intention, would pass the whole estate of the testator, see R.S.O. c. 128, s. 7. Section 4 now applies the same rule to conveyances, as to wills.

Receipt in Deed Sufficient. The object of s. 5 is to do away with the necessity of an indorsed receipt and to relieve assignees of securities from enquiry, whether the consideration money was actually advanced. It will be noticed that by s. 1 (6) the word "conveyance" includes a mortgage. At common law a formal receipt in the body of a deed estopped the parties thereto but not strangers; *Harding v. Ambler* (1837) 3 M. & W. 279; *Rex v. Scammonden* (1789) 2 T. R. 474; 1 R.R. 752, but in equity it might be shewn that the money had not been paid; *Choppin v. Choppin* (1725) 2 P. Wms. 291; *Kettlewell v. Watson* (1884) 26 Ch. D. 501. By the Judicature Act, the rule in equity was adopted. A receipt for the purchase money endorsed upon the deed was sufficient evidence of payment of the consideration money to prevent a vendor's lien being established against a purchaser from the grantee who had not notice that the money had not been paid; *Rice v. Rice* (1853) 2 Drew. 73; *White v. Wakefield* (1835) 7 Sim. 401; *Shropshire Union Ry. & Canal Co. v. Reg.* (1875) L.R. 7 H.L. 496, 509; *Bickerton v. Walker* (1885) 31 Ch. D. 151, 159. When, however, a conveyance was registered, the effect of a receipt in the body of the deed was sufficient under s. 98 of the Registry Act, R.S.O. c. 136, to prevent a vendor's lien being established against a subsequent purchaser for value without notice, whose conveyance was registered. An assignee of a mortgage takes the same subject to the equities between the original parties; *Harter v. Coleman* (1882) 19 Ch. D. 630; *Pressey v. Trotter* (1878) 26 Gr. 154; *Martin v. Bearman* (1880) 45 U. C. R. 205; *Wilson v. Kyle* (1880) 28 Gr. 104, but it would seem that he will now be entitled to rely upon the receipt contained in the mortgage as proof of the original advance; *Bick-*

erton v. Walker (1885) 31 Ch. D. 131, although R.S.O. c. 121 s. 33, seems opposed to this view. This receipt will not be of any value in favour of a purchaser or assignee who has actual knowledge that the money has not been paid, or who has notice of suspicious circumstances which ought to cause inquiry, if such inquiry would lead to the discovery that the money had not been paid; Kennedy v. Green (1835) 3 Myl. & K. 609; Kettlewell v. Watson (1884) 26 Ch. D. 685.

The enactment in favour of a subsequent purchaser is not confined to claims which might be made upon alleged vendors' liens for unpaid purchase money or the like. It is sufficient to give him an equitable title in the same way as if the money had been actually paid although his legal title may be defective; Jones v. McGrath (1888) 16 O. R. 617.

Execution of Deed. Formerly a purchaser was entitled to require the vendor to execute the conveyance in his presence or that of his solicitor or agent; Viney v. Chaplin (1857) 4 Drew 237, 2 De G. & J. 468; Re Bellamy and Metropolitan Board of Works (1883) 24 Ch. D. 387. This right is now abrogated.

Leases to be Under Seal. Where a lease is for more than three years, or at a rent less than two-thirds of the improved value, it must be by a sealed instrument, otherwise it is, as a lease, void under s. 7, but it may be good as an agreement and if specific performance would be granted it is of the same effect as a lease by deed; Walsh v. Lonsdale (1882) 21 Ch. D. 9; Swain v. Ayres (1888) 20 Q. B. D. 588, 21 Q. B. D. 293; Strong v. Stringer (1889) 61 L. T. 473; Lowther v. Heaver (1889) 41 Ch. D. 264; Allhusen v. Brooking (1884) 26 Ch. D. 565; Coatsworth v. Johnston (1886) 55 L. J. Q. B. 220.

Surrenders of similar tenancies must also be by deed, unless they arise by act or operation of law; See Gault v. Sheppard (1886) 14 A. R. 209; Hunter's Real Property Statutes 37.

Contingent Interests. At common law every grant of an estate in expectancy was subject to three requirements:—

- (1) A particular estate of freehold was required to support it.
- (2) The estate in expectancy was required to vest either during the continuance of the particular estate or *eo instanti* it was determined.
- (3) A contingent estate could not be limited after a fee simple.

By s. 29 such estates are now capable of taking effect notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, but in other respects the law is unaltered.

Executory Interests. Estates which were incapable of taking effect at law by reason of the rules respecting contingent remainders might, before the Statute of Uses, be given effect to as equitable estates under the doctrines of the Court of Chancery. The Statutes of Uses clothed them as they arose with the legal estate. Executory interests may be created either *inter vivos* or by will. When created by will they are called executory devises. They are usually classified as springing uses or devises and shifting uses or devises. A shifting use is one which when it takes effect destroys a prior estate created by the same grant or will, e. g. a grant to A. in fee to the use of B. in fee, but if B. should die without issue living at his death, to the use of C. in fee. A springing use is one which springs up into existence upon the happening of a specified event, e. g. a grant to A. in fee to the use of B. in fee on his attaining the age of twenty-one.

Possibility. There are two kinds of possibilities, (1) a bare possibility, such as a *spes successioneis* or the expectancy of an heir; (2) a possibility coupled with an interest e. g. the inchoate right to dower of the wife of a living person in lands of which he is seised in possession; Rose v. Zimmerman (1852) 3 Gr. 598; Miller v. Wiley (1866) 16 C. P. 529; Allen v. Edinburgh Life Assoc. Co. (1877) 25 Gr. 306, or a devise to the survivors of several persons; Roe v. Jones (1789) 3 T. R. 88; Hyden v. Williamson (1731) 3 P. Wms. 132.

Right of Entry. At common law rights of entry was not assignable. By 32 Henry VIII, c. 9, a sale of any pretended rights or titles to lands of which the grantor was out of possession was subjected to a penalty; Doe d. Williams v. Evans (1845) 1 C. B. 724; Marsh v. Webb (1891) 21 O. R. 281; 19 A. R. 564; 22 S. C. R. 437. All dealings with rights of entry except by release to the person in possession were dealings with "pretended" rights and titles within

the meaning of 32 Hen. VIII c. 9. Since the enactment of section 8, a right or title which is good in fact, that is, not fictitious, is not a pretended title, simply because it is a right of entry; *Jenkins v. Jones* (1882) 9 Q. B. D. 128.

The right of entry referred to by s. 8 is not the right of re-entry for condition broken which passed with a sale of the reversion under 32 Hen. VIII c. 34, but an original right where there has been a disseisin or where a party has the right to recover possession and has a right of entry, and nothing but that remains; *Hunt v. Bishop* (1853) 8 Ex. 675, 680.

Disposition of Such Interests. At common law such interests as those mentioned in s. 8 were not alienable *inter vivos*. An assignment or a contract to assign them would however have been enforced in equity if made for a valuable consideration; *Ferne Contingent Remainder* 366, 551. And even at law an actual disposition might pass by way of estoppel. All such interests may now be disposed of by an instrument under seal, subject to the provision that no estate tail shall thereby be defeated or enlarged, so that a person entitled in expectancy to an estate tail, cannot by deed release his right. If it is desired to cut out his estate, the estate tail must be properly barred.

Grant. The object of s. 9 was to prevent any general warranty of title arising from the word "grant." In conveyances where express covenants were contained as to title, any implication of a covenant was excluded, but in conveyances by trustees where there were no covenants as to title the doubts as to what might be implied from the word "grant" deterred them from conveying by the use of that word. *Sheppard's Touchstone* 181-3; *Clarke v. Samson* (1748) 1 Ves. 100.

Exchange. An exchange at common law is a mutual grant of equal interests, the one in consideration for the other; *Leith & Smith* 360. Such an exchange is made between two persons or two sets of persons and no more. *Provost of Eton College v. Bishops of Winchester* (1774) 3 Wils. Ch. 468. A common law exchange is now obsolete. The word "exchange" was the operative word and it created an implied warranty of title, and a right of re-entry in case of the eviction of either party. This implied warranty is now abolished. Exchanges are now carried out by mutual conveyances; *Bertram v. Wichcote* (1833) 6 Sim. 92.

Grantees take as tenants in common. Upon the death of one joint tenant, the survivor takes the estate. Parties taking under conveyances and wills made since 1834 take as tenants in common, and each is entitled in severalty to an undivided share of the estate, unless a contrary intention appears. Executors, or trustees, in fee simple, still take as joint tenants, so that upon the death of one the survivors can confer a good title.

General words. Similar general words to those mentioned in s. 12 were formerly implied in every conveyance expressed to be made in pursuance of the Act respecting Short Forms of Conveyances, R. S. O. (1887) c. 105. Since 1st July 1886, every conveyance whether made under the short forms Act or not will be construed as if it contained the general words unless a special exception is made therein. A somewhat similar provision was made in England by the Conveyancing Act 1881 (44 & 45 V. c. 41) s. 6. Without general words, everything part and parcel of the land conveyed would pass under the maxim *Cujus est solum ejus est usque ad coelum*. That presumption was however rebuttable, *Potts v. Bovine* (1889) 16 A.R. 191. Easements also, which were appurtenant to the land, would also pass without general words. And upon a conveyance by the owner of two tenements, ways of necessity, and all apparent and continuous easements which were necessary for the use of the property, would pass; *Watts v. Kelson* (1871) L.R. 6 Ch. 166; *Wheeldon v. Burrows* (1879) 12 D. 31, and also formed roads although not strictly ways of necessity; *Brown v. Alabaster* (1888) 37 Ch. D. 490; *Bayley v. Great Western Ry. Co.* (1884) 26 Ch. D. 434; *Pearson v. Spencer* (1863) 3 B. & S. 761, 1 B. & S. 571; *Briggs v. Semmens* (1890) 19 O.R. 522. Rights of drainage and of aqueduct are within the category of continuous and apparent easements; *Israel v. Leith* (1890) 20 O.R. 361. The word "lights" enlarges the operation of the grant in the case of new windows as against the grantor and those claiming under him; *Beddington v. Altee* (1887) 35 Ch. D. 317, 331; but only to such light as is enjoyed at the time of the grant under circumstances which would lead to an expectation that the enjoyment of the light would be continued and would not be simply precarious; *Birmingham, Dudley and District Banking Co. v. Ross* (1888) 38 Ch. D. 295, 307. The word "yards" was held to pass the fee in a piece of land not described in the deed; *Willis v. Watney* (1882) 30 W.R. 424;

and a shingle mill erected in the Georgian Bay and connected by a tramway with the land described, was held to pass therewith although some 500 feet therefrom; *Winfield v. Fowlie* (1887) 14 O.R. 102.

■ The words will not comprise property or rights subsequently acquired by the grantor; *Booth v. Alcock* (1873) L.R. 8 Ch. 663.

Bargain and sale by corporation. S. 13 is now of no practical importance since corporeal hereditaments lie in grant. A corporation cannot stand seised to a use and could not, therefore, before the enactment convey by a bargain and sale.

Enrolment. Under the Statute of Enrolments, 27 Hen. VIII, c. 16, a bargain and sale of an estate of freehold was of no effect unless enrolled as therein mentioned.

Sales free from incumbrances. Notwithstanding s. 15 terms will not be imposed on a vendor which he never contemplated; *Dickin v. Dickin* (1882) 30 W.R. 887; *Re Great Northern Ry. Co. and Sanderson* (1885) 25 Ch. D. 788. Where the validity of a mortgage was disputed the court ordered that on payment into court of the amount claimed and ten per cent. additional, the land should absolutely vest in the purchaser; *Milford Haven Ry. and Estate Co. v. Mowatt* (1885) 28 Ch. D. 402. In one case the Court declined to make an order discharging the encumbrance created by an annuity without the consent of the annuitant; *Patching v. Bull* (1882) 30 W.R. 244, but see *Dickin v. Dickin* (1882) 30 W.R. 887. Where the maintenance of a person of weak mind was charged on land, *Boyd C.* refused to discharge the encumbrance unless the whole purchase money was paid into Court; *Re Albertson* (Oct. 17th, 1898) (not reported). Where the wife of a vendor declined to bar her dower, the purchaser was protected by the setting aside of a sufficient portion of the purchase money; *Skinner v. Ainsworth* (1876) 24 Gr. 148.

Payment into Court. S. 16 is similar to sub-sections 2, 3, 4, 5, 6 and 7 of s. 69 of The English Conveyancing Act. It will be noticed that the section is not in terms limited (as the English section is) to matters under the Act.

Implied Covenants. The covenants implied in the English Act differ somewhat in form and effect from those contained in The Short Forms of Conveyances Act. Those covenants extend only to the grantor's own acts, while the English covenants extend to the acts of any one through whom he derives title otherwise than by purchase for value.

Covenants Joint and Several. One advantage derived from implying the covenants under the Act is that if there is more than one covenantor the covenants are joint and several. In any ordinary Short Form Deed from two or more, the covenants are joint unless apt words, to make them joint and several, are inserted.

Expressed to Convey as Beneficial Owner. Words must be introduced into the conveyance, that the party whose covenant is desired, conveys as beneficial owner, otherwise no covenant will be implied though it may be clear that he does convey as beneficial owner.

Covenants run with the Land. S. 17 (4) is but declaratory of the law; *Roach v. Wadham* (1805), 6 East 289. The fact that the covenantee has obtained the covenant by concealment amounting to fraud will be no defence against a subsequent purchaser; *David v. Sabin* (1893), 1 Ch. 523.

Variation of Covenants. If the covenants are once implied by the insertion of the words "as beneficial owner," they cannot be excluded by a proviso, though they may be varied or extended; *Williams v. Hathaway* (1877), 6 Ch. D. 544; nor by notice, even on the conveyance, of an encumbrance or other fact covenanted against; *Page v. Midland Ry. Co.* (1894) 1 Ch. 11.

A vendor selling compulsorily has the right to insert words limiting the implied words where such would convey more than he intended, or could be required, to sell; *Re Peck and London School Board* (1893) 2 Ch. 315.

Execution of Powers. A power of appointment is an authority which one person called the donor gives to another called the donee. The formalities required by the donor should be observed. A power to appoint by deed cannot be exercised by will; *Sug. Powers*, 8th Ed., 209. A power to appoint by will cannot be exercised by deed taking effect in the lifetime of the donee. *Thacker v. Key* (1869) L.R. 8 Eq. 409; *Re Collard and Duckworth* (1889) 16 O.R. 735. S. 18 is similar to Imp. Act 22 & 23 Viet. c. 35, s. 12, and dispenses with all formalities required to be observed by a donee in the execution

and attestation of a power other than an ordinary deed attested by two witnesses. Where a power is exercisable by will, the will must be executed and attested as required by the Wills Act (R. S. O. c. 128.)

Release of Powers. S. 19 is from the English Conveyancing Act 1881 s. 52. The donee of a power which he might exercise for his own benefit could always release it; *E.g. Powers*, 8th Ed. 88-90. But a power simply collateral, i.e., a power given to a person who had no estate or interest in what he was empowered to convey could not be released, e.g. a power to an executor to sell land; *Digges Case* (1600) 1 Coke 173; *West v. Berney* (1819) 1 Russ. & Myl. 431; 32 R. R. 237. A power in gross, which is a power where the donee has an interest, but the power does not affect such interest, could be released independently of s. 19, e.g. a power given to a tenant for life to appoint the corpus. *Re Radcliffe*, *Radcliffe v. Bewes* (1891) 1 Ch. 227; *Horne v. Swann* (1823) Turn & Russ. 430, 24 R. R. 92, even though the release will result in a benefit to the donee; *Re Somes*, *Smith v. Somes* (1896) 1 Ch. 250.

S. 19 makes no change in the law except as to collateral powers. The section does not enable trustees who have a joint power of appointment in the nature of a trust to release the power; *Re Eyre*, *Eyre v. Eyre* (1883) 49 L. T. 259, see *Weller v. Ker* (1866) L. R. 1 H. L. S.c. 11; *Saul v. Pattinson* (1886), 34 W. R. 561. Where life tenants who had a power of appointment by will, assumed to appoint by deed, and covenanted not to revoke the appointment, it was held that the appointee had not a good title and that s. 19 did not help the case. *Re Collard and Duckworth* (1889) 16 O.R. 735.

Mistaken payment to Tenant for life. S. 20 was introduced to alter the law laid down in *Cockerell v. Cholmeley* (1830) 1 Russ. & Myl. 418, 1 Cl. & Fin. 60, 36 R.R. 16, where a sale was declared invalid because of the mistaken payment.

Auctions of Estates. Ss. 21-26 are taken from Imp. Statute 30 & 31 Vict. c. 48. The Courts of Law held sales where puffers were employed illegal; *Howard v. Castle* (1796) 6 T. R. 642, 3 R. R. 296, and the Courts of Equity under some circumstances gave effect to them; *Mortimer v. Bell* (1865) L. R. 10 Ch. 10. The rule at law was adopted. There is a distinction between a reserved bid, and a reserved right to bid; *Gilliat v. Gilliat* (1869) L. R. 9 Eq. 60. If the seller wishes to have a reserved bid and the right to bid himself, he should insert both in the conditions of sale, see *Dinock v. Hallett* (1866) L. R. 2 Ch. 21. A puffer is a person who bids at a sale, but does not intend and is not bound to complete the purchase; *Shimmim v. Bellew* (1867) R. R. 1 285. Where the vendor reserved the right to make one bid, and the auctioneer with his sanction bid three times, and then the vendor stated what the reserved price was, and the purchaser then bid beyond that price, the purchaser was held to be at liberty to avoid the sale; *Carfitt v. Jepson* (1877) 46 L. J. C. P. 529. But the vendor is not responsible for sham bids made without his knowledge or that of the auctioneer; *Union Bank v. Munster* (1887) 37 Ch. D. 51.

Release of Rent Charge. Under the old law, the effect of a release of part of the land was that the charge would be gone. The effect of the present section 27 is;

- (a) Where one person is the owner of the whole of the land subject to the charge, and sells a part, with the concurrence of the person entitled to the charge, the charge is thereafter recoverable in full out of the unreleased part.
- (b) Where there are several owners, and all the owners of the unreleased part concur, the result is the same.
- (c) Where the owner of any portion of the land remaining unreleased does not concur, a proportionate part only can be recovered from him; *Booth v. Smith* (1884) 14 Q. B. D. 318.

scintilla Juris. S. 28 was enacted merely to remove doubts as to the operation of the statutes of uses. *Thuresson v. Thuresson* (1899) 30 O.R. 504.

Contingent Remainders. A contingent remainder was required to take effect in possession on the termination of the particular estate or *eo instanti*, that it determined. Contingent remainders, might therefore be defeated by the tenant for life forfeiting or surrendering his estate, or by his acquiring the reversion or ultimate remainder so as to effect a merger. To prevent this, trustees to preserve contingent remainders were appointed by well drawn settlements. S. 29 obviates the necessity for their appointment in the three cases of forfeit-

ure, surrender or merger of the particular estate. A contingent remainder may still, however, be defeated by the natural expiration of the particular estate, as by the death of the tenant for life.

Improvements under Mistake of Title. Compensation will not be allowed for improvements made pending the action. *O'Grady v. McCaffray* (1882) 2 O.R. 309. A purchaser at a tax sale which is set aside is entitled to be compensated; *Haisley v. Somers* (1887) 13 O.R. 600. The lien is limited to the amount of the enhanced value of the land at the date of action; *Munsie v. Lindsay* (1886) 11 O.R. 520, 529. The clearing of land for farming purposes is an improvement; *Robinet v. Pickering* (1879) 44 U.C. R. 337, and so is the erection of a wall or a fence; *Morton v. Lewis* (1866) 16 C.P. 485. In estimating the amount of the lien, a fair occupation rent should be charged on the full increased value and interest should be allowed on the actual cost or proper outlay for lasting improvements as an offset; *Munsie v. Lindsay* (1886) 11 O.R. 520. The improving occupant cannot be charged with profits made by him; *Comms. Queen Victoria Park v. Colt* (1895) 22 A.R. 1.

S. 30 applies only to a case of improvements on land wholly belonging to another person to which the improving occupant turns out to have no claim or title. It does not apply to the case of a purchaser who, though his deed professes to grant an estate in fee, only takes an equity of redemption, there being a mortgage outstanding; *Beaty v. Shaw* (1888) 14 A.R. 600.

Unskilful Survey. A defendant who employs a man who is a public land surveyor to make the survey for him, is entitled to compensation for an unskilful survey made by such surveyor. The establishing of the line or limit according to The Surveyor's Act is not a condition precedent to the application of s. 31; *Plumb v. Steinhoff* (1882) 2 O.R. 614; but the error must arise from lack of skill and not from wrong instructions; *Doe d. Moule v. Campbell* (1851) 8 U.C. R. 19. The cost of the improvements will not be allowed but their value; *Plumb v. Steinhoff* (1882) 2 O.R. 614, 617.

Purchases of reversions. SS. 33-35 are from Imperial Act 31 & 32 Vict. c. 4. The words "unfair dealing" follow the words "without fraud" in the section corresponding to s. 35, and the word "merely" precedes the words "on the ground of undervalue." Mere inadequacy of price was formerly sufficient to entitle an expectant heir to apply to a court of equity to set aside a sale of a reversion, and the onus of proving the transaction fair and the price sufficient was on the purchaser; *Shelly v. Nash* (1818) 3 Madd. 232. The sections have in no degree whatever altered the *onus probandi* in those cases which raise from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion, or advantage taken of that weakness—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of those circumstances and conditions, and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person, claiming the benefit of it, is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable; *Aylesford (Earl) v. Morris* (1873) L.R. 8 Ch. 484; see *Waters v. Donnelly* (1884) 9 O.R. 391. The reversioner should, as a rule, have competent, independent advice, but in the absence of any reason for suspecting fraud, the want of advice alone would not justify overturning a transaction carried out fairly and which secured to the reversioner the sum fixed as the fair value of his right; *O'Rorke v. Bolingbroke* (1877) 2 App. Cas. 814, 838. Where an heir deals, not behind the back of his father, but with his sanction and assistance, and has all the protection which his father can give him he is not entitled to relief as if the contract had been entered into without such parental protection; *King v. Hamlet* (1834) 2 Myl. & K. 456; 3 Cl. & F. 218; 39 R.R. 24, 237. *Talbot v. Stainforth* (1860) 1 J. & H. 484, but where a son was not dependent upon his father, and had no expectations from him, and both were illiterate, the knowledge of the father was not sufficient to render a sale unimpeachable; *Morey v. Totten* (1857) 6 Gr. 176. If the price is thought to be fair and liberal at the time the transaction is entered into, the sale will not be set aside should it turn out from a latent effect, e.g. the illness and early death consequent thereon of the life tenant, to be inadequate; *O'Rorke v. Bolingbroke* (1877) 2 App. Cas. 814, 836. During the continuance of the same situation in which the reversioner entered into the contract, acquiescence goes for nothing, the same distress which pressed him to enter into the contract is presumed to prevent him from coming to set it aside; *Beynon v. Cook* (1875) L.R. 10 Ch. 389 *Fry v. Lane* (1888) 40 Ch. 1 312.

Neither the repeal of the usury laws, nor the enactment of the sections under consideration has made any difference in the jurisdiction of the court to set aside unconscionable bargains where there is fraud in the sense above described. Where a reversioner, just 21, who was in difficulties, borrowed £150 on his reversion and executed securities for £200 with interest at 20 per cent. reducible to 10 per cent. on punctual payment, the securities were ordered to stand as security for the money actually advanced and 5 per cent. interest; *Miller v. Cook* (1870) L.R. 10 Eq. 641, which case also shews that the advice of an independent solicitor will not necessarily make the transaction good.

Purchase for value without notice. S. 36 is a departure from the English Rule which required the purchaser to negative notice before he paid his whole purchase money; *Price v. Brady* (1869) 16 Gr. 376; *Harvey v. Smith* (1864) 2 E. & A. 480; *Peterkin v. Macfarlane* (1879) 4 A.R. 25, 60.

Assignment to Assignor. At common law a man could not convey either real or personal property to himself or his wife. Under the Statute of Uses, real property could be conveyed to a grantee to uses to hold to the use of the grantor or his wife. But to effectuate the same object with leaseholds or other personal property, two conveyances were necessary until 29 Vict. c. 28, s. 19 taken from Lord St. Leonard's Act, 22-23 Vict. c. 35, s. 21. Conveyances from a husband to his wife were however supported as declarations of trust; *Baddeley v. Baddeley* (1878) 9 Ch. D. 113; *Fox v. Hawkes* (1879) 13 Ch. D. 822; *Whitehead v. Whitehead* (1887) 14 O.R. 621; *Jones v. McElraith* (1887) 15 O. R. 189, and conversely a conveyance by a wife of her separate estate to her husband was sufficient to convert her into a trustee for him; *Sanders v. Malsbury* (1882) 1 O.R. 178.

Debentures of Corporations Transferable. S. 38 was until the revision in 1897 part of The Mercantile Amendment Act. What is a debenture? *Lindley J.* said in *British India Steam Navigation Co. v. Inland Revenue Commrs.* (1881) 7 Q.B.D. 165; "Now what the correct meaning of debenture is, I do not know. I do not find any particular definition of it. We know that there are various classes of instruments, which are commonly called 'debentures.' You may have mortgage debentures, which are charges of some kind on property; you may have debentures which are bonds, and if this instrument were under seal it would be a debenture of that kind; you may have a debenture which is nothing more than an acknowledgment of indebtedness and you may have an instrument like this, which is something more—it is a statement of two Directors that a company will pay. I think any of these things may be debentures." See also *Re Florence Land Co., Ex parte Moor* (1878) 10 Ch. D. 530. As a matter of definition, "debenture" merely means an instrument which shews that the party owes and is bound to pay; *Re Imperial Land Co.* (1871) L.R. 11 Eq. 478. Any document which either creates or acknowledges a debt is a debenture; *Levy v. Abercorris Co.* (1888) 37 Ch. D. 260. Etymologically debenture is but debt "writ large" per *Boyd C.*, *Bank of Toronto v. Cobourg Ry. Co.* (1884) 7 O.R. 1, 7. The law imports as a predominant characteristic to these documents the quality of negotiability, enabling the person holding them to recover without regard to any equities that might exist between the Company and prior holders or the original obligees, *ib.* p. 8; *London Joint Stock Bank v. Simmons* (1892) A.C. 201; but see 15 L.Q.R. 130. Documents under the corporate seal of a Company in the form of an acknowledgment of debt payable to the Bank of Toronto or order are held to be more of the nature of promissory notes than mortgages, though they were, by statute, a charge on all the properties of the company, and the fact that the payee's name was written in after their execution did not invalidate them; *Bank of Toronto v. Cobourg Ry. Co.* (1884) 7 O.R. 1.

It is not necessary that there should be a serial issue of documents to constitute them debentures; *Edmunds v. Blaina Furnaces Co.* (1897) 36 Ch. D. 215.

Frauds on Sales and Mortgages. S. 39 is of no great practical importance in Ontario, owing to the provisions of the Registry and Chattel Mortgage Acts.

As to Criminal Liability, see Criminal Code s. 370.

CHAPTER 121.

An Act respecting Mortgages of Real Estate.

INTERPRETATION, s. 1.

PART I., ss. 2-17.

OBLIGATION TO TRANSFER MORTGAGE,
s. 2.

INSPECTION OF TITLE DEEDS, s. 3.

APPLICATION OF INSURANCE MONEY,
s. 4.

IMPLIED COVENANTS, ss. 5-7.

RELEASE OF EQUITY OF REDEMPTION
WITHOUT MERGER, ss. 8-10.

ASSIGNMENT BY EXECUTORS, s. 11.

DISCHARGE OF MORTGAGE MAY BE
MADE AT ANY TIME, s. 12.

EFFECT OF ADVANCE ON JOINT AC-
COUNT, s. 13.

RECEIPTS OF MORTGAGEE OR SUR-
VIVOR OF TWO OR MORE MORT-
GAGEES, ETC., TO BE EFFECTUAL
DISCHARGES, s. 14.

RIGHT OF MORTGAGEE TO DISTRAIN
LIMITED, ss. 15, 16.

PAYMENT AFTER DEFAULT WITH-
OUT NOTICE, s. 17.

PART II., ss. 18-30.

POWER OF SALE AND INCIDENTAL
POWERS TO BE IMPLIED, ss. 18-
29.

TAXATION OF COSTS, ss. 30, 32.

PART III., ss. 31-34.

RESTRICTION AS TO PROCEEDINGS ON
MORTGAGES, s. 31.

PAYMENT IN TERMS OF NOTICE TO BE
ACCEPTED, s. 32.

DEFENCE OF PURCHASE FOR VALUE
WITHOUT NOTICE, s. 33.

TIME WITHIN WHICH CERTAIN SALES
MAY BE QUESTIONED, s. 34.

HER MAJESTY, by and with the advice and consent of
the Legislative Assembly of the Province of Ontario,
enacts as follows:—

Interpreta-
tion.

1. Where the words following occur in this Act, they shall
be construed in the manner hereinafter mentioned, unless a
contrary intention appears—

“Property.”

1. “Property” includes real and personal property, and any
debt, and any thing in action, and any other right or interest.

“Land.”

2. “Land” includes tenements and hereditaments, corporeal
or incorporeal; and houses and other buildings; also an un-
divided share in land.

“Convey-
ance.”

3. “Conveyance” includes assignment, appointment, lease,
settlement, and other assurance and covenant to surrender,
made by deed, on a sale, mortgage, demise, or settlement of
any property or on any other dealing with or for any property;
and “convey” has a meaning corresponding with that of con-
veyance.

“Mortgage.”

“Mortgage
money.”

“Mortgagor.”

4. “Mortgage” includes any charge on any property for secur-
ing money or money's worth; and “mortgage money” means
money or money's worth, secured by a mortgage; and “mort-
gagor” includes any person from time to time deriving title

under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and "mortgagee" includes any person from time to time "Mortgagee." deriving title under the original mortgagee.

5. "Incumbrance" includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum; and "incumbrancer" has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof. R. S. O. 1887, c. 102, s. 1.

PART I.

2.—(1) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act be bound to assign and convey accordingly. R. S. O. 1887, c. 102, s. 2 (1).

(2) The right of the mortgagor under this section to require an assignment as aforesaid shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer. 60 V. c. 15, Sched. A (23).

(3) This section does not apply in the case of a mortgagee being or having been in possession.

(4) This section shall have effect notwithstanding any stipulation to the contrary. R. S. O. 1887, c. 102, s. 2 (2, 3).

3.—(1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2) This section applies only to mortgages made after the 1st day of July, 1886, and shall have effect notwithstanding any stipulation to the contrary. R. S. O. 1887, c. 102, s. 3.

4.—(1) All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage. R. S. O. 1887, c. 102, s. 4.

Covenants to be implied.

Imp. Act, s. 7.

5. There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases by virtue of this Act be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:—

On mortgage, by beneficial owner.

(a) In a conveyance by way of mortgage, the following covenants by the person who conveys, and is expressed to convey as beneficial owner, namely ;

For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage ;

Good title ;

Right to convey ;

That, on default, the mortgagee shall have quiet possession of the land ;

Free from all incumbrances ;

That the mortgagor will execute such further assurances of the said lands as may be requisite ; and

That the mortgagor has done no act to incumber the land mortgaged ;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to *The Act respecting Short Forms of Mortgages*.

Rev. Stat. c. 126.

On mortgage of leaseholds, by beneficial owner.

(b) In a conveyance by way of mortgage of leasehold property, the following further covenant by the person who conveys, and is expressed to convey, as beneficial owner, namely ;

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and

all the covenants, conditions and agreements contained in, the lease, or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance;

And also, that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements, contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all accidents, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them. R. S. O. 1887, c. 102, s. 5.

Payment of rent and performance of covenants.

6. In a mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums; in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him. R. S. O. 1887, c. 102, s. 6.

Implied covenants in mortgages are joint and several. Imp. Act, s. 28.

7. The preceding two sections apply only to mortgages made after the 1st day of July, 1886. R. S. O. 1887, c. 102, s. 7.

Application of ss. 5, 6.

8. Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property. R. S. O. 1887, c. 102, s. 8.

Mortgagee of freehold property, etc., may receive a release, etc., without merger of debt.

9. In case such prior mortgagee or his assignee acquires the equity of redemption of the mortgagor in the manner aforesaid, no subsequent mortgagee or his assignees shall be entitled

Where mortgagee acquires equity of redemption,

subsequent mortgagee not entitled to foreclose or sell property without redeeming, etc.

to foreclose or sell such property without redeeming or selling, subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption. R. S. O. 1887, c. 102, s. 9.

Priority under registry laws not to be affected.

10. The preceding two sections shall not affect any priority or claim which any mortgagee may have under the registry laws. R. S. O. 1887, c. 102, s. 10.

Executors of mortgagee may assign, etc.

11. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the person having the mortgagee's estate. R. S. O. 1887, c. 102, s. 12; c. 110, s. 16.

Certificate of payment, etc. to be valid, at whatever time given.

12. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators, or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with *The Registry Act*, be valid, to all intents and purposes whatsoever. R. S. O. 1887, c. 102, s. 13; c. 110, s. 17.

Rev. Stat. c. 136.

Effect of advance on joint account, etc.

Imp. Act 44-45 V. c. 41, s. 61.

13.—(1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares—the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete dis-

charge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3) This section applies only to a mortgage, or obligation, or transfer made after the 1st day of July, 1886. R. S. O. 1887, c. 102, s. 14.

14. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security. R. S. O. 1887, c. 102, s. 15. [See also *Cap. 129, sec. 9.*]

Receipts of trustees, mortgagees, etc., or survivor, to be effectual discharges.

15. The right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are not exempt from seizure under execution. This section shall not apply to mortgages existing on the 25th day of March, 1886. R. S. O. 1887, c. 102, s. 16.

Right of mortgagee to distrain limited.

16.—(1) As against creditors of any mortgagor or person in possession of mortgaged premises under a mortgage, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent, but this restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for the general benefit of such creditors appointed before lawful sale of the goods distrained, nor unless the officer executing such writ of execution, or such assignee shall, by notice in writing to be given to the person distraining, or his attorney, bailiff, or agent, before such lawful sale, claim the benefit of the said restriction, and in case such notice is so given, the distrainer shall relinquish to the officer or assignee the goods distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods distrained as shall be necessary to satisfy one year's

Mortgagee's right of distress limited to one year's interest or rent.

arrears of such interest or rent and the reasonable costs of distress and sale, and shall thereupon relinquish any residue of goods, and pay any residue of moneys, proceeds of goods so distrained, to the said officer or assignee.

Reimbursement of officer or assignee.

(2) Any officer executing a writ of execution, or an assignee who shall pay any money to relieve goods from distress under the next preceding subsection, shall be entitled to reimburse himself therefor out of the proceeds of the sale of such goods.

Notice of sale.

(3) Goods distrained for arrears of interest or rent, as aforesaid, shall not be sold except after such public notice as is now required to be given by a landlord who sells goods distrained for rent. R. S. O. 1887, c. 102, s. 17.

Payment of principal after default.

17.—(1) Where default has been made in the payment of any principal money secured by any mortgage made subsequent to the 1st day of July, 1888, according to the terms and conditions thereof, the same may be paid at any time thereafter without previous notice to the person entitled to receive the same, and without the payment of any interest in lieu of such notice; Provided always, that if in or by the said mortgage or otherwise there has been any express agreement with respect either to such notice or to interest to be paid in lieu thereof, such agreement shall be binding and have the same effect as if this section had not been passed; Provided moreover, that this section shall not be held as applying to any default in the payment of principal money that may have become due or payable only by reason of some default made in the payment of interest money secured or payable by or under any such mortgage, or by reason of some default made in the payment of any instalment of principal money, or any portion of any instalment of principal money secured or payable by or under any such mortgage, but shall be held as applying to any such instalment in respect of which default has been made as aforesaid.

Proviso.

Proviso.

Mortgages made on or prior to July 1st, 1888, not affected.

(2) Any rule, question or matter of law and equity affecting or arising out of any default in the payment of money secured by any mortgage made on or prior to the said 1st day of July, 1888, shall in all respects, and for all purposes, be adjudged and determined as if the provisions of this section had not been enacted. 51 V. c. 15, s. 2.

PART II.

Powers incident to mortgages after default for certain time.

18. Where any principal money is secured or charged by deed executed after the 11th day of March, 1879, on any hereditaments of any tenure, or on any interest therein, the person to whom the money shall, for the time being, be payable, his executors, administrators and assigns, shall, at any time after the expiration of four months from the time when the principal money shall have become payable, according to the terms of the

deed, or after any interest on the principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:

1st. A power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner. Power of sale.

2nd. A power to insure, and keep insured, from loss or damage by fire, the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for such insurance to the principal money secured at the same rate of interest. Power to insure. R. S. O. 1887, c. 102, s. 18; 51 V. c. 15, s. 3, part.

19. Receipts for purchase money given by the person or persons exercising the power of sale by the preceding section conferred, shall be sufficient discharges to the purchaser, who shall not be bound to see to the application of the purchase money. Receipts for purchase money sufficient discharges. R. S. O. 1887, c. 102, s. 19.

20.—(1) No sale as aforesaid shall be made until after two months' notice in writing has been given to any subsequent incumbrancer, and to the person entitled to the property subject to the charge and to such incumbrance, the notice to be given either personally or at his usual or last place of residence in this Province, which notice may be given at any time after any default in making a payment provided for by the deed. R. S. O. 1887, c. 102, s. 20 (1); 51 V. c. 15, s. 3, part. Notice before sale.

(2) In case of the death of the person entitled subject to the charge, and of his interest therein passing to infant heirs or devisees, the notice shall be given as aforesaid to his executors or administrators, as well as to his heirs or devisees, as the case may be.

(3) The notice for an infant heir is to be served upon his guardian, and is also to be served upon the infant himself, if over the age of twelve years. R. S. O. 1887, c. 102, s. 20 (2-3).

21. When a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power has been improperly or irregularly exercised, or that no such notice as aforesaid has been given: but any person dam- Improper sale not to defeat title of purchaser.

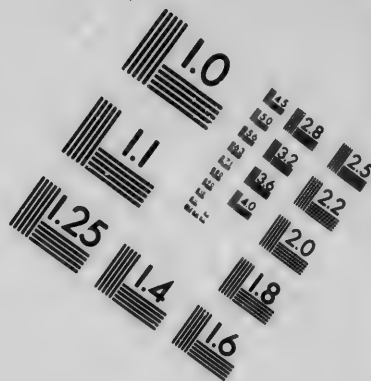
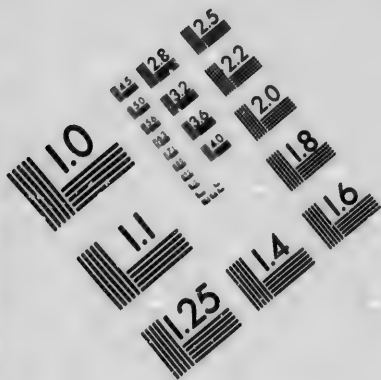
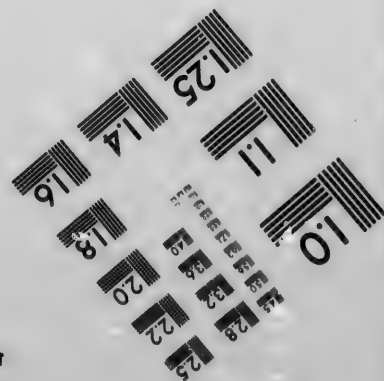
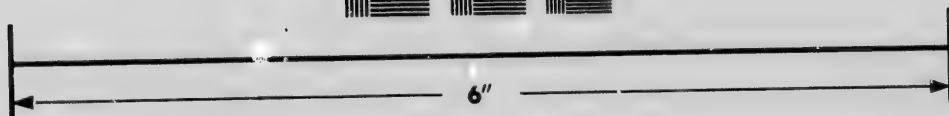
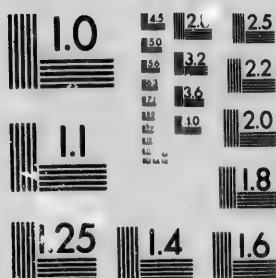


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nified by any such unauthorized, improper, or irregular exercise of such power, shall have his remedy against the person selling. R. S. O. 1887, c. 102, s. 21.

Form of
notice.

22. The notice of sale may be in the following form or to the following effect :

I hereby require you on or before the day of 18 , (a day not less than two calendar months from the service of the notice, and not less than six months after the default) to pay off the principal money and interest secured by a certain indenture dated the day of 18 and expressed to be made between (here state parties and describe mortgage property) which said mortgage was registered on the day of (and if the mortgage has been assigned add: and has since become the property of the undersigned). And I hereby give you notice that the amount due on the said mortgage for principal, interest, and costs respectively, is as follows : (set the same forth).

And unless the said principal money and interest and costs are paid on or before the said day of I shall sell the property comprised in the said indenture under the authority of the Act entitled *An Act respecting Mortgages of Real Estate*.
Dated the day of 18 .

R. S. O. 1887, c. 102, s. 22 ; 58 V. c. 19, s. 1.

Registration
of notice.

23. The notice of sale of lands may be registered in the registry office of the registry division in which the lands are situate, in the same manner as any other instrument affecting the land, and such registration shall have the same effect, and the duties of the registrar in respect of the same shall be as in the case of any other registered instrument, and the fee to be paid such registrar for registering the same shall be fifty cents. R. S. O. 1887, c. 102, s. 23.

Affidavit for
registration.

24.—(1) The affidavit for the purpose of registering the notice shall be made by the person who served the same, and shall prove the time, place, and manner of such service, and that the copy delivered to the registrar is a true copy of the notice served.

Certified copy
of registered
notice to be
evidence.

(2) A copy of such registered notice and affidavit, certified under the hand and seal of office of the registrar, shall in all cases be received as *prima facie* evidence of the facts therein stated. R. S. O. 1887, c. 102, s. 24.

Application of
purchase
money.

25. The money arising by a sale effected as aforesaid shall be applied by the person receiving the same as follows : firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale ; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made ; and thirdly, in discharge of all the principal moneys then due in respect of such charge ; and the residue of such money shall be paid to the subsequent incumbrancers according to their priorities, and the balance to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be. R. S. O. 1887, c. 102, s. 25.

26. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of. R. S. O. 1887, c. 102, s. 26.

Conveyance to the purchaser.

27. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and was then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate is outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made. R. S. O. 1887, c. 102, s. 27.

Owner of charge may call for title deeds and conveyance of legal estate.

28. So much of Part II of this Act as provides for a power to sell shall not apply in the case of a deed which contains a power of sale except as is in the next section provided; and so much of this Act as provides a power to insure shall not apply in the case of a deed which contains a power to insure, nor shall any of the provisions of Part II. of this Act apply to any deed which contains a declaration that Part II. of this Act is not to apply thereto. R. S. O. 1887, c. 102, s. 29; 51 V. c. 15, s. 4. 53 V. c. 27, s. 1.

Provisions as to sale, etc. not to apply in certain cases.

29.—(1) Whenever a mortgage made in pursuance of *The Act respecting Short Forms of Mortgages* contains a power of sale in the form No. 14, in Column One of Schedule B to the said Act, the mortgagee, his heirs, executors, administrators or assigns may, in exercising the said power, in lieu of taking the proceedings provided for by the said form No. 14, Column Two, take proceedings under and have the benefit of the provisions of Part II. of this Act, except that such power shall not be exercisable until after at least four months' default and at least two months' notice, or such longer periods as may by the power contained in such mortgage be fixed therefor, and the said Part II. shall apply to a sale made under such power. 51 V. c. 15, s. 4.

Power of sale. Rev. Stat. c. 126.

(2) Whenever a mortgage purporting to be made in pursuance of *The Act respecting Short Forms of Mortgages* contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take proceedings to sell under and sell and have the

Mortgagee having power of sale may proceed under this Part.

When mortgage provides for sale without notice. Rev. Stat. c. 126.

benefit of the provisions of Part II. of this Act as fully and effectually as if the mortgage had not contained a power of sale. This subsection shall be held to apply to all mortgages whether heretofore or hereafter made. 53 V. c. 27, s. 1.

Taxation of costs.

30. The mortgagee's costs may, without an order, be taxed by one of the taxing officers of the Supreme Court of Judicature or by the local master, at the instance of any party interested. R. S. O. 1887, c. 102, s. 28.

PART III.

When demand of payment made or notice of intention to exercise power of sale given, no other proceedings to be taken until expiration of time named in notice or demand, without order of a judge.

31.—(1) In order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or the lands or any part thereof thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court.

Proof on which order may be granted.

(2) Such order may be obtained *ex parte*, but only upon such affidavits and proof as will satisfy the Judge that it is reasonable and equitable that the proposed action or proceeding should be allowed to be taken and proceeded with.

Title of affidavit or order.

(3) Such affidavit or order may be entitled as follows:—

In the matter of a mortgage purporting to be made between (*describing the parties thereto as in the mortgage*) and bearing date on the day of

This section not to apply to proceedings to stay waste etc.

(4) This section shall not apply to proceedings to stay waste or other injury to the mortgaged premises, and the costs of any application thereunder shall be in the discretion of the Judge. R. S. O. 1887, c. 102, s. 30.

Payment to be accepted if made in terms of notice.

32. When such demand or notice requires payment of all moneys secured to be paid by or under a mortgage, the party making such demand or giving such notice shall accept and receive payment of the same if made as required by the terms of such notice or demand; and if there be any dispute as to the costs payable by the person by or on whose behalf such payment is either made or tendered then such costs shall, on

Taxation of costs.

three clear days' notice to such person by the person claiming the same, be taxed and ascertained by the clerk of a County Court, or by a local master aforesaid, and thereupon and in such case, if within ten days after said costs have been so taxed and ascertained, payment of said moneys and costs are duly made or tendered to the person entitled thereto, or to his solicitor or agent in that behalf, the same shall be deemed and taken to have been paid or tendered, as the case may be, within the meaning of such notice or demand, and in compliance therewith, R. S. O. 1887, c. 102, s. 31.

33. The purchaser in good faith of a mortgage may to the extent of the mortgage (and except as against the mortgagor, his heirs, executors, or administrators), set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do. R. S. O. 1887, c. 102, s. 32.

34. No sale made prior to the 23rd day of March, 1888, shall be declared to be invalid on the ground, or by reason only of the same having been made in pursuance of a power of sale contained in a mortgage where such power has been exercised by an assignee of such mortgage instead of the original mortgagee unless within two years after the making of any such sale, proceedings have been taken to declare the same to be invalid or irregular; but nothing in this section contained shall be deemed or construed to confirm any such sale which for any other reason or any other ground might be set aside, or declared irregular or invalid; nor shall anything herein contained affect any proceeding, suit, or matter, adjudged or determined before or pending at the said date or brought within three months thereafter. 51 V. c. 15, s. 5.

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NOTES.

Title of Act. The title of the Act is somewhat misleading. Though many of the provisions are applicable only, or more particularly, to mortgages of real estate, the word "property" is by s. 1 to be construed, unless a contrary intention appears, as including real and personal property, and anything in action and any other right or interest. Such sections, therefore, as contain the word "property" must at least be construed, if no contrary intention appears, to relate to mortgages of every kind, i.e., to all conveyances of or charges upon property, real or personal, including book debts and policies of insurance, as security for money or money's worth.

Mortgagor. Mortgagor is defined to include any person from time to time deriving title under the original mortgagor or entitled to redeem. It will therefore include a purchaser; a grantee under a voluntary conveyance; Howard v. Harris (1683) 1 Vern. 193; a second mortgagee, Hoole v. Smith (1881) 17 Ch. D. 434; an execution creditor having a charge on the land, Commercial Bank v. Watson (1859) 5 L.J.O.S. 163; Chamberlain v. Sovais (1881) 28 Gr. 404; a dowress, Palmes v. Danby (1700) Pre. Ch. 137; a wife entitled to an inchoate right of dower, Building and Loan Association v. Caraswell (1879) 8 P.R. 73; Ayerst v. McClean (1890) 14 P.R. 15; Blong v. Fitzgerald (1893) 15 P.R. 467; a surety for the mortgage money, Seidler v. Sheppard (1866) 12 Gr. 456; Martin v. Hall (1878) 25 Gr. 471; a tenant for years of mortgaged land, Martin v. Miles (1883) 5 O.R. 404; Collins v. Cunningham (1892) 21 S.C.R. 139; Tarn v. Turner (1888) 39 Ch. D. 456; and a mortgagee of such tenant, McMaster v. Demmery (1866) 12 Gr. 193; and generally every one deriving an interest from the mortgagor, per Wilson, C.J.; Martin v. Miles (1883) 5 O.R. 404. The wife of a purchaser of an equity of redemption would not during his lifetime have the right to redeem, Monk v. Benjamin (1890) 13 P.R. 356, nor a simple contract creditor, unless after decree for sale in a creditor's suit, Christian v. Field (1842) 2 Hare 177. A person who owns an undivided interest in land has no right to redeem a mortgage made by his co-owner on his undivided interest; Nichol v. Allenby (1889) 17 O.R. 275.

Transfer Instead of Reconveyance. A party redeeming was formerly not entitled to an assignment, but simply to a reconveyance, Thompson v. McCarthy (1877) 13 L.J.N.S. 226; Dunstan v. Patterson (1847) 2 Phill. 341. After the enactment of s. 2 (1) in England it was held in Teevan v. Smith (1882) 20 Ch. D. 724, that when a first mortgagee had notice of a second mortgage, the mortgagor could not require him to transfer the mortgage. This decision was followed in Ontario in Rogers v. Wilson (1887) 12 P.R. 322, 545, where it was held that a mortgagee who held two mortgages from the same mortgagor, could not be compelled to assign the first mortgage, unless the second mortgage was paid. To provide for the difficulties in adjusting the rights of several successive encumbrancers, s. 2 (2) was enacted in England in 1882, but was not enacted in Ontario until 1897. It leaves untouched the decision in Rogers v. Wilson. It would seem also that it left untouched the right of the mortgagee to consolidate his securities in the few cases where such right exists, because the mortgagee is bound only to transfer "on the terms on which he would be bound to reconvey," Thompson v. Warwick (1894) 21 A.R. 637; Muttlebury v. Taylor (1892) 22 O.R. 312. Where a tenant for life failed to keep down the interest on a mortgage, he was held not to be entitled to require the mortgagee, who was a remainderman, to transfer the mortgage; Alderson v. Elgey (1884) 26 Ch. D. 567.

The mere fact that a mortgagee holds two or more mortgages upon the property will not entitle him to refuse an assignment of the first mortgage to the mortgagor, if he is suing him upon his covenant, when such mortgagor has parted with his equity or redemption and the subsequent mortgages were made not by him, but by his assignees; Kinnaid v. Trollope (1888) 39 Ch. D. 636; Queen's College v. Claxton (1894) 25 O.R. 282; Stark v. Reid (1895) 26 O.R. 257.

The assignment should contain only the ordinary trustee covenant against encumbrances, and should, if necessary, recite the exact position of the parties, and of any collateral securities, Gooderham v. Traders Bank (1888) 16 O.R. 438. The section does not apply where any mortgagee is or has been in possession, because of the rule that an assignment by such a mortgagee would not discharge him from accountability for the income of the property after the assignment; Re Prytherch, Prytherch v. Williams (1889) 42 Ch. D. 590.

Where a company has a lien on the shares of a shareholder for a debt due by him to it, s. 2 applies, and on payment, even by the debtor, it may be required to assign the debt and lien; *Everitt v. Automatic Weighing Machine Co.* (1892) 3 Ch. 506.

Where there is a charge, e.g. a jointure, intervening between the first mortgage and subsequent mortgages, then if the holder of the charge redeems, the subsequent mortgages can only redeem subject to that charge; *Smithett v. Hesketh* (1890) 44 Ch. D. 161.

Inspection of Title Deeds. A mortgagee was not, before s. 3 was enacted, bound to produce his deeds unless he was redeemed; *Chichester v. Marquis of Donegal* (1870) L. R. 5 Ch. 497, or in an action where fraud was charged; *Kennedy v. Green* (1833) 6 Sim. 6, or where the deed was referred to in the defence so as to make it part thereof; *Latimer v. Neate* (1837) 4 Cl. & F. 570; but this rule did not extend to the mortgage; *Patch v. Ward* (1865) L. R. 1 Eq. 436, or an endorsement thereon; *Phillips v. Evans* (1844) 2 Y. & C. C. 647; but *semble* only for proof at the trial; *Beaumont v. Foster* (1836) 5 L. J. Ch. 4, but not an assignment of the mortgage; *Lewis v. Davis* (1853) 17 Jur. 253. The right to inspect is under s. 3 co-extensive with the right to redeem, so that if the title of the mortgagor is extinguished by the Statute of Limitations, the right to inspect is gone.

Insurance Moneys. S. 4 is from Imp. Act 44 & 45 Vict. c. 41 s. 23 (3) (4) with some variations in the language. Formerly the right of the mortgagee to the insurance money was, in the absence of an assignment, legal or equitable, of the insurance governed by 14 Geo. III c. 78 s. 83 which was repealed by 50 Vict. c. 26 s. 154 (R. S. O. 1887 c. 167 s. 155) *Stilson v. Pennock* (1868) 14 Gr. 604; *Carr v. Fire Insce. Co.* (1887) 14 O. R. 487.

The right to insurance money will extend to money received in respect of fixtures upon the property; *Carr v. Fire Insce. Co.* (1887) 14 O. R. 487; *Waterous Engine Works Co. v. McCann* (1894) 21 A. R. 486. Where the insurance moneys are more than sufficient to pay off the mortgage upon the property, the mortgagor is entitled to the surplus although the mortgagees may hold another mortgage from him upon other property; *Re Union Assee. Co.* (1893) 23 O. R. 627.

The mortgagee may hold the moneys received, in reserve, while any part of the mortgage moneys is unpaid, and is not bound to apply it, either upon arrears or upon the mortgage moneys as they become due or *a fortiori* in acceleration of the payments to become due; *Edmonds v. Hamilton Provident and Loan Socy.* (1891) 18 A. R. 347; *Corham v. Kingston* (1889) 17 O. R. 432.

Implied Covenants. It will be noticed that when covenants are implied under s. 5 they are joint and several. Where in a bill of sale of chattels the vendor is expressed to convey "as beneficial owner" the covenants will be implied; *Ex parte Stanford* (1886) 18 Q. B. D. 259.

Merger. Whether by taking a release of the equity of redemption a merger of the mortgage debt is caused is a question of intention. What the intention of the parties was is a question of fact; *North of Scotland Mortgage Co. v. German* (1880) 31 C. P. 349. Where there are intermediate encumbrancers there will be no merger; *Hart v. McQuesten* (1875) 22 Gr. 133, even though the personal liability of the mortgagor may be released, *ib.*; s. 9; see *Thorne v. Cann* (1895) A. C. 11; *Weaver v. Vandusen* (1889) 27 Gr. 477; *Liquidators Estate Co. v. Willoughby* (1898) A. C. 321. Where the mortgagee after taking a conveyance of the equity of redemption, there being no intermediate encumbrance, seeks to recover the mortgage money on the covenant for payment, the onus is upon the mortgagee, to prove there was no merger. *North of Scotland Mortgage Co. v. Udell* (1882) 46 U. C. R. 511; *Cameron v. Gibson* (1880) 17 O. R. 233, and if he sells the property so as to put it out of the power of the mortgagor to redeem, he cannot recover; *British and Canadian Loan and Investment Co. v. Williams* (1888) 15 O. R. 366. Taking a conveyance to the mortgagee's wife will prevent a merger; *Macdonald v. Bullivant* (1884) 10 A. R. 582.

Assignment of Mortgage by Executors. S. 11 was necessary at the time when the legal estate in lands vested in the heir of the deceased. It may be that it is still necessary after the expiration of a year from the death, see *F. S. O. c.* 127 s. 13.

Discharges of Mortgages. Under the words "the mortgagee or his assignee, his heirs, executors, administrators or assigns or any one of them" one executor may give a good discharge; *Ex parte Johnson* (1875) 6 P. R. 225, if he receives the mortgage money, *Dilke v. Douglas* (1880) 5 A. R. 63, but not of

a mortgage made by himself; *Beatty v. Shaw* (1888) 14 A. R. 600, see Notes to R. S. O. c. 129 p. 391. Ex parte Johnson, *supra* is not to be implicitly relied upon, see Armour on Titles, 220.

Advance on Joint Account. S. 13 appears to have been re-enacted in Ontario under the erroneous idea that the law here in 1886 was the same as the English law in 1881. In England the presumption in mortgage investments was in favor of a tenancy in common; *Robinson v. Preston* (1858) 4 K. & J. 505; and it was therefore necessary, on the death of one of two mortgagees, to join his representatives in a release of the mortgage. This section was enacted in England as mere conveyancing machinery to facilitate the dealing with the property. The joint account clause was not conclusive as between the parties interested in the money; *Re Jackson, Smith v. Sibthorpe* (1887) 34 Ch. D. 732, but except when a contrary intention appeared, it was conclusive as between the mortgagees and the mortgagor. Ontario legislation has since 1849 contained the provisions of s. 14 making the receipt by the survivor or survivors of mortgagees good. Those provisions were taken from the English Statute of 7 & 8 Vict. c. 76, which was repealed in the following year. It will be noticed that s. 13 provides that receipts "in writing" shall be a good discharge while s. 14 makes the payment of the money the discharge. A discharge of mortgage under The Registry Act may be effectually given by the surviving mortgagee by virtue of s. 14, he being the person "entitled by law to receive the money and discharge the mortgage" under s. 76 of The Registry Act (R. S. O. c. 136); *Dilke v. Dougals* (1880) 5 A. R. 63, 77.

The object of the joint account clause is where the mortgagees are trustees to keep the trusts off the face of the mortgage deed. The importance of not setting forth the trusts is shewn by the case of *Macklin v. Dowling* (1890) 19 O.R. 441, where trustees who had taken a release of the equity of redemption were held not to be able to make a good title without the concurrence of the *cestui que trust*. The court has absolutely refused to go behind the recital of joint account or to inquire what the trusts are; *Re Harman and Uxbridge &c. Ry. Co.* (1883) 24 Ch. D. 720, 726; see also *Re Parker and Beech's Contract* (1886) 54 L.T. 750. The English Act contains a form of a joint account clause. Adapted to the forms used in Ontario, it would read as follows:—"Witnesseth, that in consideration of \$ paid to the mortgagor by the mortgagees, out of money belonging to them on joint account (the receipt whereof is hereby acknowledged), &c." 44 & 45 Vict. c. 41, Schedule 4.

Right of distress. S. 15 extends to all cases where interest is distrained for viz., (1) mere licenses and (2) where the relationship of landlord and tenant is created by the mortgage between the mortgagor and mortgagee; *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 A.R. 347. The ordinary power given by a mortgage under the Act respecting short forms of Mortgage "that the mortgagee may distrain for arrears of interest" is a mere license and binds only the goods of the party giving it. It does not create the relationship of landlord and tenant; *Trust and Loan Co. v. Lawrason* (1882) 10 S.C.R. 679, 6 A.R. 286; *Royal Canadian Bank v. Kelly* (1869) 19 C.P. 196, 420; *Laing v. Ontario Loan and Savings Co.* (1881) 46 U.C.R. 114. The right to distrain for interest exists only as to such interest as becomes due at or before the maturity of the mortgage—not such as is payable by way of damages thereafter; *Klinck v. Ontario Industrial Loan and Investment Co.* (1888) 16 O.R. 562; and it may be that it should be distrained for within six months after the mortgage matures *ib.* There may be a power to distrain for arrears of principal money; *McDonnell v. Building and Loan Assn.* (1885) 10 O.R. 580; *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S.C.R. at p. 552; and there would seem to be no exemptions allowable to a mortgagor on such a distress.

Interest payable as rent. The mortgage may create the relationship of landlord and tenant between the mortgagor and mortgagee. The usual method is by the insertion of an attornment clause by which the mortgagor acknowledges himself tenant to the mortgagee at a certain rent, but it may be by a demise by the mortgagee—he executing the mortgage; see *Morton v. Woods* (1868) L. R. 3 Q.B. 658, L.R. 4 Q.B. 293. An attornment operates as an estoppel—the mortgagor cannot if he occupies the land deny the tenancy *ib.*, *West v. Fritch* (1848) 3 Ex. 216, Ex parte Punnett (1880) 16 Ch. D. 226; Ex parte Voisey (1882) 21 Ch. D. 442; *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S. C.R. 433. In England, attornment clauses have, in some cases, been held to be invalid because the absurdity of the rent reserved shewed that the parties did not

intend to *bona fide* create the relation of landlord and tenant at a genuine rent which the parties intended should be paid, but that what they did intend was, that in case of bankruptcy of the mortgagor, the mortgagee should be enabled to obtain a security upon chattels which had not been assigned to him by a bill of sale and which, but for the device, would be distributed among his creditors; see *Ex parte Williams* (1877) 7 Ch. D. 138, where the rent was seven times the annual value; *Ex parte Jackson* (1889) 14 Ch. D. 725, where the rent was 37 times the annual value. But where the rent, though large, was substantially a rent which a tenant might honestly agree to pay, and which a mortgagee might honestly expect to receive, the attornment clause was upheld; *Ex parte Voisey* (1882) 21 Ch. D. 442; *Re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335. The ground for holding an attornment invalid when the rent is excessively absurd, is that it is a fraud upon the Bankruptcy law. It was not intended, however, to restrict the principles laid down to cases in which the question was raised after a bankruptcy, but the principles must be generally applied wherever the interests of third persons require their application, and therefore in a case in Ontario where the attornment clause purported to create a tenancy at a rental of \$4,000 a year, when the actual value was but \$750, it was held that no real tenancy was created and an execution creditor was entitled to seize chattels upon the mortgaged premises as against the mortgagee: *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S.C.R. 483, 16 A.R. 255, 15 O.R. 440.

The mortgagee does not by reason of the attornment clause cease to be a mortgagee because he is made landlord, and is therefore entitled to the rights of a mortgagee as to trade fixtures; *Ex parte Punnett* (1880) 16 Ch. D. 226.

It is no objection to an attornment clause that the rent is fluctuating in amount so long as it is capable of being made certain: *Ex parte Voisey* (1882) 21 Ch. D. 442.

Where the relation of landlord and tenant was created a mortgagee could formerly distrain the goods of a stranger; *Kearsley v. Philips* (1883) 11 Q. B. D. 621, but this right is now taken away by s. 15; *Edmonds v. Hamilton Provident and Loan Socy.* (1891) 18 A. R. 347.

A mortgagee with an attornment clause has conferred upon him a very onerous obligation, viz. the liability to account to subsequent mortgagees, not only for rents actually received, but for such as might without wilful default have been received and the mortgagee is thus compelled for his own protection to be active in enforcing his right as a lessor, though his security otherwise may be ample; he is thus, as it were, converted into a bailiff for subsequent encumbrancers; per *Strong J.* *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S. C. R. at pp. 501, 502; see also per *James L. J.* *Re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 356, but the foregoing dictum is inconsistent with the decision in *Stanley v. Grundy* (1883) 22 Ch. D. 478, where *Bacon V. C.* held that the mortgagee was not obliged to avail himself of the clause.

Payment of Principal After Default. S. 17 relieves the mortgagor of the necessity to give six months notice before he can compel the mortgagee to accept his money after default; *Harmer v. Priestley* (1853) 16 Beav. 571; *Browne v. Lockhart* (1840) 10 Sim. 424; *Archbold v. Building and Loan Assn.* (1888) 15 O.R. 237. Unless the mortgage otherwise provides, no notice is required, and no bonus need be paid when the mortgage was made after 1st July 1888. When a default occurs in payment of part of the principal the mortgagee cannot be compelled to accept the whole although the mortgage may contain a provision making the whole sum payable upon default unless the mortgagee has demanded or taken proceedings to recover the whole; *Cruso v. Bond* (1882) 1 O. R. 384; *Re Houston, Houston v. Houston* (1882) 2 O. R. 84.

Powers Incident to Mortgages. P. II of the Act (ss. 18-28) are, with variations as to time, from Lord Cranworth's Act (23 & 24 Vict. c. 145) ss. 11-24. They have never been to any extent relied upon in practice either here or in England because of the more favorable provisions usually inserted in mortgages. The sections have been repealed in England by the Conveyancing Act 1881 and more favorable provisions enacted. It will be noticed that the powers are limited to mortgages of "hereditaments of any tenure or any interest therein."

The power to insure gives the mortgagee power only to add the premiums to the mortgage debt and gives no right to require its immediate payment.

The power of sale is not exerciseable if the mortgage contains a power of sale, unless the mortgage purports to be made under the Short Forms Act, and the power of sale is "without notice" and therefore not entitled to the benefit of the exponential clause of that act, see *Re Gilchrist and Island* (1886) 11 O. R. 537, and the power to insure does not apply if the mortgage contains such a power.

The provisions of part II may be altogether excluded by a declaration in the mortgage that it is not to apply; see s. 28. Perhaps the only benefit to be derived from such exclusion is that the mortgagee's costs cannot be taxed without an order under s. 30.

A purchaser who had notice of the facts which made the exercise of the power improper would not be protected by s. 21; *Parkinson v. Hanbury* (1867) L. R. 2 H. L. 1; *Selwyn v. Garfit* (1887) 38 Ch. D. 273; but the section would protect a *bona fide* purchaser without notice even though the mortgage had been, on a proper taking of accounts, satisfied; *Dicker v. Angerstein* (1876) 3 Ch. D. 600.

Service of the notice may be made either personally or at the usual or last place of residence of the party to whom it is given within the province. It is not necessary that he should be out of the province to make the service good under the latter alternatives; *O'Donohue v. Whitty* (1883) 2 O.R. 430. Notice should be served upon execution creditors having executions in the sheriff's hands at the time of giving notice of sale to the owner; *Re Abbott and Metcalf* (1891) 20 O. R. 299; and upon a person having an agreement to purchase of which the mortgagee has notice; *Stewart v. Rowsom* (1892) 22 O. R. 533. The surplus may be paid to the apparent owner of the equity of redemption; *Harper v. Culbert* (1882) 5 O. R. 152. Where the owner of the equity is dead a valid sale cannot be made until a personal representative is appointed; *Parkinson v. Hanbury* (1867) L. R. 2 H. L. 1, 18.

Fixtures cannot be sold separately; *Re Yates* (1888) 38 Ch. D. 112, nor timber, *Stewart v. Rowsom* (1892) 22 O. R. 533. The mortgagee should not sell separate parcels of mortgaged property of different natures, e. g. a farm and stores in a village, not in any way used together, *en bloc* when reasonable enquiries would show that method to be imprudent; *Aldrich v. Canada Permanent Loan Co.* (1896) 27 O. R. 548; 24 A. R. 193.

The power to convey given by s. 26 is important. Under it an equitable mortgagee by demise of a leasehold less the last day, may convey the superior lease; *Hiatt v. Hillman* (1871) 19 W. R. 694, and an equitable mortgagee of land may convey the legal estate; *Re Solomon and Meagher's contract* (1889) 40 Ch. D. 508, and where any sale is made of land registered under the Land Titles Act it would seem that a purchaser from the first mortgagee would be entitled to a certificate for the same title as the mortgagor had at the time of the mortgage notwithstanding subsequent encumbrancers; see *Re Richardson* (1871) L. R. 12 Eq. 398, L.R. 13 Eq. 142.

Under s. 30 the costs of a mortgagee may be taxed though the mortgage was made before 1879; *Ferguson v. English and Scottish Investment Co.* (1881) 8 P. R. 404.

Making Unnecessary Costs. SS 31 and 32 do not apply where the power of sale may be exercised without notice; *Canada Permanent Building Society v. Teeter* (1889) 19 O. R. 156.

An advertisement is a further proceeding within s. 31; *Smith v. Brown* (1890) 20 O. R. 166. The service of a notice of sale and a writ of summons at the same time will be a violation of s. 30 and the service of the writ will be set aside; *Perry v. Perry* (1884) 10 P. R. 275.

Purchaser for Value Without Notice. E. 33 was enacted to settle the law caused by the conflicting decisions of *Mur v. Dunnett* (1864) 11 Gr. 85; *Totten v. Douglas* (1868) 15 Gr. 126; *Ryckman v. Canada Life Assn. Co.* (1870) 17 Gr. 550, and *Smart v. McEwan* (1871) 18 Gr. 623, in the latter two of which *Strong v. C.* held that a mortgagee could not set up the defence of purchase for value without notice. Now that choses in action are legally assignable, R. S. O. c. 51 s. 58 (5) p. 181; and hidden equities cannot be set up against a registered instrument, R. S. O. c. 136 s. 98, the section is perhaps unimportant, especially as the defence is now destroyed in the large class of cases of applications to what was called the auxiliary jurisdiction of the Court of Chancery; *Ind. Coope v. Emerson* (1886) 33 Ch. D. 323, 12 App. Cas. 300.

Except Against the Mortgagor, &c. The exception in s. 33 raises a doubt whether an assignee of a mortgage can rely upon a receipt for the mortgage money contained in the mortgage, R.S.O. c. 119 s. 5 see p. 587 and Bickerton v. Walker (1885) 31 Ch. D. 151. Before that section there was no doubt that an assignee took subject to all the equities between the original parties to the mortgage; Pressey v. Trotter (1878) 26 Gr. 154; Martin v. Bearman (1880) 45 U. C. R. 205; Wilson v. Kyle (1880) 28 Gr. 104.

Invalid Sales. S. 34 was passed to cure sales which the decision in *Re Gilchrist and Island* (1886) 11 O. R. 337 had shown to be invalid.

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2. INTESTATE SUCCESSION.

CHAPTER 127.

An Act respecting the Devolution of Estates.

SHORT TITLE, s. 1.	REAL ESTATE VESTS IN HEIRS AND DEVISEES UNLESS CAUTION REGISTERED, ss. 13-15.
APPLICATION OF SECS. 3-11, ss. 2, 3.	POWERS OF EXECUTORS OVER REAL ESTATE, s. 16.
PROPERTY TO DEVOLVE ON PERSONAL REPRESENTATIVE, s. 4.	CONFIRMATION OF CERTAIN SALES, ss. 17-20.
DISTRIBUTION OF PROPERTY OF MARRIED WOMAN DYING INTESTATE, s. 5.	OFFICIAL GUARDIAN MAY FRAME RULES, s. 21.
DISTRIBUTION OF ESTATE OF PERSON DYING INTESTATE AND WITHOUT ISSUE, s. 6.	INTERPRETATION OF TERMS IN SECS. 23-36, s. 22.
APPLICATION OF PROPERTY IN PAYMENT OF DEBTS, s. 7.	DESCENTS BEFORE 1ST JULY, 1834, NOT WITHIN ACT, s. 23.
SALES OF INFANTS' ESTATES, s. 8.	DESCENTS SINCE 1ST JULY, 1834, ss. 24-30.
POWER OF PERSONAL REPRESENTATIVE OVER REAL PROPERTY, s. 9.	DESCENTS BETWEEN 1ST JULY, 1834, AND 1ST JANUARY, 1852, ss. 31-36.
PERSONAL REPRESENTATIVES TO BE DEEMED IN LAW HEIRS, s. 10.	DESCENTS BETWEEN 1ST JANUARY, 1852, AND 1ST JULY, 1886, ss. 37-55.
SALE FREE FROM DOWER, s. 11.	GENERAL PROVISIONS, ss. 56-67.
WIDOWS' PREFERENTIAL SHARES, s. 12.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title. **1.** This Act may be cited as "*The Devolution of Estates Act.*"
R. S. O. 1887, c. 108, s. 1.

Application of ss. 3-10. **2.** Sections 3 to 10 inclusive of this Act shall apply only to the estates of persons dying on and after the 1st day of July, 1886. R. S. O. 1887, c. 108, s. 2.

Estates to which ss. 3-10 apply. **3.** Subject as above this and the next seven sections of this Act shall apply:—

- (a) To all estates of inheritance in fee simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or incorporeal.
- (b) To chattels real in Ontario.
- (c) To all other personal property of any person who has died domiciled in Ontario.

Provided, that all real or personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable. R. S. O. 1887, c. 108, s. 3.

4.—(1) All such property as aforesaid which is vested in any person, or is comprised in any such disposition as aforesaid made by him, shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed.

Property to devolve on personal representative.

(2) Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed of real estate aforesaid.

Saving as to dower.

(3) Any husband who, if sections 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed or instrument in writing executed within six months after his wife's death, and attested by at least one witness, elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of this Act.

Saving as to husband's interest in property of wife.

(4) Where any person applies to be appointed an administrator, and the administration applied for is a general administration, the application and the affidavit in support thereof shall shew the particulars of the real estate of the deceased, and the value or probable value thereof; and the amount of the

Administrators to give security to cover real estate.

security to be given, shall have reference to such value as well as to the value of the other estate of the deceased. R. S. O. 1887, c. 108, s. 4.

Distribution of property of married woman dying intestate.

5. The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had pre-deceased her. 60 V. c. 14, s. 32.

Distribution of estate of person dying intestate and without issue.

6. When a person shall die without leaving issue, and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister. R. S. O. 1887, c. 108, s. 6.

Application of property in payment of debts.

7. The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts. R. S. O. 1887, c. 108, s. 7.

Sa. es where infants interested.

8.—(1) Where infants are concerned in real estate which but for the preceding sections of this Act would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the Official Guardian of infants appointed under *The Judicature Act*, or, in the absence of such consent or approval, without an order of the High Court.

Local Guardians in outer counties.

(2) The High Court may appoint the Local Judge of any county or the Local Master therein, as Local Guardian of Infants, in such county during the pleasure of the Court, with authority to give such written consent or approval as aforesaid instead of the Official Guardian; and the Official Guardian and Local Guardian shall be subject to such general orders as the High Court may from time to time make in regard to their authority and duty under this Act. R. S. O. 1887, c. 108, s. 8.

Power of personal representatives of real property.

9. Subject as hereinbefore provided, the legal personal representatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them. R. S. O. 1887, c. 108, s. 9.

When personal representatives to be deemed "heirs."

10. When any portion of the real estate of a person dying on or after the first day of July, 1886, vests in his personal representatives under this Act, such personal representatives,

in the interpretation of any Statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he is interested, shall, while the estate remains in them, be deemed in law his heirs, as respects such portion, unless a contrary intention appears, but nothing in this section contained shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument. 60 V. c. 14, s. 31.

11.—(1) Where the personal representatives of a deceased person are desirous of selling any land devolving upon them free from dower they may apply to a Judge of the High Court, and if the Judge approves he may by an order to be made by him in a summary way, upon such evidence as to him seems meet, and either *ex parte* or upon notice (to be served personally unless the Judge otherwise directs) determine whether the land shall be sold free from the right of the dowress; and in making such determination regard shall be had to the interests of all the parties.

Application for order allowing sale of land by personal representatives free of dower

(2) No *ex parte* order shall be made unless where service upon the dowress cannot be conveniently made.

(3) If a sale free from such dower is ordered, all the right and interest of such dowress shall pass thereby; and no conveyance or release to the purchaser shall be required from such dowress; and the purchaser, his heirs and assigns, shall hold the premises freed and discharged from all claims by virtue of the rights of any such dowress, whether the same be to any undivided share, or to the whole or any part of the premises sold.

(4) In such case the Court or Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to dower as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such right or interest; or may direct the payment, to the person entitled to dower of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary. 60 V. c. 14, s. 30.

12.—(1) The real and personal estate of every man dying, after the first day of July, 1895, intestate and leaving a widow but no issue shall in all cases where the net value of such real and personal estate does not exceed \$1,000, belong to his widow absolutely and exclusively. 58 V. c. 21, s. 2.

Widow entitled to whole estate not exceeding \$1,000.

(2) Where the net value of the real and personal estate of any person who shall die intestate as in this section mentioned shall exceed the sum of \$1,000, the widow of such intestate

Where estate exceeds \$1,000.

shall after payment of debts, funeral and testamentary expenses and expenses of administration be entitled to \$1,000, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estate, after payment as aforesaid, for such \$1,000, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment. 58 V. c. 21, s. 3.

Widow's share
in remainder
of estate.

(3) The provision for the widow intended to be made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal estate of the intestate remaining after payment of the sum of \$1,000 and interest as aforesaid, in the same way as if such residue had been the whole of the intestate's real and personal estate, and this section had not been enacted. 58 V. c. 21, s. 4.

Real estate
not disposed
of within a
year to vest in
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Caution reg-
istered.

13.—(1) Real estate of persons dying on or after the 4th day of May 1891 not disposed of or conveyed by executors or administrators within ~~twelve~~ months after the death of the testator or intestate shall, subject to *The Land Titles Act* in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs, (or their assigns, as the case may be,) without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the registry office, or land titles office where the land is under *The Land Titles Act*, of the territory in which such real estate is situate, a Caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such Caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such Cautions if more than one are registered. 54 V. c. 18, s. 1 (1), 56 V. c. 20, ss. 3, 4; 60 V. c. 3, s. 3; c. 14, s. 29 part.

Rev. Stat.
c. 138.

Form of
Caution

(2) The Caution may be in the form or to the effect following:—

We (A. B and C. D.,) executors of (or administrators with the will annexed of, or administrators of) _____, who died on or about the _____ day of _____, do hereby certify that it may be necessary for us under our powers and in fulfilment of our duties as executors (or administrators) to sell the real estate of the said _____ or part thereof, (or the caution may specify any particular parts or parcels), and of this all persons concerned are hereby required to take notice:—

And the execution of the said Caution shall be verified by the affidavit of a subscribing witness in manner prescribed by *The Registry Act*.

Rev. Stat.
c. 138.

(3) In case the Caution specifies the tracts or parcels which the executors or administrators may have occasion to sell, the Caution shall be effectual as to those tracts or parcels only. If Caution specifies lands these only

(4) The executors or administrators before the expiration of the twelve months may file a certificate withdrawing the Caution mentioned in the preceding subsections; or withdrawing the same as to any parcel of land specified in such certificate and such certificate of withdrawal may be to the effect following: Withdrawal of Caution.

We executors (or administrators) of do hereby withdraw the Caution heretofore registered with respect to the real estate of the said (or as the case may be). 54 V. c. 18, s. 1 (2-4).

(5) The certificate of withdrawal shall be verified by the affidavit of a subscribing witness which shall be in the following form, or to the like effect. Certificate of withdrawal to be verified on oath.

I, G. H., etc., make oath and say: I am well acquainted with A. B. and C. D. named in the above certificate; that I was present and did see the said certificate signed by the said A. B. and C. D.; that I am a subscribing witness to the said certificate and I believe the said A. B. and C. D. to be the persons who registered the caution referred to in the said certificate. 60 V. c. 15, Sched. A. (42).

(6) Before the expiry of a caution another caution may be registered, and so on from time to time as long as the executors or administrators consider such action necessary and every such caution shall continue in force for twelve months from the time of its registration. 60 V. c. 15, Sched. A. (43). Renewal of caution.

(7) The limitation of the operation of this section to the real estate of persons dying on or after the 4th day of May, 1891, shall not affect any conveyance made before the 13th day of April, 1897. 60 V. c. 14, s. 29, part. Certain conveyances not affected.

14. Where executors or administrators have, through oversight or otherwise, omitted to register a Caution within twelve months after the death of the testator or intestate, as provided by the preceding section, or have omitted to re-register a Caution as required by the said section, they may register the Caution in either case notwithstanding the lapse of the twelve months respectively provided for the said purposes, provided they register therewith:— Registration of Caution after twelve months from death of testator. Proviso.

1. The affidavit of verification therein mentioned;
2. A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be,) under their powers and in fulfilment of their duties in that behalf;

3. The consent in writing of any adult devisees or heirs whose property or interest would be affected ; and
4. An affidavit verifying such consent ; or
5. In the absence and in lieu of such consent, an order signed by a High Court Judge or County Court Judge, or the certificate of the Official Guardian approving of and authorizing the Caution to be registered, which order or certificate the Judge or Official Guardian may make with or without notice on such evidence as satisfies him of the propriety of permitting the Caution to be registered ; and the order to be registered shall not require verification and shall not be rendered null by any defect or supposed defect of form or otherwise.

56 V. c. 20, s. 1.

Effect of registration.

15. In case of such caution being registered or re-registered under the authority of the preceding section such Caution shall have the same effect as a Caution registered within twelve months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them ; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators. 56 V. c. 20, s. 2.

Executors, etc., to have certain powers as to disposition of lands.

16.—(1) Executors and administrators in whom the real estate of a deceased person is vested under this Act shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether there are debts or not, as they have in regard to personal estate ; Provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale and there are no debts, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the Official Guardian appointed under *The Judicature Act* ; and for this purpose the Official Guardian aforesaid shall have the same powers and duties as he has in the case of infants.

Proviso.

Rev. Stat. c. 61.

Application of section.

(2) This section shall not apply to any administrator where the letters of administration are limited to the personal estate, exclusive of the real estate, and shall not derogate from any right possessed by an executor or administrator independently of this Act. 54 V. c. 18, s. 2.

17. (1) Sales of such real estate as aforesaid made prior to the 4th day of May, 1891, by executors and administrators with the written consent or approval of the Official Guardian, as required by section 8 of this Act, shall be deemed valid as respects all the heirs and devisees, whether infants or of full age though there were no debts of the deceased to be paid out of the proceeds.

Certain past sales made with approval of Official Guardian confirmed.

(2) The approval of the Official Guardian to be expressed in writing under his hand shall be sufficient to confirm and render valid, as respects all the heirs and devisees though there were no debts of the deceased to be paid out of the proceeds, any sale made prior to the said 4th day of May, 1891, in any case in which the value of the infant's share is under \$50

Certain past sales may be confirmed by Official Guardian.

(3) Sales of such real estate as aforesaid made prior to the said 4th day of May, 1891, by executors and administrators in other cases shall be adjudicated upon according to equity and good conscience in view of all the circumstances and every sale which has been made in good faith and for a fair consideration shall be held valid.

Other cases of past sales.

(4) Every sale made prior to the said 4th day of May, 1891, shall be valid unless it was questioned in an action within one year from the said date, except in any case where under this Act the approval of the Official Guardian was required and was not obtained.

Certain past sales valid unless questioned within one year.

(5) In case any sale made prior to the 4th day of May, 1891, is now, or heretofore has been, the subject of an action, and relief is given to either party under this section, the party obtaining such relief shall pay the costs of the action. 54 V. c. 18, s. 3.

Where past sale has been subject of action.

18. Where prior to the 4th day of May, 1891, there had been a sale by executors or administrators, no infant being concerned and no consent or approval of the Official Guardian having been obtained, but the person or one of the persons, beneficially entitled has received and accepted, or shall hereafter receive and accept, his share or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person. 54 V. c. 18, s. 4.

Persons accepting share of purchase money to be bound by sale.

19. Persons *bona fide* purchasing real estate from the executors or administrators of a deceased owner in manner authorized by this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner not specifically charged thereon otherwise than by his will, and from all claims of his devisees and heirs at law as such, and the purchasers shall not be bound to see to the application of the purchase money. 54 V. c. 18, s. 5.

Bona fide purchasers of estate to hold same free from debts.

Bona fide purchasers of estate from devisee to hold same free from debts.

Proviso.

20. Persons *bona fide* purchasing real estate from a devisee whose devise has been assented to by the executors or administrators by deed, or by writing under their hand, or *bona fide* purchasing the real estate from any heir at law or devisee to whom the same has been conveyed by the executors or administrators shall be entitled to hold the same freed and discharged from any unsatisfied debts and liabilities of the deceased owner not specifically charged thereon otherwise than by his will; but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir at law or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators, or permitted to become vested, to the prejudice of such creditors. 54 V. c. 18, s. 6.

Rules of procedure.

21.—(1) The Official Guardian shall have power with the approval of the Lieutenant-Governor in Council, or of the Judges of the High Court of Justice, to frame Rules regulating the practice and procedure to be followed in all proceedings under this Act, in which the privity or consent of such Official Guardian shall be required; and also to frame a tariff of the fees to be allowed and paid to solicitors for services rendered in such proceedings. Such Rules and tariffs when approved as aforesaid shall be published in the *Ontario Gazette*, and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at the next session after the promulgation thereof.

Appointment of Deputy Official Guardian *pro tem*.

(2) In case the Lieutenant-Governor sees occasion in consequence of the illness or absence of the Official Guardian or for any other cause, he may appoint a person to act as the Deputy *pro tem*, of the Official Guardian for the purposes of this Act; and a deputy appointed by the Lieutenant-Governor shall have all the powers of the Official Guardian as respects the said purposes.

Affidavits.

(3) Affidavits may be used in proceedings taken in pursuance of this Act; and such affidavits may be sworn before any Commissioner for taking affidavits or before a Notary Public. 54 V. c., 18, s. 7.

Interpretation.

22. The words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning, shall, where they occur in the next fourteen sections, numbered from 23 to 36 inclusive, except where the nature of the provision or the context thereof excludes such construction, be interpreted as follows, that is to say:

"Land."

1. "Land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be

laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency;

2 "The purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land becomes part of, or descendible in the same manner as, other land acquired by descent;

3. "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation, as where he is a child or other issue;

4. "Descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor;

5. "The person last entitled" to land shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof;

6. "Assurance" shall mean any deed or instrument (other than a will), by which any land may be conveyed or transferred at law or in equity. R. S. O. 1887, c. 108, s. 11 (1-6).

DESCENTS BEFORE 1ST JULY, 1834.

23. This Act shall not extend to any descent which took place on the death of any person who died before the first day of July, 1834. R. S. O. 1887, c. 108, s. 12.

Act not to extend to descents before 1st July, 1834.

DESCENTS SINCE 1ST JULY, 1834.

24. The next six sections of this Act, numbered from 25 to 30 inclusive, shall not have operation retrospectively to a period of time anterior to the sixth day of March, 1834, so as, by force of any of their provisions, to render any title valid, which in regard to any particular estate had, prior to that day, been adjudged, or has been or may be in any suit which was depending on that day, adjudged invalid on account of any defect, imperfection, matter or thing which is by such sections altered, supplied or remedied; but in every such case the law in regard to any such defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to

The next seven sections not to operate retrospectively in certain cases.

be as if those sections of this Act had not been passed. R. S. O. 1887, c. 108, s. 13.

Descent shall always be traced from the purchaser. Who to be deemed purchaser.

Imp. Act, 3-4 W. iv. c. 106, s. 2.

25. In every case on and after the first day of July, 1834, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it is proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it is proved that he inherited the same; and, in like manner, the last person from whom the land is proved to have been inherited shall in every case be considered to have been the purchaser, unless it is proved that he inherited the same. R. S. O. 1887, c. 108, s. 14.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heir shall create an estate by purchase.

Imp. Act, 3-4 W. iv. c. 106, s. 3.

26. Where land is devised by a testator dying after the first day of July, 1834, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and where any land is limited by any assurance, executed after the said first day of July, 1834, to the person or to the heirs of the person who thereby conveys the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as of his former estate or part thereof. R. S. O. 1887, c. 108, s. 15.

Where heirs take by purchase under limitations to the heirs of their ancestor the land shall descend, as if the ancestor had been the purchaser.

Imp. Act, 3-4 W. iv. c. 106, s. 4.

27. Where a person acquires land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the first day of July, 1834, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator dying after the said first day of July, 1834, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. R. S. O. 1888, c. 108, s. 16.

After the death of a person attained, his descendants may inherit.

Imp. Act, 3-4 W. iv. c. 106, s. 10.

28. Where the person from whom the descent of any land is to be traced has had any relation who, having been attained, died before such descent took place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attained, unless such land escheated in consequence of such attainer before the first day of July, 1834. R. S. O. 1887, c. 108, s. 17.

29. Proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. R. S. O. 1887, c. 108, s. 18.

Proof of entry
by heirs not
necessary.

30. Where any assurance executed before the said first day of July, 1834, or the will of any person who died before that day, contains any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been passed shall become entitled by virtue of such limitation or gift, whether the person named as ancestor was or was not living on or after the said first day of July, 1834. R. S. O. 1887, c. 108, s. 19.

Limitations
made before
1st July, 1834,
to the heirs of
a person then
living, shall
take effect as
if this Act had
not been
passed.

Imp. Act, 3-4
W. iv. c. 106,
s. 12.

DESCENTS BETWEEN 1ST JULY, 1834, AND 1ST JANUARY, 1852.

31. As respects every descent between the first day of July, 1834, and the thirty-first day of December, 1851, both days included, and as respects any descent not included or provided for in the sections of this Act numbered from 41 to 67, both included, the following sections, numbered from 32 to 36, both included, shall apply retrospectively to the first day of July, 1834, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of July, 1834. R. S. O. 1887, c. 108, s. 21.

Descents be-
tween the 1st
July, 1834, and
31st Decem-
ber, 1851.

32. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. R. S. O. 1887, c. 108, s. 22.

Brothers and
sisters shall
trace descent
through
parents.
Imp. Act, s. 5.

33. Every lineal ancestor shall be capable of being heir to any of his issue, and in any case where there is no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. R. S. O. 1887, c. 108, s. 23.

Lineal ances-
tor to be
heir in prefer-
ence to col-
lateral persons
claiming
through him.

Imp. Act 3-4
W. iv. c. 106,
s. 6.

34. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting.

The male line
to be preferred.

Imp. Act, 3-4
W. iv. c. 106,
s. 7.

ing until all his male maternal ancestors and their descendants have failed. R. S. O. 1887, c. 108, s. 24.

The mother of the more remote male ancestor to be preferred to the mother of a less remote male ancestor.
Imp. Act. 3-4 W. iv. c. 106, s. 8.

35. Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there is a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants.* R. S. O. 1887, c. 108, s. 25.

Half blood to inherit after the whole blood of the same degree.

Imp. Act. 3-4 W. iv. c. 106, s. 9.

36. Any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. R. S. O. 1887, c. 108, s. 26.

DESCENTS BETWEEN 1ST JANUARY, 1852, AND 1ST JULY, 1886.

Descents between the 1st January, 1852, and 1st July, 1886.

37. The twenty-seven sections numbered from 41 to 67, both included, shall apply retrospectively to the first day of January, 1852, inclusive, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of January, 1851, but sections 38 to 55 inclusive shall not apply to estates of persons dying or after the 1st day of July, 1886; and sections 56 to 67 inclusive shall, as to the estates of such last mentioned persons, apply only subject to the provisions of sections 1 to 21 inclusive. 60 V. c. 15, s. 3.

Interpretation as to sections 41 to 67.

38. In the said twenty-seven sections of this Act numbered from 41 to 67, both inclusive—

"Real estate."

1. "Real estate" shall be construed to include every estate, interest and right, legal and equitable, held in fee simple or for the life of another (except as in section 59 is excepted) in lands, tenements and hereditaments in Ontario, but not such as are determined or extinguished by the death of the intestate seised or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and

2. "Inheritance," as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the said twenty-seven sections. R. S. O. 1887, c. 108, s. 28.

39. Where, in the said sections, numbered from 41 to 67 both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and where any person is described as having died, it shall be understood that he died before such intestate. R. S. O. 1887, c. 108, s. 29.

Persons described "as living" or "as having died."

40. Where in any of the said sections the expressions "where the estate came to the intestate on the part of the father" or "mother," as the case may be, are used, the same shall be construed to include every case where the inheritance came to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent. R. S. O. 1887, c. 108, s. 30.

"Where the estate came to the intestate on the part of the father" or "mother," meaning of.

41. Where any person dies seised in fee simple or for the life of another of any real estate in Ontario, without having lawfully devised the same, such real estate shall descend or pass by way of succession in manner following, that is to say:—

How real estate of an intestate dying on or after 1st January, 1852, shall descend.

Firstly. To the lineal descendants of the intestate, and those claiming by or under them, *per stirpes*;

Secondly. To his father;

Thirdly. To his mother; and

Fourthly. To his collateral relatives

subject in all cases to the rules and regulations hereinafter prescribed. R. S. O. 1887, c. 108, s. 31.

42. If the intestate leaves several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1887, c. 108, s. 32.

As to descendants in equal degrees of consanguinity.

43. If one or more of the children of such intestate are living and one or more are dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died; so that each child who is living shall inherit such share as would have descended to him if all the children of the intestate, who have died leaving issue, had been living; and so that the descendants of each child who is dead shall inherit in equal shares the share which their parent would have received if living. R. S. O. 1887, c. 108, s. 33.

If some children be living and others dead leaving issue. Rule in such case.

Same rule as to other descendants in unequal degrees of consanguinity.

44. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, are of unequal degrees of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity who have died leaving issue, been living, and so that the issue of the descendants who have died, shall respectively take the shares which their parents, if living, would have received. R. S. O. 1887, c. 108, s. 34.

If the intestate leaves no descendant, right of father, mother, etc.

45. In case the intestate dies without lawful descendants and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother is living; and if such mother is dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; and if there are no such brothers or sisters, or their descendants living such inheritance shall descend to the father. R. S. O. 1887, c. 108, s. 35.

If there is no father entitled to inherit.

46. If the intestate dies without descendants and leaving, no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and brothers or sisters, or the descendants of brothers or sisters, then the inheritance shall descend to the mother during her life, and the reversion to such brothers or sisters of the intestate, as are living, and the descendants of such as are dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. R. S. O. 1887, c. 108, s. 36.

If there is neither father nor mother.

47. If there is no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there are several of such relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1887, c. 108, s. 37.

Succession of brothers and sisters and their descendants.

48. If all the brothers and sisters of the intestate are living, the inheritance shall descend to such brothers and sisters; and if any one or more of them are living and any one or more are dead, then to the brothers and sisters and every of them who are living, and to the descendants of such brothers and sisters as have died, so that each brother or sister who is living shall inherit such share as would have descended to him or her, if all the brothers or sisters of the intestate who have died leaving issue had been living, and so that such descendants shall

inherit in equal shares the share which their parent, if living, would have received. R. S. O. 1887, c. 108, s. 38.

49. The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, wherever such descendants are of unequal degree. R. S. O. 1887, c. 108, s. 39.

50. If there is no heir entitled to take under any of the preceding thirteen sections, the inheritance if the same came to the intestate on the part of his father, shall descend :

Firstly. To the brothers and sisters of the father of the intestate in equal shares, if all are living;

Secondly. If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died—in equal shares;

Thirdly. If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1887, c. 108, s. 40.

51. If there be no brothers or sisters, or any of them, of the father of the intestate, and no descendants of such brothers or sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. R. S. O. 1887, c. 108, s. 41.

52. In all cases not provided for by the next preceding fifteen sections, where the inheritance came to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed in section 50, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there are no such brothers and sisters or descendants of them, then the inheritance shall descend to the brothers and sisters, and their descendants, of the intestate's father, as before prescribed. R. S. O. 1887, c. 108, s. 42.

53. In cases where the inheritance did not come to the intestate on the part of either the father or the mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate in equal shares, and to their des-

As to such descendants in unequal degrees.

If there be no heir under the preceding 13 sections.

Further provision.

Further provision if the estate came on the mother's side.

If estate came neither on father's nor mother's side.

cendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1887, c. 108, s. 43.

Half blood to
succeed with
whole blood.

54. Relatives of the half blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise or gift from some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. R. S. O. 1887, c. 108, s. 44.

In cases not
provided for,
22-23 Car. ii.
c. 10, and 29
Car. ii. c. 3,
to apply.

55. On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of Distribution of Personal Estate. R. S. O. 1887, c. 108, s. 45.

GENERAL PROVISIONS.

Co-heirs to
take as tenants
in common.

56. Where there is but one person entitled to inherit according to the provisions of section 37 and following sections of this Act, he shall take and hold the inheritance solely; and where an inheritance, or a share of an inheritance, descends to several persons under such provisions, they shall take as tenants in common, in proportion to their respective rights. R. S. O. 1887, c. 108, s. 46.

Descendants,
etc., born after
death of intestate,
to inherit.

57. Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. R. S. O. 1887, c. 108, s. 47.

Illegitimate
persons not to
inherit.

58. Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R. S. O. 1887, c. 108, s. 48.

Curtesy,
dower and
estates by
deed or will,
not affected.
Rev. Stat.
c. 128.

59. The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding twenty-two sections of this Act, nor except as provided by section 31 of *The Wills Act of Ontario* shall the same affect any limitation of any estate by deed or will, or any estate which, although held in fee simple or for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last twenty-two sections of this Act numbered from 37 to 58, both included had not been passed. R. S. O. 1887, c. 108, s. 49.

Cases of children who have
been advanced
by settlement,
etc.

60. If any child of an intestate has been advanced by the intestate by settlement, or portion of real or personal estate, or

both of them, and the same has been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement is equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. R. S. O. 1887, c. 108, s. 50.

61. If such advancement is not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as is sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as nearly as can be estimated. R. S. O. 1887, c. 108, s. 51.

If such advancement be not equal.

62. The value of any real or personal estate so advanced shall be deemed to be that, if any, which has been acknowledged by the child by any instrument in writing, otherwise such value shall be estimated according to the value of the property when given. R. S. O. 1887, c. 108, s. 52.

Value of property advanced, how estimated.

63. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act. R. S. O. 1887, c. 108, s. 53.

Education, etc., not advancement.

64. The parties authorized to make partition of any such real estate according to law, shall receive from any of the persons entitled to a share of such real estate, an offer or proposition to purchase the share or shares of the other parties interested therein, giving the preference to the person who would have been the heir-at-law thereto, had section 37 and the following sections of this Act not been passed; and next after such heir-at-law, giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R. S. O. 1887, c. 108, s. 54.

As to the right of the parties interested in real estate subject to partition to purchase.

65. The parties so authorized to make such partition shall certify particularly to the Court in which proceedings for a partition are commenced or pending, the particulars of such offer or proposition for purchase, the nature, quantity and value of the estate or share proposed to be purchased, and whether

Particulars of offer to purchase to be certified to the Court.

they advise such offer or proposition to be accepted or rejected, and their reasons therefor. R. S. O. 1887, c. 108, s. 55.

Any Court authorized to make partition may direct a sale, giving preference to the heir-at-law, etc.

66. Any Court authorized to make partition of real estate may direct a sale of the same if it thinks it right so to do, upon the application of any of the parties beneficially interested therein, giving however the preference at all times to the person who would have been the heir-at-law to such real estate had section 37 and the following sections of this Act not been passed, and after such heir-at-law, then giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R. S. O. 1887, c. 108, s. 56.

Terms on which preference to be given.

67. Every such preference shall be upon and subject to such terms, security and conditions, as the Court thinks it right to direct. R. S. O. 1887, c. 108, s. 57.

NOTES.

Assimilation of real and personal property. The tendency of modern legislation is to assimilate the devolution of real and personal property. In England by the Land Transfer Act 1897 (60 and 61 Vict. c. 65) somewhat similar provisions to those of ss. 4, 9, 13 and 16 are enacted.

Intestate succession in Ontario. There are four epochs in the history of real estate succession in Ontario.

- (1) Prior to 1st July, 1834, the common law in England regulated the succession to real estate of which a person died intestate. Descent was traced from the person last actually seised and a seisin in law did not suffice to constitute a good root of descent, a seisin in deed or its equivalent, being requisite; Leith & Smith 470, and if the heir of a reversioner died pending a life estate he would not have had such a seisin as was necessary, *ib.* 471. Primogeniture was the rule, the eldest male being preferred over the younger and the male line to the female line. Females shared equally.
- (2) Between 1st July 1834 and 1st January 1852 primogeniture was still the rule. Descent was traced from the last purchaser, i. e. the person who last acquired the land otherwise than by descent or than by any partition equivalent to descent; s. 22 (2).
- (3) Between 1st January 1852 and 1st July 1886 descent was traced from the person last entitled; Leith & Smith 472. Primogeniture was abolished, all lineal descendants of equal degree of consanguinity sharing equally, ss. 41, 42.
- (4) Since 1st July 1886 real estate has vested in the personal representative to be distributed in the same way as personal property; s. 4.

Estates tail have not been affected by any of the foregoing.

It is not considered necessary to deal in detail with the law prior to 1886. The statute governing descent after 1st January 1852 was copied almost entirely from the revised act of the State of New York; Leith & Smith 489. A full discussion of the several sections of the act will be found in Leith & Smith pp. 469-503. Land vested in a trustee devolved upon his common law heir, s. 59. The abolition of primogeniture did not affect the construction of a devise contained in a will made before the act was passed whereby land was devised to heirs as purchasers; Tylee v. Deal (1873) 19 Gr. 601; Baldwin v. Kingston (1890) 18 A.R. 63, see also Appendix 18 A.R.

History of legislation since 1886. Between 1st July 1886 and 4th May 1891, land devolved notwithstanding any testamentary disposition upon the personal representative, and title could not be made except by a conveyance from him; Martin v. Magee (1891) 18 A.R. 384. On the 4th May 1891, the Statute 54 Vict. c. 18, s. 1 (1) came in force and thereby vested the property in the beneficiaries after the expiration of twelve months from the testator's death, unless a caution was previously registered. The act was held not to be retrospective in Re Ferguson (1891) 11 C.L.T. 201. In 1893 further provision was made as to cautions by allowing their registration, on complying with the formalities now provided by s. 14, after the expiration of twelve months, and by providing that the vesting in beneficiaries was not to be postponed by reason of no personal representative being appointed within twelve months. The act was declared to apply to the estates of persons dying before or after the act of 1891. The question shortly thereafter arose whether the effect of the act of 1893 was not to make the whole act of 1891 retrospective. In Re Baird (1893) 13 C.L.T. 277, Boyd C. held that the effect thereof was not to make the act of 1891 retrospective, but in a subsequent case the same learned judge reconsidered his former decision and held that the provisions of the act of 1893 were so engrafted on the act of 1891 as to cast back the operation of both acts so as to apply to all persons dying after July 1st, 1886; Re Martin (1895) 26 O.R. 465; Rodger v. Moran (1896) 28 O.R. 275. In 1897 by 60 Vict. c. 14, s. 29, the retroactive words of the act of 1893 were repealed, but so that the repeal should not affect any conveyance made before 13th April 1897.

The enactments of 1886 and since that time apply only to inheritable lands; Cowan v. Allen (1896) 26 S.C.R. 292.

Dower. The widow, to entitle her to a distributive share, must elect to take it by an attested instrument; *Re Galway* (1895) 17 P.R. 49. A widow may elect to take her interest under the act in lieu of her dower after the expiration of a year from the death of her husband provided the estate is not distributed on the footing of her having retained her lower right; *Baker v. Stuart* (No. 2), (1898) 29 O.R. 388. Where the widow by marriage settlement has accepted an equivalent in lieu of her dower, she has no right to any share in the lands; *Toronto General Trusts Co. v. Quin* (1894) 25 O.R. 250. The provisions allowing a gross sum to be set apart for the widow are in confirmation of *Re Rose* (1896) 17 P.R. 136.

Children of deceased brother or sister. Where the deceased leaves a father, brother and sister and descendants of deceased brothers and sisters, the latter are entitled to a distributive share, in the estate, *per stirpes*; *Walker v. Allen* (1897) 24 A.R. 336.

Consent of official guardian. The consent of the Official Guardian is required only where the land would not, but for the act, devolve upon the executors or administrators. If the testator has devised the land to his executors upon trust, even for an infant, the consent of the Official Guardian is not required; *Re Booth's Estate* (1888) 16 O.R. 429; *Koch v. Wideman* (1894) 25 O.R. 262; *Re Hewett v. Jerrayn* (1898) 29 O.R. 383; *Mercer v. Neff* (1898) 29 O.R. 680.

In *Re Fletcher* (1895) 26 O.R. 499, it was said that the consent of the Official Guardian was required only when the sale was made for distribution simply and then only when there were infants, lunatics or non-concurring heirs. Sections 8 and 16 must now, after the revision be read together, and it would appear to be safer to get the consent in all cases where infants or lunatics are interested.

Powers of Personal Representatives. A husband as administrator of his wife may sell his wife's undivided interest in land of which they were tenants in common though there are no debts; *Re Wilson* and *Toronto Incandescent Electric Light Co.* (1891) 20 O.R. 397.

A personal representative deriving title under the Act cannot exchange lands of the deceased for others, *Tenute v. Walsh* (1893) 24 O.R. 309; but may mortgage them with the consent of the Official Guardian if infants are interested; *Re Bennington* (1898) 18 C.L.T. 239.

A personal representative can make a valid renewal of a lease pursuant to the covenant of the deceased to renew; *Re Canadian Pacific Ry. Co. and National Club* (1893) 24 O.R. 205.

Though the personal representative has the power to sell lands where there are no debts he may be restrained if he attempts to sell contrary to the wishes of the beneficiaries; *Re Mallindine* (1890) 10 C.L.T. 226.

Personal representatives are not, like trustees for sale, bound to sell, but a mere discretion is cast upon them; *Re Fletcher's Estate* (1895) 26 O.R. 499.

The personal representatives may impound the share of any beneficiary for a debt due by him to the estate, and, in the event of his insolvency or death, will be compelled to value his share in proving against his estate; *Tillie v. Springer* (1892) 21 O.R. 585.

Mortgages. The Act does not affect the rule laid down by *Locke King's Act* (R. S. O. c. 128, s. 37) by which devisees of land take the same subject to the encumbrances thereon; *Mason v. Mason* (1887) 13 O.R. 725; unless the general estate is charged with the payment of all encumbrances; *Scott v. Supple* (1893) 23 O.R. 393.

Cautions. A caution may be filed (observing the preliminaries of s. 14) although no personal representative is appointed within 12 months from the death; *Re Martin* (1895) 26 O.R. 465.

Upon the expiration of a caution the lands become the property of the beneficiaries without a conveyance; *Ramus v. Dow* (1893) 15 P.R. 219.

A conveyance by the heirs or devisees within the 12 months will take effect, if no caution is registered, immediately upon the expiration of 12 months, and a caution subsequently registered will not defeat the title of the grantee for value; *Re McMillan, McMillan v. McMillan* (1893) 24 O.R. 181.

Widow's Share. Where there are no children the widow is entitled to \$1,000 over her distributive share although she may have received other benefits under the laws of another country out of the deceased's estate in that country, *Sinclair v. Brown* (1898) 29 O.R. 370.

Foreclosure. In a foreclosure action the heir's of a deceased mortgagor are proper parties as well as his personal representative; *Keen v. Codd* (1891) 14 P.R. 182; see *Carter v. Clarkson* (1893) 15 P.R. 379. If no administrator is appointed or caution registered the personal representative is not a necessary party to an action commenced after 12 months from the death; *Ramus v. Dow* (1893) 15 P.R. 219.

Infant's Shares. It is competent for the Official Guardian in giving his consent to a sale to see that infants' shares are protected or secured and application may be made to the court and proper directions then obtained; *Re Reidlan* (1886) 12 O.R. 781.

The following table may be referred to as shewing the distributive shares of beneficiaries upon an intestacy since 1886:—

<i>If the Intestate die leaving :</i>	<i>Beneficiaries take thus :</i>
Wife and child or children	One-third to wife, rest to child or children; if children dead, then to their representatives (that is, their lineal descendants), except such child or children (not heirs-at-law) who had estate by settlement of intestate or were advanced by him in his life-time equal to the other shares.
Wife only	§1,000 to wife; half of residue to wife; rest to next of kin, in equal degree to intestate, or their legal representatives, or if no next of kin, to the Crown.
No wife or child	All to the next of kin and to their legal representatives.
Child, children, or their representatives	All to him, her or them.
Children by two wives	Equally to all.
If no child, children or representatives	All to next of kin, in equal degree to intestate.
Child or grandchild by deceased child	Half to child, half to grandchild, who takes by representation.
Husband only	Half to him and half as if he had predeceased intestate.
Husband and child or children	Third to husband and two-thirds to children.
Father and mother	Equally to both.
Father, mother, brother or sister	Equally to all; children of any deceased brother or sister take share of deceased parent <i>per stirpes</i> .
Mother and brother or sister	Whole to them equally.
Wife, mother, brother, sister, nephews and nieces	Half to wife, residue to mother, brothers, sisters and nieces, but nephews and nieces take <i>per stirpes</i> .
Wife and father	Half to wife; half to father.
Wife, mother, nephews and nieces	Two-fourths to wife, one-fourth to mother, and one-fourth to nephews and nieces.
Wife, brother or sister and mother	Half to wife (under stat. of Car. II.) Half to brothers and sisters and mother equally.
Mother only	The whole.
Wife and mother	Half to wife and half to mother.
Brother or sister of whole blood, and brother and sister of half blood	Equally to both.
Posthumous brother or sister, and mother	Equally to both.
Posthumous brother or sister and brother or sister born in life-time of father	Equally to both.
Father's father and mother's mother	Equally to both.
Uncle or aunt's children, and brother's or sister's grandchildren	Equally to all.
Grandmother, uncle or aunt	All to grandmother.
Two aunts, nephew and niece	Equally to all.
Uncle and deceased uncle's child	All to uncle.
Uncle by a mother's side, and deceased uncle's or aunt's child	All to uncle.
Nephew by brother and nephew by half sister	Equally, <i>per capita</i> .
Brothers or sisters, and nephews or nieces	Equally (but the nephews or nieces take <i>per stirpes</i> .)
Nephew by deceased brother, and nephews and nieces by deceased sister	Equally, <i>per capita</i> .
Brother and grandfather	All to brother.
Brother's grandson and brother or sister's daughter	All to daughter.
Brother and two aunts	All to brother.
Brother and wife	Half to brother and half to wife.
Mother and brother	Equally.
Wife and mother, and children of deceased brother or sister	Half to wife, one-fourth to mother, one-fourth <i>per stirpes</i> to deceased brother or sister's children.
Wife, brother or sister, and children of deceased brother or sister	Half to wife, one-fourth to brother or sister <i>per capita</i> , one-fourth to deceased brother or sister's child, <i>per stirpes</i> .
Brother or sister and children of a deceased brother or sister	Half to brother or sister <i>per capita</i> . Half to children of deceased brother or sister <i>per stirpes</i> .
Grandfather and brother	All to brother.

CHAPTER 128.

An Act respecting Wills.

SHORT TITLE, s. 1.	Operation of wills from time of death of testator, s. 26.
WILLS BEFORE 1ST JANUARY, 1874, ss. 2-6.	Lapsed devise to sink into residuary devise, s. 27.
WILLS AFTER 1ST JANUARY, 1874 : PRELIMINARY, ss. 7-9.	General devise what to include, ss. 28-30.
PROPERTY DISPOSABLE BY WILL, AND PERSONS WHO MAY DISPOSE BY WILL, ss. 10, 11.	Meaning of "heir" in a devise, s. 31.
EXECUTION OF WILLS, ss. 12-15.	"Die without issue," meaning of, s. 32.
Wills of soldiers and sailors, s. 14.	General devise to trustees, what estate to pass, ss. 33, 34.
Witnesses being interested under the will not to invalidate, ss. 16-19.	Cases where devise does not lapse by death of a devisee, ss. 35, 36.
REVOCATION OF WILLS, ss. 20-22.	Mortgage debts and charges primarily chargeable on land, ss. 37, 38.
OBLITERATIONS, INTERLINEATIONS, ETC., s. 23.	IMPERIAL ACTS REPEALED, s. 39.
REVIVAL, s. 24.	
CONSTRUCTION OF WILLS : Devise, etc., to operate upon any interest remaining in testator, s. 25.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Short title.

1. This Act may be cited as "*The Wills Act of Ontario*." R. S. O. 1887, c. 109, s. 1.

WILLS BEFORE 1ST JANUARY, 1874.

Interpretation.
"Land."

2. In the next succeeding three sections of this Act the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties,

or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency. R. S. O. 1887, c. 109, s. 2.

3. Where a will made before and not re-executed, republished or revived after the first day of January, 1874, by any person dying after the sixth day of March, 1834, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the deviser after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof. R. S. O. 1887, c. 109, s. 3.

Estates acquired after the making of a will may pass by the will where such intention is expressed.

4. Where land is devised in any such will as aforesaid, it shall be considered that the deviser intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise. R. S. O. 1887, c. 109, s. 4.

A devise of land shall be taken to carry as large an estate as the testator had in the land, unless a contrary intention is expressed.

5. Any will affecting land executed after the sixth day of March, 1834, and before the first day of January, 1874, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if the witnesses subscribed their names in presence of each other, although their names were not subscribed in presence of the testator. R. S. O. 1887, c. 109, s. 5.

Witnesses need not subscribe in the presence of the testator.

6. After the fourth day of May, 1859, and before the first day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried. R. S. O. 1887, c. 109, s. 6.

Will by married woman between 4th May, 1859, and 1st January, 1874.

WILLS AFTER 1ST JANUARY, 1874.

7. Unless herein otherwise expressly provided, the subsequent sections of this Act shall not extend to any will made before the first day of January, 1874; but every will re-executed or re-published, or revived by any codicil, shall, for the purposes of the said sections, be deemed to have been made

Operation of succeeding sections.

Imp. Act 1 V. c. 26, s. 34. at the time at which the same was so re-executed, re-published or revived. R. S. O. 1887, c. 109, s. 7.

Application of sections 21, 22, 25 and 26. 8. Sections 21, 22, 25 and 26 of this Act shall not apply to the will of any person who was dead before the first day of January, 1869, but shall apply to the will of every person who has died since the thirty-first day of December, 1838, or who dies after the passing of this Act. R. S. O. 1887, c. 109, s. 8.

Interpretation. Imp. Act 1 V. c. 26, s. 1. 9. In the construction of the sections numbered 10 to 39 inclusive in this Act,

"Will."

12 Car. II. c. 24.

1. "Will" shall extend to a testament, and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of the Act passed in the twelfth year of the reign of King Charles the Second, entitled, "*An Act for taking away the Court of Wards, and liveries and tenures in capite, and by knight's service and purveyance, and for settling a revenue upon His Majesty in lieu thereof*," and to any other testamentary disposition;

"Real estate."

2. "Real estate" shall extend to messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate right, or interest (other than a chattel interest) therein;

"Personal estate."

3. "Personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein.

"Mortgage." Imp. Act 30-31 V. c. 69, s. 2.

4. "Mortgage" shall include any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate. R. S. O. 1887, c. 109, s. 9.

"Person." "Testator."

5. "Person" and "Testator" shall include a married woman. 60 V. c. 3, s. 3. See R. S. O. 1877, c. 106, s. 9 (4); R. S. O. 1887, c. 132, s. 3 (1).

Power to dispose of all property. Imp. Act 1 V. c. 26, s. 3.

Estates *pur autre vie*.

Contingent interests.

10. Every person may devise, bequeath, or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir at law, or upon his executor or administrator; and the power hereby given shall extend to estates *pur autre vie*, whether there be or be not any special occupant thereof, and whether the same be corporeal or incorporeal hereditaments; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator be or be not ascertained as

the person or one of the persons in whom the same may respectively become vested, and whether he be entitled thereto under the instrument by which the same were respectively created or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. R. S. O. 1887, c. 109, s. 10.

Rights of entry.

Property acquired after the will.

11. No will made by any person under the age of twenty-one years shall be valid. R. S. O. 1887, c. 109, s. 11.

Wills by infants invalid. Imp. Act 1 V. c. 26, s. 7.

12.—(1) No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses, shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

Execution. Imp. Act 1 V. c. 26, s. 9.

Attestation.

(2) Every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or

Signature. Imp. Act 15-16 V. c. 24, s. 1.

which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made. R. S. O. 1887, c. 109, s. 12.

Appointments
by will how to
be exercised.
Imp. Act 1 V.
c. 26, s. 10.

13. No appointment made by will, in exercise of any power, shall be valid, unless the same is executed in manner hereinbefore required; and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity. R. S. O. 1887, c. 109, s. 13.

Wills of
personalty of
soldiers and
sailors.
Imp. Act 1 V.
c. 26, s. 11.

14. Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of this Act. R. S. O. 1887, c. 109, s. 14.

Publication
unnecessary.
Imp. Act 1 V.
c. 26, s. 13.

15. Every will executed in manner hereinbefore required shall be valid without any other publication thereof. R. S. O. 1887, c. 109, s. 15.

Will not
invalid if
witness
incompetent.
Imp. Act 1 V.
c. 26, s. 14.

16. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. R. S. O. 1887, c. 109, s. 16.

Gifts, etc., to
witness
invalid.
Imp. Act 1 V.
c. 26, s. 15.

17. If any person attests the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) is thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or such wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. R. S. O. 1887, c. 109, s. 17.

Creditors
competent
witnesses.
Imp. Act 1 V.
c. 26, s. 16.

18. In case by any will any real or personal estate is charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. R. S. O. 1887, c. 109, s. 18.

19. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. R. S. O. 1887, c. 109, s. 19.

Executor
competent
witness.
Imp. Act 1 V.
c. 20, s. 17.

20.—(1) Every will made by any person dying on or after the 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases, namely:—

Revocation by
marriage.
Imp. Act 1 V.
c. 20, s. 18.

(a) Where it is declared in the will that the same is made in contemplation of such marriage;

Exceptions.

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death in the office of the surrogate clerk at Toronto;

(c) Where the will is made in the exercise of a power of appointment and the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under *The Statute of Distribution*. 60 V. c. 20, s. 1.

Imp. Act
22-23 Chas. II.
c. 10, 29 Chas.
II. c. 3.

(2) The will of any testator who died between the 31st day December, 1868, and the 13th day of April, 1897, shall be held to have been revoked by his subsequent marriage, unless such will was made under the circumstances set forth in clause (c). R. S. O. 1887, c. 109, s. 20.

21. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances. R. S. O. 1887, c. 109, s. 21. *See section 8 of this Act.*

No revocation
by change in
circumstances.
Imp. Act 1 V.
c. 20, s. 19.

22. No will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. R. S. O. 1887, c. 109, s. 22. *See section 8 of this Act.*

How only will
can be re-
voked.
Imp. Act 1 V.
c. 20, s. 20.

23. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made

Obliterations,
interlinea-
tions, etc.
Imp. Act 1 V.
c. 20, s. 21.

in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will. R. S. O. 1887, c. 109, s. 23.

Revival.
Imp. Act 1 V.
c. 26, s. 22.

24. No will or codicil, or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and shewing an intention to revive the same; and where any will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shewn. R. S. O. 1887, c. 109, s. 24.

No act as to
property
named in the
will to pre-
vent operation
of the will as
to any interest
left in testator.
Imp. Act 1 V.
c. 26, s. 23.

25. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real or personal estate, as the testator had power to dispose of by will at the time of his death. R. S. O. 1887, c. 109, s. 25. *See section 8 of this Act.*

Will to speak
from death.
Imp. Act 1 V.
c. 26, s. 24.

26.—(1) Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 26.

Imp. Act
56-57 V. c. 68,
s. 3.

(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband. 60 V. c. 22, s. 2. *See section 8 of this Act.*

Lapsed devise
to sink into
residuary de-
vise.
Imp. Act 1 V.
c. 26, s. 25.

27. Unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. R. S. O. 1887, c. 109, s. 27.

Leaseholds,
when may
pass under a
general devise.
Imp. Act 1 V.
c. 26, s. 26.

28. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend

(as the case may be), as well as freehold estates, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 28.

29. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 29.

A general devise of realty or personalty to include property over which testator has a general power of appointment. Imp. Act 1 V. c. 26, s. 27.

30. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 30.

General devise to pass whole estate in the land devised. In s. Act 1 V. c. 26, s. 28. Rev. Stat. c. 127.

31. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" and "heirs" shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy. R. S. O. 1887, c. 109, s. 31.

Meaning of "heir" in a devise of real estate.

32. In any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: but this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. R. S. O. 1887, c. 109, s. 32.

Import of words "die without issue," or "have no issue," or to that effect. Imp. Act 1 V. c. 26, s. 29.

Proviso.

When devise to trustee or executor shall pass whole estate of testator. Imp. Act 1 V. c. 26, s. 30.

33. Where any real estate is devised to a trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold is thereby given to him expressly or by implication. R. S. O. 1887, c. 109, s. 33.

When devise to a trustee shall pass the whole estate beyond what is requisite for the trust. Imp. Act 1 V. c. 26, s. 31. Rev. Stat. c. 127.

34. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to *The Devolution of Estates Act*, be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied. R. S. O. 1887, c. 109, s. 34.

When devise of estates tail s. all not lapse. Imp. Act 1 V. c. 26, s. 32.

35. Where any person to whom any real estate is devised for an estate tail or an estate in *quasi* entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 35.

Gifts to issue who leave issue on testator's death, shall not lapse. Imp. Act 1 V. c. 26, s. 33.

36. Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 36.

Mortgage debts to be primarily chargeable on the lands. Imp. Act 17. 18 V. c. 113.

37.—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum or sums of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged shall, as between the different persons claiming

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through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

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(2) Nothing herein contained shall affect or diminish any Proviso of the mortgagee on such real estate to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the first day of January, 1874. R. S. O. 1887, c. 109, s. 37.

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(3) Where any person dies on or after the 13th day of April, 1897, seized of or entitled to any estate or interest in any real estate, which at the time of his death is charged with the payment of any sum of money by way of equitable charge, including any lien for unpaid purchase money, the provisions of this section shall apply to such charge in the same manner as they would be applicable if such charge were a mortgage. 60 V. c. 15, s. 4. Also liens for unpaid purchase money, etc. Imp. Act 40-41 V. c. 15, s. 4.

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38. In the construction of any will or deed or other document to which the next preceding section of this Act relates, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in the said section contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. R. S. O. 1887, c. 109, s. 38. Consequence of direction that testator's debts be paid out of personality. Imp. Act 30-31 V. c. 69, s. 1, and 40-41 V. c. 34.

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39. The Acts of the Imperial Parliament described in the Schedule to this Act (except so far as the same relate to any wills to which section 7 and the following sections of this Act do not extend) are, and shall continue to be, repealed to the extent in the third column of the said Schedule mentioned; but such repeal shall not revive any Act or provision of law repealed by them, nor shall the said repeal prevent the application of any of the said Acts, or of any Act or provision of law formerly in force, to any transaction, matter or thing anterior to the time of the repeal of the said Acts and to which they would otherwise apply. R. S. O. 1887, c. 109, s. 39. Acts repealed

SCHEDULE.

ACTS REPEALED.	TITLE OF ACTS REPEALED.	EXTENT OF REPEAL.
32 Hen. 8, cap. 1	The Act of Wills, Wards and Primer Seizins, whereby a man may devise two parts of his land.	The whole Act.
34-35 Hen. 8, cap. 5.	The Bill concerning the explanation of Wills.	The whole Act.
20 Car. 2, cap. 3.	An Act for the prevention of Frauds and Perjuries.	Sections 5, 6, 12, 19, 20, 21 and 22.
4-5 Anne, cap. 16.	An Act for the amendment of the law and the better advancement of justice.	Section 14.
14 Geo. 2, cap. 20.	An Act to amend the law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for the prevention of Frauds and Perjuries."	Section 9.
25 Geo. 2, cap. 6.	An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning real estates in that part of Great Britain called England, and in His Majesty's colonies and plantations in America.	The whole Act.

R. S. O. 1887. c. 109, *Schedule*.

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NOTES.

History. At common law there was no right to make a will of realty, and the right to so deal with personalty seems first to have originated in the custom of certain localities, and to have spread by imperceptible degrees, until it became the law of the land. Williams on Executors, 2. The Wills Acts, 32 Hen. VIII. c. 1, and 34-35 Hen. VIII. c. 5, gave power to a tenant in fee simple to devise his lands by will in writing. No signature was required until the Statute of Frauds, 29 Car. II. c. 3, s. 5. That Statute also required that a will of lands should be attested and subscribed in presence of the deviser by "three or four credible witnesses." The Statute of Frauds, s. 19, also dealt with wills of personalty, by requiring that a nuncupative will, i.e., a will by word of mouth or informal writing, where the property exceeded £30, should be proved by three witnesses at least. Wills of land were, after the Statute of Frauds and before 25 Geo. II. c. 6, void if any of the witnesses were not credible, i.e., if a witness or his wife were a beneficiary thereunder, but by the last mentioned Statute, only the devise, legacy, estate, interest, gift or appointment became void and the will remained valid. Prior to 1874 there was no legislation in force in Ontario relating to Wills of Personalty, other than that before mentioned. Wills of Personalty in writing were therefore valid without signature or witnesses. The Statute, 4 Will. IV., c. 1, ss. 49-51 (C.S.U.C. c. 82, ss. 11-13) had however dealt with wills of realty of persons dying after 6th March, 1834, by enabling after acquired real estate to be devised by general words, and by abolishing the necessity of words of limitation in a devise of a fee simple, and by reducing the number of witnesses required to two, and by enabling them to subscribe in the presence of each other only, and not necessarily (as required by the Statute of Frauds) in presence of the testator. The statutes were cumulative, and a will which was invalid under either Statute, taken singly, might be supported on their joint authority; *Crawford v. Curragh* (1865) 15 C. P. 55. After the invention of the separate estate of married women, their wills were valid in equity to pass property held for their separate use; *Taylor v. Meads* (1865) 4 DeG. J. & S. 597, and by 22 Vict. c. 34, s. 16, power was given them to devise or bequeath their property declared by statute to be their separate property among their children, or to their husbands if there were no children, the only requisite being that the will should be executed by the married woman, in the presence of two or more witnesses, neither of whom was her husband, but no attestation was required. See C. S. U. C. c. 73, s. 16. Under this clause property could not be left to one child to the exclusion of others; *Munro v. Smart* (1879) 26 Gr. 310. The section is perpetuated as s. 6 of the present act. Married women, infants and lunatics had been especially excepted from the Statute of Wills, 34-35 Hen. VIII. c. 5, s. 14. Wills of infants of lands were always invalid, but prior to 1874 boys of the age of 14 and girls of the age of 12 might make a will of personalty.

The statutes of Hen. VIII. sections 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, and the Statutes of 25 Geo. II. 6, together with other incidental statutes, which it has not been necessary to notice are expressly repealed by the Schedule to R. S. O. c. 128, and as to the execution of wills the Statute of 4 Will. IV. c. 1 is impliedly repealed.

Wills after 1st January, 1874. The following are the main features of the act of 1874:—

- (1) The act extends to every description of property.
- (2) Everything that a man possesses (other than an estate tail) which would devolve upon his heir or personal representative, may be disposed of, including contingent interests, rights of entry of all kinds, and after acquired property.
- (3) Nuncupative Wills, except of soldiers and seamen on active service are abolished.
- (4) Infants are incapable of making a will.

- (5) The will must be signed by the testator at the "foot or end" and attested by two witnesses, both present at the same time, in his presence ;
- (6) The witnesses need not be "credible," but gifts to a witness or to the spouse of a witness are invalid.
- (7) Marriage is a revocation except in the cases provided for by s. 20, but alteration in circumstances, as by the birth of issue, is not ;
- (8) The will "as to the real and personal estate comprised in it" speaks from death.
- (9) Lapsed and illegal devises fall into the residue and do not go to the heir.

Married Women. By the original Wills Act of 1874 (36 Vict. c. 20, s. 4) a married woman was authorized to make a will, not only of her separate estate, but also of every species of property which would devolve upon her heir or personal representative, and the law so continued until 31st December 1887, when on the revision of the Statutes, the clause interpreting "person" and "testator" to include a married woman was omitted, and the married woman's power to make a will was conferred by the Married Woman's Property Act, R. S. O. (1887) c. 132, which applied only to her separate property. In consequence, a will of a married woman would not comprise property to which she became entitled on or after the death of her husband ; see 8 C.L.T. 181 ; *Re Price, Stafford v. Stafford* (1885) 28 Ch. D. 709 ; *Re Cuno, Mansfield v. Mansfield* (1889) 43 Ch. D. 12 ; *Re Smith, Bilke v. Roper* (1890) 45 Ch. D. 632. The present act restores the original interpretation of the word testator, and a married woman has now the same power as one unmarried. It moreover, in effect, provides, s. 26 (2) that wills executed before the restoration of the clause shall speak from death, and shall not require re-execution or re-publication.

Indians. An Indian may make a will ; *Johnston v. Jones* (1895) 28 O. R. 109.

Signature of Testator. The testator must sign at the "foot or end." Considerable controversy raged for some years in England over the meaning of these words. A will which had only the attestation clause on the last page, there being sufficient room on the preceding page for the testator's signature, was held not to be signed at the foot or end when the signature was on the last page ; *Smee v. Bryer* (1848) 6 Moo. P. C. 404 ; and many cases where the signature was written transversely across the will and in other places, arose. These cases were all provided for by 15-16 Vict. c. 24, s. 1, which is s. 12 (2) of our Statute. As the explanatory Statute was enacted with and as part of the principal act in 1873, no questions have arisen in Ontario on the meaning of "foot or end." Care must, however, still be taken as to the position of the signature. A will consisting of six sheets, of which five were signed by the testator and attested by the witnesses, and the sixth of which contained a testimonium and attestation clause, and the names of the witnesses, but not the signature of the testator, was refused probate even of the five sheets ; *Sweetland v. Sweetland* (1865) 4 Sw. & T. 6 ; and so where a will on a small card was signed by the testator's mark in the middle of the writing it was held not to be signed at the foot or end ; *Margary v. Robinson* (1886) 12 P. D. 8. Signatures also in earlier pages of a will have been held to be signatures of authentication, and not of execution, and the absence of a signature at the end invalidated the whole ; *Phipps v. Hale* (1874) L. R. 3 P. & D. 166 ; *Re Dilkes* (1874) L. R. 3 P. & D. 164. On the other hand signatures upon the first page of a lithographed form have been held an execution, and probate has been granted of that page. *Royle v. Harris* (1895) P. 163 ; *Re Anstee* (1893) P. 283 ; and in one case the later pages were held to be the commencement, and the signature on the first page to be at the end ; *Re Wotton* (1874) L. R. 3 P. & D. 159 ; and where a first page contained a reference to the others they were incorporated or treated as interlineations ; *Re Birt* (1871) L. R. 2 P. & D. 214.

Where a testator desired to alter his will, which had been prepared by a solicitor, and a layman wrote on the third side of the sheet of foolscap containing the will "the following alterations having been first made" followed by the changes desired and the mark of the testator, and the signatures of the witnesses were then put on the margin of the first page, which contained the will, the codicil was held not to be duly executed ; *Re Hughes* (1887) 12 P. D.

107. When the signature is on a separate piece of paper attached by wafers to a will, and it is not shown that the paper was attached when the will was signed, probate will not be granted; *Re Lambert* (1862) 31 L.J.P. 118; *Re West* (1863) 32 L.J.P. 182.

When a codicil was written on the upper part of the first side of a half sheet of foolscap doubled, with the words "for my signature and witnesses see next side," and on the fourth side appeared only the signatures of the testator and witnesses, and the witnesses saw no writing on the paper, the codicil was held not to be duly executed; *Re Hammond* (1862) 3 Sw. & T. 90.

Where a will apparently ended with an attestation clause on the third page where it was signed by the testator and witnesses, but at the foot of the third page there was written the words "Turn over," and on the fourth page was a devise of the real estate and the unattested signature of the testator, the fourth page was held not to be part of the will, although the witnesses before execution saw some writing on the fourth page, but the signature was not made or acknowledged in their presence; *Re Dearnley* (1878) 47 L.J.P. 45.

Signatures which are at the foot or end. The following wills have been held to be duly signed at the foot or end. Where the first and third pages of a sheet of foolscap were filled, and the signature was written crossways on the second page; *Re Coombs* (1866) L.R. 1 P. & D. 302; where the signature was partly across the last line but one, and entirely above the last line except one letter which touched the last line; *Re Woodley* (1864) 3 Sw. & T. 429; where the will was on three sides of a sheet of note paper, and the signature was on the second side, except the last two letters, which were on the third side; *Re Powell* (1865) 4 Sw. & T. 34; where the will ended on the third page of a sheet of foolscap, the lower half of the page being blank, and the attestation clause and signature were at the top of the fourth page; *Hunt v. Hunt* (1866) L.R. 1 P. & D. 209; *Re Wright* (1865) 4 Sw. & T. 35; where the signature was written down the lower part of the edge of a half sheet of note paper containing the will; *Re Jones* (1865) 4 Sw. & T. 1; where the will filled the first page of a double sheet of foolscap, and the signature and attestation clause were in the middle of the fourth page; *Re Fuller* (1892) P. 377; where the testimonium clause was at the foot of the second page leaving plenty of room for the signature of the testator and witnesses who, however, signed opposite an attestation clause on the third page; *Derinzy v. Turner* (1861) 1 Ir. Ch. R. 341; where the will covered three-fourths of the first page, and one-half of the second, and the signature was opposite the second line of an attestation clause near the top of the third page; *Re Williams* (1865) L.R. 1 P. & D. 4; where the signature was squeezed into what had been a blank space in the attestation clause; *Re Huckvale* (1867) L.R. 1 P. & D. 375; where the will was on the upper part of one side of a piece of paper and the signature and attestation clause on the back; *Re Archer* (1871) L.R. 2 P. & D. 252; where the will was on the first page and the signatures upon the fourth, the second and third pages being blank; *Re Rice* (1871) Ir. R. 5 Eq. 176; where the testator's signature was under those of the witnesses, but a due execution was to be inferred from the attestation clause; *Re Puddephatt* (1870) L.R. 2 P. & D. 97, see also *Re Jones* (1877) 25 W.R. 215; *Byles v. Cox* (1896) 74 L.T. 222, where the later pages of the will on a lithographed form could be read as the commencement of the will and the first pages containing the signatures and attestation as the last; *Re Wotton* (1874) L.R. 3 P. & D. 159; where the will was on the first and third sides of a sheet of foolscap and the attestation on the second; *Re Stoakes* (1875) 31 L.T. 552; where the fifth page contained an attestation clause and the sixth the signature of the testator preceded by the words "To which will and testament I hereunto annex my seal and signature"; *Re Horsford* (1874) L.R. 3 P. & D. 211; where the signatures of the testator and witnesses were on a separate paper attached by a string but all were so attached when the testator acknowledged his signature, and the witnesses signed, *ib*; *Cook v. Lambert* (1862) 3 Sw. & T. 46; *Re Gausden* (1861) 2 Sw. & T. 362; where the signature was written in the blank space of an attestation clause in a lithographed form; *Re Harris* (1875) 23 W.R. 734, see also *Re Pearn* (1876) 1 P.D. 70; *Re Walker* (1861) 2 Sw. & T. 354; *Re Casmore* (1869) L.R. 1 P. & D. 653; where the signature was written transversely along the left hand margin of the page containing the will, near the top and running downwards as far as the commencement of the second line of the will, and the witnesses' signatures were above the will and opposite a portion of the testator's signature; *Re Collins* (1879) 3 L.R. Ir. 241; where from the obvious sequence and sense of the context, the court was satisfied that the signature really followed the dispositive part of the will, though literally it

was above it; Re Kimpton (1864) 3 Sw. & T. 427; where the testator wrote "In witness whereof, I, Martin Hall Mann, have hereunto set my hand," but did not otherwise sign; Re Mann (1859) 28 L.J.P. 19; where the last sentence commenced immediately above the signature and was continued in three short lines to the left of it, the two last lines being somewhat below the signature; Re Ainsworth (1870) L.R. 2 P. & D. 151; where a will extended over to the third page of a sheet of foolscap, but the signatures of the testatrix and witnesses were on the first page, and she also signed the second page in their presence before execution, probate was granted of the first two pages; Re Wray (1883) 31 W.R. 476. Clauses below the signature written either before or after execution will be excluded from the probate; Re Dallow (1866) L.R. 1 P. & D. 189; Re Arthur (1871) L.R. 2 P. & D. 273.

Signature by Testator's Direction. The signature may be written by some other person in the testator's presence, and by his direction though he is too ill to write. It must however be accompanied by some act or word on his part to show that it is made at his request; Re Marshall (1866) 13 L.T. 643. Affixing a stamped signature of the testator by a third party at the testator's direction is sufficient; Jenkyns v. Gaisford (1862) 3 Sw. & T. 93.

Signature by Mark. If the testator executes by mark, the signature will not be vitiated by a wrong name being written against it; Re Clarke (1858) 1 Sw. & T. 22, nor by his being described throughout the will by a wrong name; Re Douce (1861) 2 Sw. & T. 593. If the testator's hand is guided in making a mark it is sufficient; Wilson v. Beddard (1841) 12 Sim. 28.

Signature by Initials. Initials are sufficient; Re Savoy (1851) 15 Jur. 1042; Re Emerson (1882) 9 L.R. Ir. 443.

Signature in Wrong Name. A testator may sign in a wrong or assumed name; Re Redding (1850) 14 Jur. 1052; Re Glover (1847) 11 Jur. 1022, but he must sign the paper he intended to sign, not the will of another person although in the same terms *mutatis mutandis*; Re Hunt (1875) L.R. 3 P. & D. 250.

Signature in Presence of Witnesses. The signature or acknowledgment must be made in the presence of two witnesses present at the same time; Hindmarsh v. Charlton (1861) 8 H.L.C. 160. Where the witnesses see the testator write something, but cannot say what it was, it may be presumed it was his signature; Smith v. Smith (1866) L.R. 1 P. & D. 143; Cooper v. Bockett (1846) 4 Moo. P.C. 419. Where the testatrix was ill in bed in one room and the will was attested by two witnesses who were in an opposite room, but who did not see her make or acknowledge her signature, or have any conversation with her respecting it, the will was held not to be validly executed; Re Killick (1864) 3 Sw. & Tr. 378.

Acknowledgment of Signature. The testator need not actually sign in the presence of the witnesses. It is sufficient if he acknowledges his signature to them, but to constitute a good acknowledgment the witnesses must see or have an opportunity of seeing the signature. If they do not, it is immaterial that the signature was in fact there or that the testator said that the paper was his will, or that his signature was inside; Re Gunston (1882) 7 P.D. 102; Holt v. Genge (1843) 4 Moo. P.C. 265; Scott v. Scott (1887) 13 O.R. 551. Where the witnesses were illiterate and could not say if the signature was on the paper at the time of attestation, probate was refused; Pearson v. Pearson (1871) L.R. 2 P. & D. 451.

Attestation. The witnesses must both be present at the same time and must subscribe in presence of the testator.

A testator's signature may be acknowledged. No such latitude is allowed in the case of an attesting witness; O'Neill v. Owen (1889) 17 O.R. 525. Where a witness who had seen the testator sign, and had witnessed his signature, and afterwards in the presence of a second witness, traced over his signature with a dry pen, and the second witness then signed, the will was held not to be duly executed; Wyatt v. Berry (1893) P. 5; Horne v. Featherstone (1896) 73 L.T. 32; Re Maddocks (1874) L.R. 3 P. & D. 169; Casement v. Fulton (1846) 5 Moo. P.C. 130. The signatures of the witnesses must be made after the testator has signed or acknowledged his signature; Hindmarsh v. Charlton (1861) 8 H.L.C. 160. The testator must see the witnesses sign, or be in a position to do so. Where the testator was in a state of insensibility; Right d. Carter v. Price (1779) 1 Dougl. 241; or where he could not as he lay in bed see them sign; Clerk v. Ward (1706) 4 Bro. P.C. 71; Jenner v. Finch

(1880) 5 P.D. 106; *Tribe v. Tribe* (1849) 1 Rob. Ecc. Rep. 775; *Doe d. Wright v. Manifold* (1813) 1 M. & S. 294; the attestation was invalid.

The implication is that the testator saw the witnesses sign; *Morrison v. Arnold* (1816) 19 Ves. 671.

Where the will was executed in a carriage outside an attorney's office, in the presence of the witnesses, and the witnesses then returned to the attorney's office, and the carriage was put back to the window of the office, through which the testatrix might have seen what passed, the execution was valid; *Casson v. Dade* (1781) 1 Bro. C.C. 99. Where one witness subscribed immediately after the testator, in the same room, and the other witness subscribed in the adjoining room, and the testator, while in bed, might have seen that part of the table on which the will was lying when the witness signed, the execution was valid; *Re Trimmell* (1865) 11 Jur. N.S. 248.

Position of Attestation. The witness should attest the operative signature, i. e., the signature at the foot or end of the will. Where the operative signature was on the tenth page, and the witnesses attested initials of the testator on the first nine pages the execution was incomplete; *Phipps v. Hale* (1874) L. R. 3 P. & D. 166. Where the attestation was at the bottom of the first page, and there was no attestation on the second, only the first page was admitted to probate; *Re Malen* (1885) 54 L. J. P. 91. The fact that a witness signs in the character of executor will not prevent his signature from being operative as that of a witness; *Griffiths v. Griffiths* (1871) L. R. 2 P. & D. 300. Where a testatrix signed by mark on the first and second pages, but the witnesses attested only the mark on the first page the will was invalid; *Re Dilkes* (1874) L. R. 3 P. & D. 164. Where the witnesses' signatures were in the margin opposite alterations and interlineations only, the attestation was good; *Re Streasley* (1891) P. 172 and the subscription of the witness need not be placed at the foot; *Roberts v. Phillips* (1855) 4 E. & B. 450.

Signature of Witness. If it be clear that the witness intended to attest the will any signature is sufficient—he need not sign his own name; *Re Duggins* (1870) 39 L.T.P. 24; “Servant to Mr. Sperling” the testator, is sufficient; *Re Sperling* (1864) 3 Sw. & T. 272; so is a mark; *Re Enyon* (1873) L. R. 3 P. & D. 92; or initials; *Re Christian* (1849) 2 Rob. Ecc. Rep. 110; although the witnesses can write; *Re Amiss* (1849) 2 Rob. Ecc. Rep. 116. But there must be some mark intended to represent a signature; a correction of an error in a previous writing of his name, or the addition of a date will not amount to a subscription; *Hindmarsh v. Charlton* (1861) 8 H.L.C. 160. The hand of the witness may be guided by another; *Lewis v. Lewis* (1861) 2 Sw. & T. 153; *Re Frith* (1858) 1 Sw. & T. 8; *Harrison v. Elvin* (1842) 3 Q.B. 117; *Bell v. Hughes* (1880) 5 L. R. Ir. 407. Where a witness after writing his christian name was too feeble to complete his signature, the attestation was incomplete; *Re Maddocks* (1874) L. R. 3 P. & D. 160.

The signature by a witness in her husband's name is not good; *Re Leverington* (1886) 11 P.D. 80; *Pryor v. Pryor* (1860) 29 L.J.P. 114. Nor is a subscription of the name of a witness by a third person who was himself present at the execution; *Re Duggins* (1870) 39 L.J.P. 24.

Form of Attestation. No form of attestation is necessary. The fact that the formal attestation described a witness as only attesting the signatures of two other witnesses (the attestation of one of whom was irregular) did not invalidate the execution; *Mason v. Bishop* (1882) 1 C. & E. 21. Before 1874 the presence of an attestation clause without attestation raised a presumption against the intended finality of the paper, so as to make it insufficient to pass even personally; *Douglas v. Smith* (1833) 3 Knapp 1; but the presumption might be rebutted; *Walker v. Walker* (1816) 1 Mer. 503; *Stewart v. Stewart* (1837) 2 Moo. P.C. 193; *Bateman v. Pemington* (1839) 3 Moo. P.C. 223.

Presumption of Due Execution. If the will appears on its face to have been properly executed, due execution will be presumed; *Lloyd v. Roberts* (1858) 12 Moo. P.C. 158; *Cregreen v. Willoughby* (1860) 5 Jur. N.S. 590; and the presence of an attestation clause, reciting the necessary facts will outweigh doubtful evidence of the witnesses to the contrary; *O'Meagher v. O'Meagher* (1883) 11 L.R. Ir. 117; *Bailey v. Frowan* (1871) 10 W. R. 511; *Re Thomas* (1859) 1 Sw. & Tr. 255; and it will not be rebutted by defective memory of the attesting witnesses. *Woodhouse v. Balfour* (1888) 13 P.D. 2; *Re Holgate* (1860) 1 Sw. & T. 261; *Vinnicombe v. Butler* (1865) 3 Sw. & T. 590, nor by the evidence of one attesting witness; *Wright v. Rogers* (1869) L.R. 1 P. & D. 678. If the will is 30 years old and contains an attestation clause, a *prima*

facie case will be made by proving the death of the witnesses, and the handwriting of one of them; *Andrew v. Motley* (1863) 12 C.B.N.S. 526, and even without evidence, if the will comes from proper custody; *Orange v. Pickford* (1858) 3 Drew. 463; *Doe d. Spilsbury v. Burdett* (1837) 4 A. & E. 1. Where the witnesses denied the signatures, but the attorney who drew the will, and was present at its execution, swore that the witnesses had duly signed the will as attesting witnesses, and other persons who knew the handwriting of the witnesses swore that the signatures were theirs, the court admitted the will to probate; *Myers v. Gibson* (1866) 14 W.R. 901.

In the face of distinct and positive evidence to the contrary the court cannot say that a will was duly executed, because it appears to be so; *Wyatt v. Barry* (1893) P. 5, even if there is a formal attestation clause; *Croft v. Croft* (1865) 4 Sw. & T. 10.

Absence of Attestation Clause. Where there is no formal attestation clause, or the clause is incomplete, the presumption of due execution applies with less force; *Re Rees* (1865) 34 L. J. P. 56; *Vinnicombe v. Butler* (1865) 3 Sw. & T. 580. And where there is no affirmative evidence that at the time of execution the testator's name was on the paper, the production of it to the witnesses, with a request that they will sign it as a paper is not in itself sufficient to justify the inference that it was already signed; *Fischer v. Popham* (1875) L. R. 3 P. & D. 246; *Re Swinford* (1869) L. R. 1 P. & D. 630.

Execution of Power. S. 13 applies as well to powers of appointment created after the act as to those previously created; *Hubbard v. Lees* (1866) 4 H. & C. 418. It does not apply to a power requiring an instrument in writing sealed and delivered; *Taylor v. Meads* (1865) 4 DeG. J. & S. 597.

Wills of Soldiers and Seamen. Soldiers and seamen may, informally or by word of mouth, in certain cases, make a will of personalty. The word soldier will probably include a militiaman; *Horton v. Leeds* (1855) 5 E. & B. 595, but not a workman employed in an army works corps, though subject to the Mutiny Act; *Cooke v. Paxton* (1859) 4 H. & N. 368. It included a person in the service of the late East India Company; *Re Donaldson* (1840) 2 Curt. 386. The soldier must be "in actual military service" i. e. on an expedition. Being quartered in barracks at home; *Drummond v. Parish* (1843) 3 Curt. 522, or in the colonies; *White v. Repton* (1844) 3 Curt. 818; or at Malta, though under orders for the West Indies; *Re Norris* (1884) 3 N. C. 197, is not sufficient. But see *Re Phipps* (1840) 2 Curt. 368; *Re Johnson* (1839) 2 Curt. 341; *Re Pery* (1844) 2 L. T. O. S. 335. An officer on a tour of inspection of the troops under his command is not in actual service; *Re Hill* (1849) 1 Rob. Ecc. 276. A soldier passing from one regiment to another, both regiments being in active service against the enemy may make a nuncupative will; *Herbert v. Herbert* (1855) Dea. & Sw. 10; and so may a soldier on joining a regiment with the view to march against the enemy; *Re Thorne* (1865) 34 L. J. P. 131; and a will made two days before marching was held valid; *Bowles v. Jackson* (1853) 1 Spinks Ecc. & Adm. 294; and so was the will of a soldier who had received a mortal wound on the battlefield; *Re Farquhar* (1845) 4 N. C. 47; *Re Prendergast* (1846) 5 N. C. 92.

A mariner or seamen must be "at sea" to make his nuncupative will valid. The phrase would not include an admiral of a naval station living on shore, and who made his will at his house; *Euston v. Seymour* (1802) cited 2 Curt. 339; 3 Curt. 530; nor a seaman who was in a British port, and whose vessel did not sail for several days after making the will; *Re Corby* (1854) 18 Jur. 634. The vessel need not necessarily be in tidal waters. A seaman engaged with the enemy in a river beyond the flux and reflux of the tide, was held to be "at sea"; *Re Austen* (1853) 17 Jur. 284. A seaman returning home invalidated; *Re Saunders* (1865) 1 P. & D. 16 or on a training ship; *Re McMurdo* (1867) 16 W. R. 283, or in harbor; *Re Lay* (1840) 2 Curt. 375 is at sea. The privilege applies to the whole service, e.g. merchant seamen; *Morrell v. Morrell* (1827) 1 Hag. 51; surgeons in the navy; *Re Saunders* (1865) L. R. 1 P. & D. 16; and sailors; *Re Hayee* (1839) 2 Curt. 338.

An infant over 14 is within the privilege; *Re Farquhar* (1846) 4 N. C. 651.

If made at sea, the will is valid, though the death takes place on shore; *Re Leese* (1853) 17 Jur. 216.

Alterations will *prima facie* be presumed to have been made during the continuance of the military service, or while at sea, as the case may be; *Re Tweedale* (1874) L. R. 3 P. & D. 204.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) 176, (see volume of Dominion Statutes 1895 p. 99,) provides for dealing with the property of a deceased seaman by the English Board of Trade, and s. 177, confers power on the Board to refuse to pay or deliver the property in accordance with a will,

(a) If the will was made on board ship, to any person claiming under the will, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship and,

(b) If the will was not made on board ship, to any person claiming under the will, and not being related to the testator by blood or marriage, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by two witnesses, one of whom is a superintendent or is a minister of religion officiating in the place in which the will is made or where there are no such persons, a justice, British Consular officer, or an officer of customs.

That part of the act applies to all sea-going ships registered in the United Kingdom. Also to all sea-going British ships registered out of the United Kingdom, and the owners, masters and crews thereof, where the crew are discharged, or the final port or destination of the ship is in the United Kingdom; ss. 230, 261.

The English Navy and Marines (Wills) Act 1865 (28 & 29 Vict. c. 72) also makes certain modifications with regard to the wills of petty officers and seamen in the navy for the purpose of protecting them from money lenders.

The wills of soldiers and seamen are subject to the laws in force as regards personality before the Statute of Frauds s. 23. Marriage of the testator will not revoke the will; *Doe v. Barford* (1815) 4 M. & S. 10, but marriage and birth of issue conjointly would do so. *Jarman on Wills* 5th Ed. 111.

Affidavits proving a will of a soldier or seaman should contain a full statement of the circumstances relied upon, as shewing that he was in active service or at sea as the case may be; *Re Thorne* (1865) 34 L. J. P. 131; 4 Sw. & T. 36, and two disinterested persons must swear that the signature to a will signed, but not attested, is in the handwriting of the testator; *Re Neville* (1833) 4 Sw. & T. 218; and it must be shown by affidavit that the deceased had at the time of its execution, a knowledge of its contents; *Re Hackett* (1859) 4 Sw. & T. 220; and if the will is verbal only the substance of the declaration must be shown, and it must appear that the deceased intended it to be testamentary.

Gifts to Witnesses. The Statute of Frauds required witnesses to wills of land to be credible. If, therefore, a witness to a will was a devisee, he could not be heard in proof of it; *Tucker v. Sanger* (1824) 13 Price 119, and the will was consequently invalid. The Statute 25 Geo. II. c. 6, which was in force in Ontario until 1874, enacted that only the devise, legacy, etc., to the witness should be void, and that such person should be admitted as a witness to the will. After conflicting decisions it was settled that the Statute did not apply to wills of mere personal estate; *Hopkins v. Hopkins* (1883) 3 O.R. 223; *Foster v. Banbury* (1829) 3 Sim. 40; *Emmanuel v. Constable* (1827) 3 Russ. 436; *Brett v. Brett* (1826) 3 Add. 210, 1 Hagg. 587. A devise to one of three witnesses was void although the will would have been sufficiently attested without him; *Little v. Aikman* (1869) 28 U.C.R. 337; *Doe d. Taylor v. Mills* (1833) 1 Moo & R. 288; *Hopkins v. Hopkins* (1883) 3 O.R. 223. The Statute 25 Geo. II. c. 6 did not make a will good if one of the witnesses was not credible by reason of a devise to the spouse of the witness, and where the husband of a married woman, to whom a devise was made, was one of two witnesses to a will, the will was invalid; *Ryan v. Devereux* (1866) 26 U.C.R. 100, but see *Crawford v. Boyd* 22 Gr. 398 where the devise only was held invalid, citing *Hatfield v. Thorpe* (1822) 5 B. & Ald. 589. A devise of rents was within the Statute of Frauds, and 25 Geo. II. c. 6; *Habergham v. Vincent* (1793) 2 Ves. 204; *Hopkins v. Hopkins* (1883) 3 O.R. 223, and so was a bequest of the produce of real estate converted by the will; *Sheddon v. Goodrich* (1803) 8 Ves. 481; but money due on mortgage was not; *Hassell v. Tynte* (1756) Amb. 318.

Wills made on or since 1st January, 1874, require attestation to pass either real or personal property, and a beneficial devise or bequest to a witness, or the spouse of a witness, will be void, but the will itself will be valid. Where a devise or bequest is to two as joint tenants and one is a witness, the other will take the whole; *Re Fleetwood, Sidgreaves v. Brewer* (1880) 15 Ch. D. 594; *Young v. Davies* (1863) 32 L.J. Ch. 372; *Farewell v. Farewell* (1892)

22 O.R. 573; and on a devise to a class as tenants in common those not attesting will take the whole; *Fell v. Biddolph* (1875) L.R. 10 C.P. 701. A third witness who attests the will as a token of approval, or as signifying acceptance of executorship cannot take a legacy thereunder; *Cozens v. Crout* (1873) 42 L.J.Ch. 840; *Re Forest* (1802) 2 Sw. & T. 834; *Re Hickman* (1867) 16 L.T. 435. But where the Court is satisfied either by evidence, or by the position of the signature, that the signature is not really an attestation of the will, the signature may be excluded from the probate; *Re Murphy* (1873) 8 Ir. R. Eq. 300; *Re Sharman* (1869) L.R. 1 P. & D. 661; *Re Smith* (1890) 15 P.D. 2; and the legacy will not be void; *Randfield v. Randfield* (1861) 8 H.L.C. 226. Where the will was attested by two marksmen, and signed also by two other persons as witnesses, their signatures were treated as those of attesting witnesses and not merely as verifying the attestation of the marksmen, and a legacy to the wife of one failed; *Wigan v. Rowland* (1853) 11 Hare 157.

Where a will gave a legacy to a person if he survived the period of distribution, and words were struck out of the will taking away the condition of survivorship, and a legatee witnessed the alteration, his representatives were excluded from participation; *Gaskin v. Rogers* (1806) L.R. 2 Eq. 284.

A solicitor who is appointed executor cannot receive the benefit of a clause entitling him to profit costs if he is one of the attesting witnesses; *Re Barber, Burgess v. Vinnicome* (1886) 31 Ch. D. 665; *Re Pooley* (1889) 40 Ch. D. 1.

A codicil confirming a will, will render valid bequests made to an attesting witness to the will, who is not a witness to the codicil; *Anderson v. Anderson* (1872) L.R. 13 Eq. 381; *Purcell v. Bergin* (1893) 20 A.R. 535. The marriage, after attestation of a will, of a devisee to one of the attesting witnesses will not affect the validity of the devise; *Thorpe v. Bestwick* (1881) 6 Q.B.D. 311. The attestation of a codicil by a legatee will not affect a bequest to him under the will, although the codicil revokes other bequests, and therefore indirectly benefits him; *Gwiney v. Gwiney* (1855) 3 Drew. 208; *Tempest v. Tempest* (1856) 2 K. & J. 635; *Re Marcus, Marcus v. Marcus* (1888) 37 L.T. 399; *Denne v. Wood* (1826) 4 L.J.O.S. 57. But where a witness to a codicil was interested under a parol trust by which the property was to be applied as requested by the testatrix, her interest as one of the objects of the trust in the property bequeathed by the codicil failed; *Re Fleetwood* (1880) 15 Ch. D. 594. Only beneficial devises or bequests fail. Where a legacy was given "to Brompton Church, to be disposed of as Dr. Irons (one of the witnesses) wishes" it was good; *Cresswell v. Cresswell* (1868) L.R. 6 Eq. 69.

Where a life interest fails owing to the life tenant or his wife being a witness, the remaindermen, if in existence, take immediately; *Re Clark, Clark v. Randall* (1886) 31 Ch.D. 72; but if not in existence the life interest must be treated as undisposed of until the remaindermen come into existence; *Re Townsend, Townsend v. Townsend* (1887) 34 Ch.D. 357.

Revocation by Marriage. Every will of a man who died between 31st December, 1868, and 13th April, 1897, though made in contemplation of marriage, was revoked by marriage, unless it was in exercise of a power of appointment over property in which the testator's estate had no interest in default of appointment; *Re Cadywold* (1858) 1 Sw. & T. 34. Section 20(a) (b) now preserves wills expressly stated to be made in contemplation of marriage, and also enables dispositions in favor of intended husbands and wives to be effectually made. A will valid at the time of execution, and not revoked by marriage according to the law of the testator's domicile at the time of the marriage, is not invalidated by a subsequent change of domicile; *Re Reid* (1866) L.R. 1 P. & D. 74. To effect a revocation by marriage the marriage must be valid; *Mette v. Mette* (1859) 1 Sw. & T. 416; *Warter v. Warter* (1890) 15 P.D. 152.

Where the will is in exercise of a power of appointment, and the property would, in default of appointment, pass under the settlement, the will is not revoked, although the persons who take in default of appointment are the same as would have taken on an intestacy under the Statute of Distributions; *Re Fitzroy* (1858) 1 Sw. & T. 133; *Re Fenwick* (1867) L.R. 1 P. & D. 319. And where the property is, in default of appointment, to devolve on the person or persons who on the decease of the testator should be her next of kin, the will is within the exception contained in s. 20(c) and is not revoked; *Re McVicar* (1869) L.R. 1 P. & D. 671; *Re Worthington* (1872) 20 W.R. 260. Where there are mutual wills, the revocation of one by marriage does not revoke the other; *Huckley v. Simmons* (1798) 4 Ves. 160.

Where the will comprises property subject to a power and other property which belongs absolutely to the testator, the execution of the power remains good notwithstanding the marriage, and limited administration will be granted; *Re Russell* (1890) 15 P.D. 111.

Revocation by Another Will. An express clause of revocation in a subsequent will, of course, revokes a former will, if the subsequent will is duly executed; *Re Parker* (1873) 20 Gr. 389; *O'Neill v. Owen* (1889) 17 O.R. 525.

A subsequent will also revokes a prior one, to the extent of its inconsistency therewith. Several testamentary papers may, however, be admitted to probate as one will, although each is described as the *last* will and testament; *Cutto v. Gilbert* (1854) 9 Moo. P.C. 131; *Freeman v. Freeman* (1854) 5 D. M. & G. 704. But in construing two documents of different dates, the use of the phrase "*last* will and testament" in the later one is of value in determining whether that will is so inconsistent as to revoke the prior one; *Plenty v. West* (1852) 16 Beav. 173.

Revocation by Burning. Singeing the cover is insufficient; *Doe d. Reed v. Harris* (1837) 6 A. & E. 209. But a slight burning or even singeing of the will itself is, perhaps, sufficient, e.g., if the testator threw the will on the fire and, without his knowledge, someone saved it; *Bibb v. Thomas* (1776) 2 W. Bl. 1043.

Revocation by Tearing. Erasing the signature with a knife is a sufficient tearing; *Re Morton* (1887) 12 P.D. 141, and so *a fortiori* is tearing off the signature; *Doe d. Crooks v. Cummings* (1850) 6 U.C.R. 305; *Hobbs v. Knight* (1838) 1 Curt. 768; *Re Lewis* (1858) 1 Sw. & T. 31; *Maynes v. Hazleton* (1881) 44 L.T. 586; or even the seal; *Price v. Price* (1858) 3 H. & N. 341. But tearing by the testator in a fit of anger and afterwards putting the pieces together as well as he could will not effect a revocation; *Re Colberg* (1841) 2 Curt. 832. Cutting out a particular clause is revocation *pro tanto*; *Re Cooke* (1847) 5 N.C. 390; *Re Woodward* (1871) L.R. 2 P. & D. 206; *Re Maley* (1887) 12 P.D. 134; *Re Leach* (1890) 63 L.T. 111. Cutting off the names of the witnesses is sufficient; *Evans v. Dallow* (1862) 31 L.J.P. 128; but see *Re Wheeler* (1880) 49 L.J.P. 29; and so is cutting off signatures placed at the end of the first five sheets, and striking a pen through the last signature, with the word "cancelled" followed by the testator's initials; *Re Harris* (1864) 3 Sw. & T. 485. Tearing a later will with the intention, declared subsequently, of reviving a prior one, will be an effective revocation to prevent probate being granted of the mutilated will; *Re Weston* (1869) L.R. 1 P. & D. 633. Where the name of an attesting witness was erased and another name inserted but the will was not re-executed, probate was granted of the will in its original condition; *Re Greenwood* (1892) P. 7.

Revocation by "Otherwise Destroying." The phrase "otherwise destroying" in s. 22 is to be read as *ejusdem generis* with the modes before mentioned. There must be a destruction of the substance or contents of the will, or a complete effacement of the writing, as by pasting over it a blank paper; *Re Horsford* (1874) L.R. 3 P. & D. 211.

If the will be executed in duplicate, the destruction of one part *animo revocandi* is a revocation, but evidence of declarations of the testator of the destruction is inadmissible; *Atkinson v. Morris* (1897) P. 40.

Destruction must be Authorized by Testator. A destruction of a will without the authority of the testator, though in his presence, is not a revocation; *Mills v. Millward* (1889) 15 P.D. 20; and it is doubtful whether a subsequent ratification of the act would be equivalent to destruction by his authority; *ib.* Of course, destruction of the will after death of the testator is not a revocation, and such destruction will not prevent probate being granted of such part of the will as can be recovered or otherwise proved; *Re Leigh* (1892) P. 82. The destruction, when authorized, must be in the presence of the testator; *Re Tobey* (1875) 6 P.R. 272; *O'Neill v. Owen* (1889) 17 O.R. 525.

Revocation by Obliteration. The Statute of Frauds s. 6, allowed a will or a portion thereof to be obliterated by the testator himself, or by some one in his presence, and by his directions and consent. Now an obliteration is ineffectual unless signed by the testator, and attested by the witnesses in the manner prescribed by s. 23, or unless the words or effect of the will before such obliteration are not apparent. Glasses may be used to discover what words were attempted to be obliterated; *Cheese v. Lovejoy* (1877) 2 P.D. 251, but not chemicals; nor will pieces of paper pasted completely over a bequest be removed; *Re Horsford* (1874) L.R. 3 P. & D. 211; but if pasted only over the

amount of the bequest, leaving the name of the legatee apparent, the court may infer that the intention was to substitute another amount, and will apply the doctrine of dependent relative revocation, and will order the pieces to be removed, and will give effect to the original words; *ib.*

Revocation by Cancellation. The Statute of Frauds s. 6, also allowed a cancellation in the same manner as an obliteration, but the present statute by s. 23, prescribes similar formalities for a cancellation to those just noticed. Probate will be granted of a will in its original shape though a pen has been drawn through every part including the signatures; *Stephens v. Taprell* (1840) 2 Curt. 458. *Re Fary* (1851) 15 Jur. 1114; *Shaw v. Thorne* (1846) 4 N.C. 649; *Re Brewster* (1860) 29 L.J. P. 69; unless the cancellation is properly signed and attested.

Alterations. Where an alteration appears in a will, it must be proved that the alteration was made before execution and had the sanction of the testator; *Field v. Livingston* (1867) 17 C.P. 15; *Greville v. Greville* (1850) 7 Moo. P.C. 320.

If alterations are made after execution, they must be signed and attested in the same manner as a will; *Smith v. Merriam* 5 Gr. 383.

Dependent Relative Revocation. Where the act of cancelling is done with reference to another act, meant to be an effectual disposition, it will be a revocation or not, according as the relative act is efficacious or not; *O'Neill v. Owen* (1889) 17 O.R. 525. If the meaning of the testator in destroying a will is "As I have made a fresh will, my old one may now be destroyed" the old will is not revoked if the new one be not in fact made; *Dancer v. Crabb* (1873) L.R. 3 P. & D. 98, and cancellation under mistake of law seems to be equally inefficacious; *Perrott v. Perrott* (1811) 14 East at p. 440. Destruction of a will with the intention of making a clear copy is not a revocation; *Re Tozer* (1842) 2 N.C. 11; *Re Kennett* (1863) 2 N.R. 461; *Re Applebee* (1828) 1 Hag. 143.

Revival. A will which has been destroyed cannot be revived; *Hale v. Tokelove* (1850) 2 Rob. Ecc. 318; *Newton v. Newton* (1861) 12 Ir. Ch. 118; *Rogers v. Goodenough* (1862) 2 Sw. & T. 342. S. 24 was designed to do away with the revival of wills by implication. An intention to revive must appear on the face of the codicil, which is relied upon as reviving a revoked will either (1) by express words referring to the will as revoked, and importing an intention to revive the same; or (2) by a disposition of the testator's property inconsistent with any other intention; or (3) by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention to revive; *Re Steele* (1868) L.R. 1 P. & D. 575; *Macdonell v. Purcell* (1894) 23 S. C. R. 101. Where a testator made a will in 1890, and revoked it by another will in January, 1891, and in March, 1891, he made a codicil, in which after stating that "I will and devise that the following be taken as a codicil to my will of 14th May, 1890," he appointed an executor in place of an executor named in the will, it was held that the codicil was insufficient to revive the will of 1890; *Macdonell v. Purcell* (1894) 23 S.C.R. 101; see also per *Hagarty, C.J.O.*, *Purcell v. Bergin* (1893) 20 A.R. 535. To the same effect is *Re Turner* (1891) 64 L.T. 805.

Where a will has been partly revoked by codicil, and is afterwards wholly revoked, a revival of the will will generally set up the will subject to, and as varied by, the codicils which partially revoked it; *Crosbie v. Macdonal* (1799) 4 Ves. 610, 9 R.R. 161; *Green v. Tribe* (1878) 9 Ch. D. 231; *Re Carritt* (1892) 66 L. T. 379, unless an intention to the contrary is shewn by the words of the reviving codicil, and the surrounding circumstances as in *McLeod v. McNab* (1891) A. C. 471.

Where there was a will with several codicils prepared by one solicitor, and a subsequent will together with two codicils referring to it, which codicils were subsequent in date to the first will, the second will and codicils were admitted to probate; *Re Courtenay* (1891) 27 L.R. Ir. 507; see also *Re Lewis* (1861) 7 Jur. N.S. 220; *Re Van Cutsem* (1890) 63 L.T. 252.

Where a will was merely revoked by implication, by an intervening will, and a codicil was executed, purporting to be a codicil to the earlier will, the Court granted probate of the three documents, leaving their interpretation to a court of construction; *Re Stedham* (1881) 6 P.D. 205; *Re Dyke* (1881) 6 P. D. 207; *Re Chilcote* (1897) P. 223, and see *Re Edge* (1882) 9 L. R. Jr. 516.

Where a legacy of £100 is given to an executor, which is increased to £500 by a codicil, and the codicil is then revoked, the gift by will is not revived; *Boulcott v. Boulcott* (1853) 2 Drew. 25.

Dealings with Property by Testator. Before 1869 any alienation by the testator of lands devised by the will effected a revocation of the devise even though he re-acquired the same or some freehold estate therein; *Loughhead v. Knott* (1868) 15 Gr. 34; and even though the alienation were to the devisee; *Doe d. Marsh v. Scarborough* (1849) 5 U.C.R. 499. S. 25 alters this rule, and a will now passes to a devisee, all the estate of which the testator dies seised. If a testator is lessee at the date of the will, and subsequently acquires the fee, the devise will carry the fee; *Cox v. Bennett* (1868) L.R. 6 Eq. 422; *Struthers v. Struthers* (1864) 5 W.R. 809. *Sinclair v. Brown* (1870) 17 Gr. 333. A contract for sale of land devised by will will effect a conversion, and the purchase money will constitute part of the personal estate; *Farrar v. Winterton* (1842) 5 Beav. 1; *Moor v. Raisbeck* (1841) 12 Sim. 123; *Ross v. Ross* (1873) 20 Gr. 203.

Will to Speak from Death. After acquired lands would not pass under a will of a testator dying before 1869; *Plumb v. McManon* (1872) 32 U.C.R. 8; *Whateley v. Whateley* (1867) 14 Gr. 430, 13 Gr. 436. The will now speaks from death, but only with reference to the property comprised in it, and not with reference to the objects of gift; *Violet v. Brookman* (1857) 26 L.J. Ch. 308; *Bullock v. Bennett* (1855) 7 D. M. & G. 283; *Langdale v. Briggs* (1856) 8 D. M. & G. 436.

Where a testator devises to his wife all the remainder of his real estate, and then proceeds to enumerate the lands comprised in such remainder, after acquired lands will not pass; *Crombie v. Cooper* (1877) 24 Gr. 470; *Vansickle v. Vansickle* (1882) 1 O.R. 107, 9 A.R. 352. And where a testator devised his property on H street to A, and the residue of his estate at the time of his death to B, and subsequently acquired other property on H street, it was held that the will showed sufficiently a contrary intention within s. 26, that the will should not speak from death as to the property on H street; *Morrison v. Morrison* (1885) 9 O.R. 223, 10 O.R. 303.

Where the devise or bequest is specific as "my ring" or "my horse" after acquired property will not pass, but where it is of that which is generic, of that which may be increased or diminished, something more is required on the face of the will for the purpose of indicating a "contrary intention"—that after acquired property answering the description shall not pass; *Goodland v. Burnett* (1855) 1 K. & J. 341; *Castle v. Fox* (1871) L.R. 11 Eq. 542; *Stevens v. Bayley* (1858) 8 Ir. C.L.R. 410; *Re Otley and Ilkley Ry. Co.* (1865) 34 Beav. 525.

Where a testator released debts due by his son "and all other moneys due from him to me" the release was held to extend to moneys subsequently advanced; *Everett v. Everett* (1877) 7 Ch. D. 428.

Where the testator uses the words "now vested in me" as to part of his property, and as to other parts refers to such premises as shall be vested in me at my death, the word "now" will be construed to refer to the date of the will; *Cole v. Scott* (1848) 16 Sim. 259, 1 Mac. & G. 518, but see, *Lilford v. Keck* (1862) 30 Beav. 300.

It is not necessary that the contrary intention should be expressed in so many words; *Cole v. Scott* (1848) 16 Sim. 259, 1 Mac. & G. 518. But the word "now" will generally be insufficient to show such contrary intention; *Hepburn v. Skirving* (1858) 4 Jur. N.S. 651; *Wagstaffe v. Wagstaffe* (1869) L.R. 8 Eq. 229; *Re Champion, Dudley v. Champion* (1893) 1 Ch. 101.

Lapse of Devise of Real Estate. Formerly devises which lapsed by reason of the death of the devisee before the testator, or because they were illegal, enured to the benefit of the heir as on an intestacy; *Jones v. Mitchell* (1823) 1 Sim. & St. 290; *Hutcheson v. Hammond* (1790) 3 B. C. C. 128; *Smith v. Lomas* (1864) 12 W.R. 949. Now they fall into the residue; *Green v. Dunn* (1855) 20 Beav. 6; *Cogswell v. Armstrong* (1855) 2 K. & J. 227.

S. 27 applies however only to devises of real estate or interests therein, where there is an operative residuary devise.

It does not apply to cases where the gift of a sum charged on the devised land fails either by death or by the contingency upon which it is given not happening; *Tucks v. Kayess* (1858) 4 K. & J. 339; *Sutcliffe v. Cole* (1855) 3 Drew. 135.

It was held in *Freme v. Clement* (1881) 18 Ch. D. 499 that where a testator made a will operating as an exercise of a special power of appointment limited to his children the residuary devisee (being an object of the power) would take

property comprised in an appointment which passed by the death of the appointee, but the reasoning of this decision was disapproved in *Holyland v. Lewin* (1884) 26 Ch. D. 266.

General Devise may Include Leaseholds. Before s. 28 a general devise of lands would include leaseholds if there were no freehold lands to answer the description; *Rose v. Bartlett* (1833) Cro. Car. 293, even though described as freehold; *Day v. Trig* (1715) 1 P.W. 286; *Doe v. Dunning v. Cranstown* (1840) 7 M. & W. 1; *Nelson v. Hopkins* (1852) 21 L.J. Ch. 410. The effect of s. 28 is that leaseholds will pass under a general devise of lands at a particular place unless a contrary intention appears on the will; *Wilson v. Eden* (1852) 18 Q.B. 474, 16 Beav. 153; *Moase v. White* (1876) 3 Ch. D. 763; *Matthews v. Matthews* (1867) L. R. 4 Eq. 278; *Greenwell v. Davison* (1888) 58 L.T. 304, but a mere general devise of real estate will not include leaseholds; *Butler v. Butler* (1884) 28 Ch. D. 66, unless there are no freeholds; *Nelson v. Hopkins* (1852) 21 L.J. Ch. 410. If there is sufficient on the face of the will to satisfy a reasonable man that the intention of the testator was not by the word "lands" to pass leasehold estates, the same will not pass by the devise; *Prescott v. Barker* (1874) L.R. 9 Ch. 174.

Powers of Appointment. A general power to appoint property in any manner the testator may think proper will be executed by a general devise or bequest unless a contrary intention appears; *Re Spooner* (1851) 2 Sim. N. S. 129; *Clifford v. Clifford* (1851) 9 Hare 675; *Atty.-Gen. v. Brackenbury* (1863) 1 H. & C. 782; *Re Jones, Greene v. Gordon* (1887) 34 Ch. D. 65, even if made before the instrument creating the power; *Patch v. Shore* (1864) 2 Dr. & Sm. 589; *Hodson v. Dancer* (1868) 16 W. R. 1121; and although the power was created by the testator himself subsequently to the will; *Boyes v. Cook* (1880) 14 Ch. D. 53; *Re Hermando, Hermando v. Sawtell* (1884) 27 Ch. D. 284; *Airey v. Bower* (1887) 12 App. Cas. 263. The contrary intention must be found in the will, and not inferred from circumstances; *Boyes v. Cook* (1880) 14 Ch. D. 53, but it may be found on the comparison of two successive wills; *Pettinger v. Ambler* (1865) L. R. 1 Eq. 510; or from the fact that the bequest is of personal estate "not otherwise effectually disposed of"; *Moss v. Harter* (1854) 2 Sm. & G. 458. If the testator refers to a power different from the one possessed at his death, a contrary intention will be presumed; *Thompson v. Simpson* (1881) 44 L. T. 710.

Sec. 29 does not extend to special or limited powers; *Re Williams, Foulkes v. Williams* (1889) 42 Ch. D. 93; e.g. a power to appoint to any one except A.; *Re Bryon, Williams v. Mitchell* (1891) 3 Ch. 474, except perhaps after A's death; *ib.* The section extends however to a power exercisable only by will; *Re Powell* (1870) 18 W. R. 228. Where the power requires the will to refer to the power the section has no application; *Phillips v. Cayley* (1889) 43 Ch. D. 222.

Devise passes whole Estate. The Canadian Statute 4 Will. IV., c. 1, s. 50, was substantially to the same effect as s. 30. A devise over in the event of intestacy does not show a contrary intention; *Farrell v. Farrell* (1867) 26 U. C. R. 652; nor does the fact that words of inheritance follow some devise and not others; *Wisden v. Wisden* (1854) 2 Sm. & G. 396. A devise to two as joint tenants for life with power to them to sell for life followed by a direction that the survivor should take the property given to the other, gives to the survivor a fee; *Chellew v. Martin* (1873) 21 W. R. 671. Where a devise could not come into existence unless a prior devise in the same will was construed as a life estate, a sufficient contrary intention was held to appear; *Gravenor v. Watkins* (1871) L. R. 6 C. P. 500. A devise to A. and B. as joint tenants and to the survivor of them, his heirs and assigns will be construed as a devise to them for life with a contingent remainder in fee to the survivor; *Quarm v. Quarm* (1892) 1 Q. B. 184.

Meaning of "Heirs." In a will made after primogeniture was abolished, a devise on certain contingencies to "the heirs" of a named person will include all his brothers and sisters and not his eldest brother only; *Sparks v. Wolff* (1898) 25 A. R. 326; 29 S. C. R. 585.

"Die without Issue." Before 1874 an effect was given to a devise after the death of one to whom an estate for life was given if he should die without issue. *Prima facie* these words meant "on an indefinite failure of issue," and were exactly equivalent to "on the extinction of the heirs of his body." Such a devise was held by implication to express an intention that the heirs of the body of the devisee should take. They could not take as purchasers and therefore the words were construed as words of limitation and

gave the devise for life an estate tail. But if there was enough on the face of the will to show that the words "die without issue" did not mean "on an indefinite failure of issue," but were by the context or other legitimate grounds of construction shewn to have been used as meaning "if no such issue shall be born" or "never having had issue" or "die without leaving issue living at his death," the will might be construed according to the meaning. The presumption was against such a construction, but it was only a presumption which might be rebutted; *Bowen v. Lewis* (1884) 9 App. Cas. 907, 917, 925. While there was authority for expanding a life estate into an estate tail in order to provide for heirs of the body, there was no authority for expanding it into a fee simple; *Coltsmann v. Coltsmann* (1868) L. R. 3 H. L. 121.

Where a devise made in 1842 was to A, and in case of his dying without issue the property was to be sold by the executors, it was held that the event contemplated was a failure of issue at A's death; *Chisholm v. Emery* (1871) 18 Gr. 467, 17 Gr. 403, and so where the property was to be divided equally among the survivors; *Crawford v. Broddy* (1896) 26 S. C. R. 345, see also *Gray v. Richford* (1878) 2 S. C. R. 431; *Forsyth v. Galt* (1871) 22 C. P. 115, 21 C. P. 408; *Stinson v. Stinson* (1874) 21 Gr. 116; *Dale v. McGuinn* (1858) 15 Gr. 101; *Little v. Billings* (1880) 27 Gr. 353; *Tyrwhitt v. Denison* (1880) 28 Gr. 112; *Scott v. Duncan* (1881) 29 Gr. 496. In the absence of a contrary intention the first taker will now take an estate in fee with an executory devise over; *Cowan v. Allen* (1896) 26 S. C. R. 292. S. 32 is confined to the expressions mentioned therein and has no application to cases where the expression is "die without heirs of the body"; *Davson v. Small* (1874) L. R. 9 Ch. 651; *Re Sallery* (1861) 11 Ir. Ch. R. 236, nor to cases where the expression is combined with other words such as "dying under 21"; *Morris v. Morris* (1853) 17 Beav. 198.

Devise to Trustees. S. 34 is probably another drafting of s. 33. The real history of the two sections is that they are two drafts dealing with the same subject, though both remain in the act of Parliament; *Per Jessel M. R.*, *Freame v. Clement* (1881) 18 Ch. D. 514. Trustees have been held to take an estate in fee from having a power of leasing; *Re Eddel* (1871) L. R. 11 Eq. 559, and a power of maintenance; *Berry v. Berry* (1873) 7 Ch. D. 657, and from being directed to pay debts; *Marshall v. Gingell* (1882) 21 Ch. D. 790.

Death of Beneficiary. Ordinarily when a beneficiary predeceases the testator the devise or bequest to him will lapse. Sections 35 and 36 introduce, however, a fictitious survivorship (1) when the devise is of an estate tail and the devise leaves issue who would be inheritable under the entail (2) when the devise or bequest is to a child or other issue absolutely or for more than a life interest and he dies leaving issue.

The following points have been established with reference to devises and bequests to issue.

(1) The property is treated as if it had belonged to the beneficiary and therefore disposable by his will; *Johnson v. Johnson* (1854) 3 Hare 157; *Re Mason* (1865) 13 W. R. 709; but it is so treated only for the purpose of preventing a lapse and not for any other purpose, e.g. to render the property subject to a covenant by the beneficiary to settle after acquired property; *Pearce v. Graham* (1863) 32 L. J. Ch. 359.

(2) The fictitious survivorship will be given effect to though the issue of the testator may have died before the date of the will; *Mower v. Orr* (1849) 7 Hare 473; *Barkworth v. Young* (1857) 4 Drew. 1; *Wisden v. Wisden* (1854) 2 Sm. & G. 396.

(3) It is not necessary that the issue living at the death of the testator should be the same issue as were living at the death of the beneficiary; *Re Parker* (1862) 1 Sw. & T. 523.

(4) The husband of a deceased beneficiary will be tenant by the curtesy of any real property devised to his wife of which he would have been such tenant if she had owned the property at her death; *Eager v. Furnivall* (1881) 17 Ch. D. 115.

(5) S. 36 does not apply where the devise or bequest is to the testator's children as a class; *Browne v. Hammond* (1858) Johns. 210; *Olney v. Bates* (1855) 3 Drew. 319, even though the class consist of but one person; *Re Harvey*, *Harvey v. Gillow* (1893) 1 Ch. 567, but where money was to be divided equally among "my nine children" the gift was construed to be a gift to persons designated and not to a class and the representative of a deceased child who left issue was held to be entitled to his share; *Re Stansfield*, *Stansfield v. Stansfield* (1880) 15 Ch. D. 84.

(6) Where the gift is to children living at the testators' death, section 36 has no application; *Fullford v. Fullford* (1852) 16 Beav. 565.

(7) The issue must be legitimate; *Hargraff v. Keegan* (1885) 10 O. R. 272.

(8) Where a will directed that the share of a daughter of the testator should be paid to the trustees of her marriage settlement if she survived him it was held that under s. 36 she must be deemed to have survived for all the purposes of the will and that the trustees were entitled though she predeceased the testator; *Re Howe's Trusts* (1883) 22 Ch. D. 663.

(9) The child must be deemed for the purposes of the will to have predeceased the parent, so that a devise by the child to his parent which would by force of the section have carried the property back to the parent will be construed to have lapsed; *Re Hensler, Jones v. Hensler* (1881) 19 Ch. D. 812.

(10) The representative of the deceased child stands in the same position *quoad* the estate as he himself would have done; *Pickersgill v. Rodger* (1876) 5 Ch. D. 163.

Locke King's Act. Section 37 (1) (2) is commonly known as Locke King's Act. s. 37 (3) is taken from 40 & 41 V. c. 34. The latter act has been held to extend to leaseholds by virtue of the words "land or other hereditaments of whatever tenure" *Drake v. Kershaw* (1888) 37 Ch. D. 874. The words "real estate" in s. 37 must receive the same construction by virtue of s. 9 (2) and in view of s. 9 (4) s. 37 (3) was probably unnecessary; see *Broadbent v. Groves* (1883) 24 Ch. D. 100. The object of the section is to throw the mortgage debt on the mortgaged property; *Goodwin v. Lee* (1854) 1 K. & J. 378; *Swainson v. Swainson* (1857) 6 D. M. & G. 652. An equitable mortgage is within the section; *Pembroke v. Friend* (1859) 1 J. & H. 132; *Coleby v. Coleby* (1865) L. R. 2 Eq. 803; *Davis v. Davis* (1876) 24 W. R. 962. Where lands had been delivered in execution under a writ of elegit, the charge created by the judgment was held to be a mortgage under the section; *Re Anthony, Anthony v. Anthony* (1892) 21 Ch. 450. The lands must however be specifically charged, not subject merely to a general lien; *Dunlop v. Dunlop* (1882) 21 Ch. D. 583, 590. The section will apply though the land be in a foreign country; *Smith v. Moreton* (1868) 37 L. J. Ch. 6. An amount payable to a lessee by his lessor as the purchase money of ground rents of houses built by the lessee is a vendor's lien within s. 9 (4). *Re Kidd, Brooman v. Withall* (1894) 3 Ch. 558. The Devolution of Estates Act does not supersede but is to be read in conjunction with ss. 37 & 38; *Mason v. Mason* (1887) 13 O. R. 725. Section 37 does not apply to an estate tail and the mortgagor's general estate will therefore be liable to pay an encumbrance created by him on entailed lands; *Re Anthony, Anthony v. Anthony* (1893) 3 Ch. 498. The Crown is entitled to the benefit of the section; *Dacre v. Patrickson* (1859) 1 Dr. & Sm. 186. The section does not apply to a mortgage by a partner of his own property to secure a partnership debt where the partnership assets are at his death sufficient to pay all its debts; *Re Ritson, Ritson v. Ritson* (1899) 1 Ch. 128.

In deciding whether a sufficient contrary intention is shown, each case must rest on its own circumstances; *Rolfe v. Perry* (1863) 3 D. J. & S. 486. To amount to a contrary intention the direction must distinctly and unmistakably refer to the mortgage debt; *Nelson v. Page* (1868) L. R. 7 Eq. 25; *Mason v. Mason* (1887) 13 O. R. 725. A devise "free from all encumbrances" is of course sufficient; *Toronto General Trusts Company v. Irwin* (1896) 27 O. R. 491. Where land was specifically devised, and the testatrix by her will, charged her estate with the payment of all encumbrances upon such land, the devisee was held to be entitled to have the encumbrance paid out of the other estate in priority to a pecuniary legatee; *Scott v. Supple* (1893) 23 O. R. 393, but see *Re Smith, Smith v. Smith* (1899) 1 Ch. 365. Where different portions of the property subject to a mortgage is devised to different persons the devisees bear the encumbrance ratably according to the value of their respective portions; *Newmarch v. Storr* (1878) 9 Ch. D. 17, although some portions pass under specific devise and another under a residuary devise; *Gibbins v. Eyden* (1860) L. R. 7 Eq. 375; *Sackville v. Smyth* (1874) L. R. 17 Eq. 153, and where a portion of the property is exonerated from the mortgage the devisee of the remainder will be charged only with his ratable proportion; *Toronto General Trusts Co. v. Irwin* (1896) 27 O. R. 491.

Where a deceased person has in his lifetime entered into a contract for the erection of buildings upon his land, the heir-at-law or devisee is entitled to have the buildings completed at the expense of the personal estate; *Cooper v. Jarman* (1866) L. R. 3 Eq. 98; *Holt v. Holt* (1864) 2 H. & M. 118; *Re Day, Sprake v. Day* (1898) 2 Ch. 510.

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CHAPTER 133.

An Act respecting the Limitation of Actions relating to Real Property, and the time of Prescription in certain cases. (*As amended by 62 V. c. 11, s. 16.*)

SHORT TITLE, s. 1.
INTERPRETATION, s. 2.
COMMENCEMENT OF ACT AS TO ABSENTEES, s. 3.
PERIOD OF LIMITATION—TEN YEARS AFTER RIGHT OF ACTION ACCRUED, s. 4.
WHEN RIGHTS OF ACTION DEEMED TO HAVE ACCRUED :
On dispossession, s. 5 (1).
On death, s. 5 (2).
On alienation, s. 5 (3).
Wild lands, s. 5 (4).
Rent under lease, s. 5 (5).
Tenancy from year to year, s. 5 (6).
Tenancy at will, s. 5 (7, 8).
Forfeiture or breach of condition, s. 5 (9, 10).
Future estates, s. 5 (10-12).
PERIOD OF LIMITATION AS TO CERTAIN FUTURE ESTATES, s. 6.
ADMINISTRATOR TO CLAIM FROM DEATH OF DECEASED, s. 7.
ENTRY NOT TO BE DEEMED POSSESSION, s. 8.
CONTINUAL CLAIM NOT TO PRESERVE RIGHTS, s. 9.
DESCENT CAST, WARRANTY, ETC., NOT TO BAR RIGHT OF ENTRY OR ACTION, s. 10.
POSSESSION OF ONE JOINT TENANT, ETC., NOT TO BE DEEMED POSSESSION OF ANOTHER, s. 11.
POSSESSION OF RELATIONS NOT TO BE DEEMED POSSESSION OF THE HEIRS, s. 12.
ACKNOWLEDGMENT TO BE EQUIVALENT TO POSSESSION OR RECEIPT OF RENT, s. 13.

RECEIPT OF RENT TO BE DEEMED RECEIPT OF PROFITS, s. 14.
RIGHT OF PARTY OUT OF POSSESSION EXTINGUISHED AT THE END OF THE PERIOD LIMITED, s. 15.
ACTIONS FOR ARREARS OF DOWER, RENT AND INTEREST TO BE WITHIN SIX YEARS, ss. 16-18.
MORTGAGOR OUT OF POSSESSION BARRED AFTER TEN YEARS, s. 19.
ACKNOWLEDGMENTS, ss. 20-21.
MORTGAGEE BARRED AFTER TEN YEARS, s. 22.
ACTIONS FOR MONEY CHARGED ON LAND AND LEGACIES, ss. 23, 24.
ACTIONS FOR DOWER, ss. 25, 26.
BAR OF ESTATES TAIL, ss. 27-29.
LIMITATION OF EQUITABLE CLAIMS, ss. 30-33.
EASEMENTS :
Profits à prendre, s. 34.
Rights of way, water and other easements, s. 35.
Light, s. 36.
Interruptions, s. 37.
Pleadings in actions claiming easements, etc., ss. 38-39.
Disabilities in cases of, ss. 40-42.
DISABILITIES AND EXCEPTIONS :
Easements, ss. 40-42.
In cases of land or rent, ss. 43-45.
Five years allowed from the termination of disability, s. 43.
Twenty years the utmost allowance, s. 44.
No further time for a succession of disabilities, s. 45.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title

1. This Act may be cited as "*The Real Property Limitation Act.*" R. S. O. 1887, c. 111, s. 1.

Interpretation.

2. Where the following words occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

"Land."

1. "Land" shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land (and to chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency;

"Assurance."

2. "Assurance" shall mean any deed or instrument (other than a will) by which any land may be conveyed or transferred; and

"Rent."

3. "Rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land. R. S. O. 1887, c. 111, s. 2.

Commence-
ment of Act.
C. S. U. C. c.
88; 32 V. c. 7,
s. 22.

3. This Act shall commence and be deemed to have taken effect, and chapter 88 of the Consolidated Statutes of Upper Canada, and section 22 of the Act passed in the thirty-second year of Her Majesty's reign, and chaptered 7, to have been repealed, on and from the first day of July in the year of our Lord 1877, as respects any person who on and for twelve months continuously after the twenty-first day of December, 1874, resided without this Province, and is a person entitled to make an entry or distress or to bring an action to recover any land or rent; or so resident, is a mortgagor, or person entitled to redeem within the meaning of sections 19, 20, or 21 of this Act; or so resident is a person entitled to, or claiming under a mortgage within the meaning of section 22; or so resident is a person entitled to bring an action, or other proceeding within the meaning of section 23; or so resident is a person entitled to an action or other proceeding within the meaning of section 24; or so resident is a person claiming an estate, interest or right, to take effect after or in defeasance of an estate tail within the meaning of section 29; or so resident is a person entitled to demand dower; and except as respects the persons, and in the cases, mentioned above in this section, this Act shall be deemed to have commenced and taken effect and the said Acts to have been repealed on and from the first day of July, 1876. R. S. O. 1887, c. 111, s. 3.

LAND OR RENT.

4. No person shall make an entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. R. S. O. 1887, c. 111, s. 4.

No land or rent to be recovered but within ten years after the right of action accrued. Imp. Acts 3-4 Wm. iv. c. 27, s. 2; 37-38 V. c. 57, s. 1.

5. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned;

When the right shall be deemed to have first accrued.

1. Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in the receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

On dispossession. Imp. Act, 3-4 W. iv. c. 27, s. 3.

2. Where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

On death. Imp. Act, 3-4 W. iv. c. 27 s. 3.

3. Where the person claiming such land or rent claims in respect of an estate or interest in possession, granted, appointed or otherwise assured by any instrument other than a will, to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument has been in possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming, as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

On alienation Imp. Act, 3-4 W. iv. c. 27, s. 3.

4. In the case of lands granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such

As to lands not cultivated or improved.

grantee or such person claiming under him while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of ten years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken as aforesaid.

Proviso.

When right deemed to accrue where rent amounting to \$4 reserved by lease in writing has been wrongfully received.

Imp. Act, 3-4 W. iv. c. 27, s. 9.

5. Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of \$4 or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

Imp. Act, 3-4 W. iv. c. 27, s. 8.

6. Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received, whichever last happened.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

Imp. Act, 3-4 W. iv. c. 27, s. 7.

7. Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

Case of mortgagor or *cestui que trust*.

8. No mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of the next preceding subsection to his mortgagee or trustee.

9. Where the person claiming such land or rent, or the person through whom he claims, has become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.

In case of forfeiture or breach of condition. Imp. Act, 3-4 W. iv. c. 27, s. 3.

10. Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession as if no such forfeiture or breach of condition had happened.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession. Imp. Act, 3-4 W. iv. c. 27, s. 4.

11. Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

In case of future estates. Imp. Act, 34 W. iv. c. 27, s. 3.

12. A right to make an entry or a distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession, by the determination of any estate or estates in respect of which such land has been held or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent.

Further provision for case of future estates. Imp. Act, 3-4 W. iv. c. 27, s. 5. 37-38 V. c. 57, s. 2.

6.—(1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.

Time limited as to future estates when person entitled to the particular estate out of possession, etc. Imp. Act, 37-38 V. c. 57, s. 2.

The case of bar of future estate and of a subsequent interest created after right of entry, etc., accrued to owner of particular estate.
Imp. Act, 37-38 V. c. 57, s. 2.

(2) If the right of any such person to make such entry or distress, or to bring any such action, has been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined as aforesaid, shall make any such entry or distress, or bring any such action, to recover such land or rent.

When the right to an estate in possession is barred, the right of the same persons to future estates shall also be barred.
Imp. Act, 3-4 W. iv. c. 27, s. 20.

(3) Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period, hereinbefore limited, which is applicable in such case, and such person has, at any time during the said period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession. R. S. O. 1887, c. 111, s. 6.

An administrator to claim as if he obtained the estate without interval after death of deceased.
Imp. Act, 3-4 W. iv. c. 27, s. 5.

7. For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. R. S. O. 1887, c. 111, s. 7.

A mere entry not to be deemed possession.
Idem s. 10.

8. No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon. R. S. O. 1887, c. 111, s. 8.

No right to be preserved by continual claim.
Idem s. 11.

9. No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. R. S. O. 1887, c. 111, s. 9.

No descent, warranty, etc., to bar a right of entry or action.
Idem s. 39.

10. No descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land. R. S. O. 1887, c. 111, s. 10.

Possession of one coparcener, etc., not to be the pos-

11. Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common have been in possession or receipt of the entirety, or more than

his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them. R. S. O. 1887, c. 111, s. 11.

session of the others.
Imp. Act, 3-4 W. iv. c. 27, s. 12.

12. Where a relation of the persons entitled, as heirs, to the possession, or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs. R. S. O. 1887, c. 111, s. 12.

Possession of relations not to be the possession of the heirs.
Idem s. 13.

13. Where any acknowledgment of the title of the person entitled to any land or rent has been given to him or to his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. R. S. O. 1887, c. 111, s. 13.

Acknowledgment in writing given to the person entitled or his agent, to be equivalent to possession or receipt of rent.
Imp. Act, 3-4 W. iv. c. 27, s. 14.

14. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act. R. S. O. 1887, c. 111, s. 14.

Receipt of rent to be deemed receipt of profits.
Imp. Act, 3-4 W. iv. c. 27, s. 35.

15. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period shall be extinguished. R. S. O. 1887, c. 111, s. 15.

At the end of the period of limitation the right of the party out of possession to be extinguished.
Imp. Act, 3-4 W. iv. c. 27, s. 34.

ARREARS OF DOWER, RENT, AND INTEREST.

16. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action for a longer period than six years next before the commencement of such action. R. S. O. 1887, c. 111, s. 16.

No arrears of dower to be recovered for more than six years.
Idem s. 41.

No arrears of rent or interest to be recovered for more than six years.
Imp. Act, 3-4 W. iv. c. 27, s. 42.

17. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. R. S. O. 1887, c. 111, s. 17.

Exception in favour of subsequent mortgagee when a prior mortgagee has been in possession.
Idem s. 42.

18. Where any prior mortgagee or other incumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. R. S. O. 1887, c. 111, s. 18.

MORTGAGES AND CHARGES ON LAND.

Mortgagor to be barred at end of ten years from the time when the mortgagee took possession, or from the last written acknowledgment.
Imp. Act, 3-4 W. iv. c. 27, s. 28; and 37-38 V. c. 57, s. 7.

19. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him; and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgement, or the last of such acknowledgments, if more than one, was given. R. S. O. 1887, c. 111, s. 19.

Acknowledgment to one of several mortgagors.
Imp. Act, 3-4 W. iv. c. 37, s. 28.

20. In case there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons. R. S. O. 1887, c. 111, s. 20.

Acknowledgment by one of several mortgagees.
Imp. Act, 3-4 W. iv. c. 37, c. 28.

21. In case there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgement, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or

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persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage. R. S. O. 1887, c. 111, s. 21.

22. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued. R. S. O. 1887, c. 111, s. 22.

Mortgages may enter or sue within ten years from last payment. Imp. Act, 7 W. iv. & 1 V. c. 28.

23. No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent; and in such case no action or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given. R. S. O. 1887, c. 111, s. 23.

Money charged upon land and legacies to be deemed satisfied at the end of ten years if no interest paid or acknowledgment given in writing in the meantime.

Imp. Act, 3-4 W. iv. c. 27, s. 40: and 37-38 V. c. 57, s. 8.

24. No action, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable, out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears,

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising the same. Imp. Act, 37-38 V. c. 57, s. 10.

except within the time within which the same would be recoverable if there were not any such trust. R. S. O. 1887, c. 111, s. 24.

DOWER.

Action of
dower to be
brought with-
in ten years.

25. No action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or of any person claiming under her. R. S. O. 1887, c. 111, s. 25.

Time from
which right to
bring action of
dower to be
computed.

26. Where a dowress has, after the death of her husband, actual possession of the land of which she is dowable, either alone or with heirs or devisees of her husband, the period of ten years within which her action of dower is to be brought shall be computed from the time when such possession of the dowress ceased. This section shall not apply to any case in which the right of action ceased before the 5th day of March, 1880. R. S. O. 1887, c. 111, s. 26.

BAR OF ESTATES TAIL.

Where period
of limitation
elapsed
against a ten-
ant in tail to
be deemed to
have elapsed
against those
whose rights
he could have
barred.

Imp. Act, 3-4
W. iv. c. 27,
s. 21.

Term elapsed
in such cases
during the life
of the tenant
to be computed
against those
whose rights
he could have
barred.

Imp. Act, 3-4
W. iv. c. 27,
s. 22.

27. Where the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same, has been barred by reason of the same not having been made or brought within the period limited by this Act, no such entry, distress or action shall be made or brought by any person claiming any estate or right which such tenant in tail might lawfully have barred. R. S. O. 1887, c. 111, s. 27.

28. Where a tenant in tail of any land or rent entitled to recover the same has died before the expiration of the period limited by this Act, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent, but within the period during which such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action. R. S. O. 1887, c. 111, s. 28.

In case of pos-
session under
an assurance
by a tenant in
tail, which
does not bar
the remain-
ders, they
shall be barred
at the end of
ten years after
the period at
which the as-
surance, if
then executed,

29. Where a tenant in tail of any land or rent has made an assurance thereof, which does not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person is by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosever (other than some person entitled to such possession or receipt in respect of an estate which has taken effect after or in defeasance of the estate tail) continues or is in such possession or receipt for the period of ten years next after the commence-

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ment of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of ten years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. R. S. O. 1887, c. 111, s. 29.

would have
barred them.
Imp. Acts, 3-4
W. iv. c. 37,
s. 23; and
37-38 V. c. 67,
s. 6.

EQUITABLE CLAIMS.

30.—(1) Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring an action against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In case of ex-
press trust, the
right shall not
be deemed to
have accrued
until a convey-
ance to a
purchaser.
Imp. Act, 3-4
W. iv. c. 27,
s. 25.

(2) Subject to the provisions of Section 32 of *The Trustee Act*, no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. R. S. O. 1887, c. 111, s. 30.

Claim of *cestui que trust* against trustee.
Rev. Stat. c. 129.

31. In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered. R. S. O. 1887, c. 111, s. 31.

In cases of fraud no time shall run whilst the fraud remains concealed.
Imp. Act, 3-4 W. iv. c. 27, s. 26.

32. Nothing in the last preceding section contained shall enable any owner of lands or rents to bring an action for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed. R. S. O. 1887, c. 111, s. 32.

Unless in the case of *bona fide* purchaser for value without notice.
Imp. Act, 3-4 W. iv. c. 27, s. 26.

33. Nothing in this Act contained shall be deemed to interfere with any rule of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act. R. S. O. 1887, c. 111, s. 33.

Right to refuse relief on the ground of acquiescence or otherwise.
Imp. Act, 3-4 W. iv. c. 27, s. 27.

PRESCRIPTION IN CASES OF EASEMENTS.

Certain claims
not to be de-
feated by
shewing only
that the same
enjoyed for
less than 30
years.
Imp. Act, 2-3
W. iv. c. 71,
s. 1.

Indefeasible if
enjoyed over
60 years.

Right of way,
or water not to
be defeated by
shewing only
that it began
more than 20
years prior.
Imp. Act, 2-3
W. iv. c. 71,
s. 2.

Indefeasible if
enjoyed over
40 years.

Right to
access and
use of light by
prescription
abolished.

How the
periods be
calculated,
and what
acts only

34. No claim which may be lawfully made at the Common Law, by custom, prescription or grant, to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, Her Heirs or Successors, or of any ecclesiastical or lay person or body corporate, except such matters or things as are hereinafter specially provided for, and except rent, and services, shall, where such profit or benefit has been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such profit or benefit has been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. R. S. O. 1887, c. 111, s. 34.

35. No claim which may lawfully be made at the Common Law by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of our said Lady the Queen, Her Heirs or Successors, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated, and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. R. S. O. 1887, c. 111, s. 35.

36. No person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building; but this section shall not apply to any such right which has been acquired by twenty years' use before the fifth day of March, 1880. R. S. O. 1887, c. 111, s. 36.

37. Each of the respective periods of years in the last preceding three sections mentioned shall be deemed and taken to be the period next before some action wherein the claim matter to which such period relates was or is brought in

question; and no act or other matter shall be deemed an interruption within the meaning of the said three sections, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making or authorizing the same to be made. R. S. O. 1887, c. 111, s. 37.

shall be an interruption to the prescription.
Imp. Act, 2-3
W. iv. c. 71,
s. 4.

38.—(1) In all pleadings wherein the party claiming may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same is denied, all and every the matters in the next preceding four sections of this Act mentioned and provided which are applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.

What allegation by the party claiming shall be sufficient.
Imp. Act, 2-3
W. iv. c. 71,
s. 5.

(2) In all pleadings wherein it would formerly have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this Act as are applicable to the case, and without claiming in the name or right of the owner of the fee as was usually done.

(3) If the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged, and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general denial of such allegation. R. S. O. 1887, c. 111, s. 38.

What proof admitted for or against such allegation.

39. In the several cases mentioned in and provided for by this Act, of claims to lights, ways, water-courses or other easements, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as is applicable to the case and to the nature of the claim. R. S. O. 1887, c. 111 s. 39.

No presumption admissible on proof of enjoyment for a less period than prescribed by this Act.
Imp. Act, 2-3,
W. iv. c. 71,
s. 6.

DISABILITIES AND EXCEPTIONS.

1.—In Cases of Easements.

40. The time during which any person otherwise capable of resisting any claim to any of the matters mentioned in sections 34 to 39 inclusive of this Act, is an infant, idiot, *non compos mentis*, or tenant for life, or during which any action has been pending and has been diligently prosecuted until

Time during which a party could not act not to be computed against him.
Imp. Act, 2-3
W. iv. c. 71,
s. 7.

abated by the death of any party or parties thereto, shall be excluded in the computation of the period in said sections mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible. R. S. O. 1887, c. 111, s. 40.

Term of years, etc., excluded from computation in certain cases.
Imp. Act, 23 W. iv. c. 71, s. 8.

41. Where any land or water upon, over or from which any such way or other easement, water-course or run of water has been enjoyed or derived, has been held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim is, within three years next after the end, or sooner determination of such term, resisted by any person entitled to any reversion expectant on the determination thereof. R. S. O. 1887, c. 111, s. 41. 62 V. c. 11, s. 16.

Exception as to lands of the Crown not duly surveyed and laid out.

42. Nothing in sections 34 to 39 inclusive of this Act shall support or maintain any claim to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, Her Heirs and Successors, or to any way or other easement, or to any water-course or the use of any water to be enjoyed or derived upon, over or from any land or water of our said Lady the Queen, Her Heirs and Successors, unless such land, way, easement or water-course or other matter lies and is situate within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority. R. S. O. 1887, c. 111, s. 42.

2.—*In cases of Land or Rent.*

In cases of infancy, or lunacy at the time when the right of action accrues, then five years to be allowed from the termination of the disability, or previous death. Imp. Acts, 34 W. iv. c. 27, s. 16; 37-38 V. c. 57, s. 3.

43. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues as in sections 4, 5, and 6 mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiotcy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened. R. S. O. 1877, c. 111, s. 43.

Twenty years utmost allowance for disabilities. Imp. Acts, 34

44. No entry, distress or action, shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent, first accrued was under any of the disabilities

hereinbefore mentioned, or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired. R. S. O. 1887, c. 111, s. 44.

45. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the said period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person. R.S.O. 1887, c. 111, s. 45.

W. iv. c. 27,
s. 17; 37-38 V.
c. 57, s. 5.

No further
time to be al-
lowed for a
succession of
disabilities.
Imp. Act, 3-4
W. iv. c. 27,
s. 18; 37-38 V.
c. 57, s. 9.

NOTES.

Origin of Statute. The Real Property Limitation Act is a combination of the English Statutes limiting the time for the recovery of land or rent and the Prescription Act of 1832 with a few variations.

Differences from English Act. The following differences may be noted :—

- (1) Excluding the cases of disabilities and future estates the English period of limitation for recovery of land is now 12 years ; in Ontario the limitation is 10 years, except in the case of wild land when the period is 20 years.
- (2) The easement of light, unless acquired before 5th March, 1880, cannot be acquired by prescription in Ontario.
- (3) The Real Property Limitation Act does not in Ontario affect the remedy of a mortgagee or other person having a charge on land against the person of the party liable for the debt upon a covenant to pay it, the limitation in such cases being prescribed by R.S.O. c. 72.
- (4) Under the Ontario Act, differing in this respect from the English, the word land includes incorporeal hereditaments, s. 2 (1). Nevertheless exclusive possession of land for more than 10 years will not destroy an easement over the same. *Mykel v. Doyle* (1880) 45 U.C.R. 65 ; *McKay v. Bruce* (1891) 20 O.R. 799, but it is good evidence of abandonment ; *Bell v. Golding* (1896) 23 A.R. 482 and *quaere* whether the earlier cases were rightly decided *ib.*

Land or Rent.

The statute is as before intimated properly divisible into two parts, one part relating to the recovery of land or rent and the other providing new rules as to prescription in the case of easements.

Rent. The word "rent" does not mean rent reserved on a lease for years, but is confined to rent existing as an inheritance distinct from the land such as fee farm rents ; *Grant v. Ellis* (1841) 9 M. & W. 113 ; *Irish Land Commission v. Grant* (1885) 10 App. Cas. 26.

Title to Realty Extinguished. Unlike the Statutes of limitation relating to personal actions, this Act does not merely bar the remedy, but extinguishes the title of the person, who would have been entitled to the land but for the Act. The Statute need not therefore be pleaded as a defence. The plaintiff has to state the title upon which he means to rely, and the Statute says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it, to the person who otherwise has the title by possession or in whatever other way he may have it. Therefore if the plaintiff states that the period allowed by the Statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the Statute allows his title to continue ; *Dawkins v. Lord Penrhyn* (1878) 4 App. Cas. 51. When the facts appear on the statement of claim, the defendant might formerly have demurred. He may now raise the question as a point of law or by moving to dismiss the action as frivolous ; *Lawrance v. Norreys* (1888) 39 Ch. D. 213, 15 App. Cas. 210. Where a person has obtained a title by possession, the fact of his taking a lease from the original owner does not give back the title to the latter. The party in possession would be estopped from disputing the lessor's title only during the term of the lease ; *Hillock v. Sutton* (1883) 2 O.R. 548, see also *Bryan v. Cowdall* (1873) 21 W. R. 693 ; *Sanders v. Sanders* (1881) 19 Ch. D. 373 ; *Court v. Walsh* (1882) 1 O.R. 170.

Title by Possession. Mere possession of real property for any length of time will not necessarily confer a good title. The Statute is a law of extinctive, not one of acquisitive prescription—in other words the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or dispossessor in possession ; *Gray v. Richford* (1878) 2 S.C.R. 431. To ascertain whether a person in possession can defy all comers it is therefore necessary to examine the state of the title when he took possession, and ascertain who were then the owners, whether such owners were seised of estates in possession or were to become entitled to estates in the future and whether such owners were under disability and if such disability has been, for a sufficient length of time, at an end.

When Time Commences to Run.

Trespassers. The Statute applies not to want of actual possession by the owner, but to cases where he has been out of, and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to bring the case within the Statute; *Smith v. Lloyd* (1854) 9 Ex. 562. The time therefore runs from the wrongful taking of possession, *Dixon v. Gayfer* (1854) 17 Beav. 429, and it ceases to run immediately that possession is discontinued, though rightful possession may not be resumed by the owner; *Agency Co. v. Short* (1888) 13 App. Cas. 793. In the absence of fraud the right to the land is extinguished at the expiration of the prescribed period, though the owner may have been ignorant of the other's possession; *Rains v. Buxton* (1880) 14 Ch. D. 537.

Successive Independent Trespassers. The possession of one intruder ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant; *Agency Co. v. Short* (1888) 13 App. Cas. 793. Persons who come into and hold possession under a trespasser in one of the regular modes known to the law, e.g., by devise, descent or conveyance, are entitled to add to the period of their possession the time during which possession was held by any person through whom they claim; *Hewitt on Limitations*, 161.

Against Landlords. Where a landlord merely omits to collect rent from his lessee, and the lessee does not pay rent to any other person, time commences to run against the landlord from the determination of the lease; *Sanders v. Amesley* (1804) 2 Sch. & Lef. 106; *Chadwick v. Broadwood* (1840), 3 Beav. 308, 530; *Doe d. Davy v. Oxenden* (1840) 7 M. & W. 131, and the same rule applies though there may have been only an agreement for a lease; *Warren v. Murray* (1894) 2 Q.B. 648, and even where the whole rent was paid to the original landlord, and his assignee, notwithstanding a conveyance of part of the land to the plaintiff, the rent not having been legally apportioned, time did not run against the plaintiff until the expiration of the lease; *Laybourn v. Gridley* (1892) 61 L.J. Ch. 352. When a renewal lease is granted before the expiration of the term it is doubtful if, when the tenant is out of possession, time does not commence to run against the landlord from the granting of the renewal lease; *Ecclesiastical Commissioners v. Rowe* (1880) 5 App. Cas. 736; *Corpus Christi College v. Rogers* (1880) 49 L.J. Ex. 4. Where a lease is void, *ab initio*, the time runs from its execution; *Magdalen Hospital v. Knotts* (1879) 4 App. Cas. 324.

Tenants from year to year. Time will run in favor of a tenant from year to year holding without written lease from the end of the first year of the tenancy or the last payment of rent, whichever is the later; *Baines v. Lumley* (1868) 16 W.R. 574. A payment by the tenant to a person whom he believes to be the agent of the owner will, if the payment is ratified by the owner, prevent time from running; *Lyell v. Kennedy* (1889) 14 App. Cas. 437; *McAuliffe v. Fitzsimons* (1889) 26 L.R. Ir. 29. The reservation of any rent however small, will be sufficient to create a tenancy within s. 5 (6); *Magdalen Hospital v. Knotts* (1879) 4 App. Cas. 324. The payment by the tenant of taxes where the agreement was \$6 a month and taxes was held not to be a payment of rent; *Finch v. Gilray* (1889) 16 A.R. 484; *Coffin v. North American Land Co.* (1891) 21 O.R. 80.

Tenant at will. A tenant at will, will acquire a title by possession at the expiration of ten years from the determination of his tenancy or 11 years next after the commencement of the tenancy. Where before title is acquired a new tenancy at will is created by agreement, express or implied, a new right of entry accrues; *Re Defoe* (1882) 2 O.R. 625, but an entry by the landlord, without objection on the part of the tenant, for the purpose of doing repairs does not interrupt the acquisition of a title by the tenant; *Lynes v. Snaith* (1899) 1 Q.B. 486. The tenancy will be determined by a mortgage made by the owner to the knowledge of the tenant, and a new tenancy sufficient to give a new starting point may be created; *Jarman v. Hale* (1899) 1 Q.B. 994; *McDiarmid v. Hughes* (1888) 16 O.R. 570, but there must be some evidence of the creation of a new tenancy; *Keffer v. Keffer* (1877) 27 C.P. 257; *Day v. Day* (1871) L.R. 3 P.C. 761; see *Cooper v. Hamilton* (1881) 45 U.C.R. 502.

An entry in assertion of right by the owner and a consent to remain as tenant or to give up possession when required will create a new tenancy; *Smith v. Keown* (1881) 46 U.C.R. 163; *Ryan v. Ryan* (1981) 5 S.C.R. 387. Neither a mortgagor nor a *cestui que trust* is a tenant at will of his mortgagee or trustee for the purposes of s. 5 (7). That section applies to tenancies at will, pure and simple, where the party in possession could not either at law or in equity set up any right to retain possession against the owner; *Warren v. Murray* (1894) 2 Q.B. 648; *Drummond v. Sant* (1871) L.R. 6 Q.B. 763. Where a person is let into possession of land as purchaser, he is, while not in default, entitled to retain possession and the owner is a trustee for him, within the meaning of s. 5 (8). Time therefore will not commence to run in his favor until after default; *Irvine v. Macaulay* (1897) 28 O.R. 92; 24 A.R. 446. Where a mortgagor pays off a mortgage the true relation of mortgagee and mortgagor ceases, and in the absence of a reconveyance or discharge the mortgagor will become a tenant at will of the mortgagee, and the mortgagee's legal estate will be extinguished in 11 years under s. 5 (7); *Sands to Thompson* (1883) 22 Ch. D. 614. Notwithstanding the observations in the latter case, it seems now to be established that s. 5 (8) extends to implied as well as express trusts; *Warren v. Murray* (1894) 2 Q.B. 648; *Irvine v. Macaulay* (1897) 24 A.R. 446; *Building and Loan Assn. v. Poaps* (1896) 27 O.R. 470.

Payment of rent to wrong person. Where the rent of property comprised in a written lease exceeds \$4 per annum, any person not entitled thereto who makes a claim to and receives the rent will acquire a title as against the landlord at the expiration of 10 years from the first wrongful receipt; s. 5 (5); *Williams v. Pott* (1871) L.R. 12 Eq. 149; *Hopkins v. Hopkins* (1883) 3 O.R. 232. If the yearly rent is less than \$4, time will not run until the lease expires.

Against Remaindermen. So long as a tenant for life under the same will or settlement is in possession, time can never run against the remaindermen; *Gray v. Richford* (1878) 2 S.C.R. 431, 455; *Anstee v. Nelms* (1856), 1 H. & N. 232. Where a tenant for life alienates his estate the purchaser becomes "the person last entitled to the particular estate" within s. 6, and the actual possession not being separated from the right to possession, the limitation of five years from the remainder vesting contained in that section does not apply; *Pedder v. Hunt* (1887) 18 Q.B.D. 565. The sections relating to estates in reversion expectant on the determination of a particular estate apply only where another person than the reversioner is entitled to the particular estate; *Doe d. Hai v. Moulds* (1847) 16 M. & W. 689. After the Statute has commenced to run the creation of new rights will not stop it; *Stackpole v. Stackpole* (1843) 4 Dr. & W. 320; see also *Thornton v. France* (1897) 2 Q.B. 143.

Future Estates. A future estate within s. 5 (11) (12) and s. 6 will include an estate in fee simple, which by force of the Statute of Uses divests a prior fee simple; *Thuresson v. Thuresson* (1899) 30 O.R. 504. Where an estate is settled to A for life, and after his death to such uses as he may appoint, and A's life estate is extinguished by adverse possession, A's appointee will be entitled under s. 6 to 5 years after A's death to recover the land; *Re Earl of Devon's Settled Estates* (1896) 2 Ch. 562, and where land is settled to such uses as A may appoint, and until appointment to the use of B in fee and B's title is extinguished, the right of an appointee from A accrues only on the appointment taking effect, and he has at least 5 years and perhaps 10 years to bring an action; *Thuresson v. Thuresson* (1899) 30 O.R. 504.

Mortgages. When the mortgage deed confers no right upon the mortgagor to enjoy the land until default, the right of entry accrues to the mortgagee immediately upon the execution of the mortgage, and his action must be brought within ten years from that time or from the last payment or acknowledgment; *Doe d. Roylance v. Lightfoot* (1841) 8 M. & W. 553; but a payment after the time has run will be ineffectual; *Hemming v. Blanton* (1873) 42 L. J. C. P. 158. A judgment for foreclosure will give a new starting point, and time will only then run from the date of the judgment; *Pugh v. Heath* (1882) 7 App. Cas. 235. Where a mortgage created before possession was taken by the defendant, or his predecessors in title is paid off, a new right of entry is acquired, and the person paying is a "party claiming under a mortgage" within s. 22; *Henderson v. Henderson* (1896) 23 A. R. 577; but the result is otherwise when the mortgage is made after the Statute has commenced to run in favor of a trespasser as against the mortgagor; *Thornton v. France* (1897) 2 Q. B. 143.

The creation of a mortgage after the Statute had commenced to run against the mortgagor was held in *Cameron v. Walker* (1890) 19 O. R. 212 to create a new right of entry, and a person claiming under it entitled under s. 22 to 10 years after default or the last payment to bring an action, but this decision is contrary to *Thornton v. France* (1897) 2 Q. B. 142, where the contrary was held.

Mortgagees. The possession of a mortgagee within s. 19 must have been gained by him in that character; if, therefore, he purchase the equity of redemption and enter into possession, he cannot set up that possession as the possession of a mortgagee in answer to the claims of persons seeking to impeach his title as purchaser; *Faulds v. Harper* (1886) 11 S. C. R. 639, 655.

Estate Tail. Where the tenant in tail is barred, the issue in tail are also barred; *Austin v. Llewellyn* (1853) 9 Ex. 276, see *Earl of Abergavenny v. Brace* (1872) L. R. 7 Ex. 145, and there is no saving for disabilities; *Goodall v. Skerratt* (1854) 3 Drew. 216. But s. 21 does not apply where the tenant in tail has conveyed his right, and thus put it out of his power to enter; *Cannon v. Rimington* (1852) 12 C. B. 1.

Against Trustees. Ordinarily no lapse of time will bar an action to recover land held by a trustee on an express trust. But under s. 24 simple contract debts secured by a trust in a will to pay the same out of real estate will be barred in 10 years; *Re Stephens, Warburton v. Stephens* (1889) 43 Ch. D. 39; *Fearnside v. Flint* (1883) 22 Ch. D. 579. Where land is conveyed to trustees to pay an annuity only the arrears are affected by the section; *Hughes v. Coles* (1884) 27 Ch. D. 231, but if the right first accrued 10 years before action none of the instalments which accrued before action are recoverable; *ib.*

Concealed Fraud. Sections 31 and 32 provide that time shall not run, where any person has been deprived of land through concealed fraud, until the fraud was, or might with reasonable diligence have been, discovered. The circumstances must lead to the reasonable inference that the fraud was the cause of the deprivation and exclude other possible causes; *Lawrance v. Norreys* (1890) 15 App. Cas. 210. There must be some contrivance to induce the real owner to believe that he is not the owner; *Willis v. Howe* (1893) 2 Ch. 545. Mere ignorance is insufficient; *Dawkins v. Lord Penrhyn* (1877) 6 Ch. D. 324; *Rains v. Buxton* (1880) 14 Ch. D. 537. Bringing up an eldest son (the heir) in the belief that he is a younger son is concealed fraud; *Vane v. Vane* (1873) L. R. 8 Ch. 383; and so is procuring instruments to be executed by a person of unsound mind; *Lewis v. Thomas* (1843) 3 Hare 26, and so is the omission by an insolvent of an estate from his statement of affairs; *Sturgis v. Moore* (1858) 24 Beav. 541. A purchaser is not entitled to the benefit of s. 32 if his agent who negotiated the purchase had in the course of the transaction knowledge of the fraud, or had reason to believe that a fraud had been committed; *Vane v. Vane* (1873) L. R. 8 Ch. 483.

What Possession is Sufficient.

Adverse Possession. The effect of the present Statute has been said to do away with the doctrine of non-adverse possession and although, perhaps, now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before the Act was originally passed. *Ely v. Bliss* (1852) 2 D. M. & G. 476. Before the Act it was necessary to determine in what manner the person who had been in possession had held such possession. If he had held in a character incompatible with the idea that the freehold remained vested in the owner the possession was adverse, but if compatible with the owner's title it was not adverse. Now the question is (in most cases) whether the requisite time has elapsed since the right of the owner to recover possession accrued; *Nepean v. Doe* (1835) 2 M. & W. 910.

Against Infants. Where a person enters upon the property of an infant whether the infant has been in actual possession or not, such person will be fixed with a fiduciary position as to the infant (1) when he is the natural guardian of the infant (2) when he is so connected, by relationship or otherwise, with the infant as to impose on him a duty to protect, or at least not prejudice, his rights; *Quinton v. Frith* (1868) Ir. R. 2 Eq. 396. Upon this principle the possession of a father of his infant child's land is the possession of the infant; *Thomas v. Thomas* (1855) 2 K. & J. 79; *Hobbs v. Wade* (1887) 36 Ch. D. 553; *Kent v. Kent* (1891) 20 O.R. 445, 19 A.R. 352; *Tinker v.*

Rodwell (1894) 69 L.T. 591, but the possession of a person who enters into possession under an agreement with an infant's mother with notice of the infant's rights is adverse; *Re Taylor* (1880) 28 Gr. 640. A person who purchases from a trustee for an infant with notice of the trust is the possession of the infant; *Young v. Harris* (1892) 65 L.T. 45; and so is that of an uncle who was executor of the ancestor of the infants from whom they derived title; *Pelley v. Bascombe* (1864) 33 L.J. Ch. 100, 34 L.J. Ch. 233. The possession as bailiff will be deemed to continue after the infant's majority until there is something to change the character thereof; *Tinker v. Rodwell* (1894) 69 L.T. 591. Conversely, when trustees for an infant take possession of land on his behalf, their possession will be the possession of the infant so as to acquire for him a title by possession against the true owner; *Re Goff* (1879) 8 P.R. 92.

Wife. The possession of a wife of her husband's lands is the possession of the husband, and where a husband disappeared in 1847 and did not return until 1877 and his wife remained in possession until 1875, when a purchaser claiming through her and another husband, whom she had married in 1853, took possession, it was held that the husband was entitled to recover the land; *McArthur v. Eagleson* (1878) 43 L.C.R. 406, 3 A.R. 577.

Schoolmaster. Where the possession is incidental to a contract of hiring the Statute does not operate; as where a schoolmaster occupied a school, his possession was held to be that of the owner of the school; *Moore v. Doherty* (1843) 5 Ir. L.R. 499; see *Truesdell v. Cook* (1871) 18 Gr. 532, 535.

Guests. Where a brother put his sisters in possession and contributed to their support and paid the taxes and did the necessary repairs, the sisters were held to be in the position of guests and could not acquire a title; *Peakim v. Peakim* (1895) 2 Ir. R. 359.

Estoppel. Where a person in possession becomes rightfully entitled to the possession under a will or settlement, he will be deemed, unless he disclaims, to continue in possession under his rightful title and consequently the Statute of Limitations will stop running in his favor; *Gray v. Richford* (1878) 2 S.C.R. 431; *Re Dunham* (1881) 29 Gr. 258; *Re Defoe* (1882) 2 O.R. 623; *Molony v. Molony* (1894) 2 Ir. R. 1, and if the settlor had no title, a tenant for life, in possession under the settlement, will hold any title by possession, acquired by him, subject to the trusts of the settlement; *Dalton v. Fitzgerald* (1897) 2 Ch. 86.

Caretaker. If a person enters into possession of land as the servant or caretaker of the owner, or if being in possession he agrees to protect the property for the owner, the possession will be the possession of the owner and the Statute will not run against him; *Doe d. Perry v. Henderson* (1847) 3 U.C.R. 486; *Doe d. Quinsey v. Caniffe* (1849) 5 U.C.R. 604; *Allen v. England* (1862) 3 F. & F. 49; *Greenshields v. Bradford* (1881) 28 Gr. 299, and even where the caretaker has the entire beneficial use of the land, the Statute will not run if it be shown that he was entitled thereto as the remuneration for the care of it or performing other services; *Ryan v. Ryan* (1880) 4 A.R. 563, 590; 5 S.C.R. 387, and where the possession was on behalf of one person and subsequently that person was adjudged to be a trustee for others as to undivided portions thereof, the continuance in possession after the severance in the ownership was held to be still in the same character; *Heward v. O'Donohue* (1891) 19 S.C.R. 341. The fact of the occupation being as caretaker may be shown by parol evidence; *Hickey v. Stover* (1885) 11 O.R. 106.

Possession Under Defective Title. Where a person is residing upon and cultivating a lot of land to the whole of which he claims title under conveyances which, if they were valid, would cover the whole, he is regarded as being constructively in possession of the whole lot; *Weld v. Scott* (1855) 12 U.C.R. 537; *Steens v. Shaw* (1882) 1 O.R. 32; *McGregor v. Keilier* (1883) 9 O.R. 681; *Robertson v. Daley* (1886) 11 O.R. 352; *Re Bain and Leslie* (1894) 25 O.R. 136.

Possession by Trespassers. Where the person invoking the aid of the Statute is a mere trespasser, having no color of title, he is confined to what is called "pedal possession," i.e., to such property as he has actually cultivated or enclosed for the requisite period; *Weld v. Scott* (1855) 12 U.C.R. 537; *Harris v. Mudie* (1882) 7 A.R. 414; *Parks v. Cahoon* (1894) 23 S.C.R. 92. The possession moreover must be continuous. Isolated acts of trespass will not

give a title; *Sherren v. Pearson* (1887) 14 S.C.R. 581. Where a trespasser grew crops on the land in the summer and did nothing at all in the winter, except draw manure on it, which he spread in the spring, it was held that the right of the true owner attached on each occasion when the possession became vacant in the autumn, and that the operation of the Statute ceased until actual possession was taken again in the spring; *Coffin v. North American Land Co.* (1891) 21 O.R. 80. The possession must be exclusive; *Griffith v. Brown* (1880) 5 A.R. 303. Where the owner of the land put his cattle thereon to pasture he was held to be in receipt of the profits so as to prevent title being acquired by a person in possession; *Rennie v. Frame* (1896) 29 O.R. 586, and where the person in possession improved the land under agreement with the owner, *Spragge, C.J.O.*, thought the owner might be considered to be in receipt of profits; *Workman v. Robb* (1882) 7 A.R. 389. The use of a tunnel or a cellar under the land is such an exclusive possession of the portion of the land occupied thereby as to enable a title to be acquired; *Beven v. London Portland Cement Co.* (1893) 67 L.T. 615; *Rains v. Buxton* (1880) 14 Ch. D. 537.

Boundaries. Where a fence line is relied upon to give a title by possession to land of a neighbour encroached upon it must be an actual operative boundary. The line of an actual fence will not be produced so as to give title to land not enclosed; *Ferrier v. Moodie* (1854) 12 U. C. R. 379, but see *McGregor v. Keiller* (1893) 9 O. R. 677. If there has been actual possession title will be acquired, though there is no fence; *Elliott v. Bulmer* (1876) 27 C. P. 217. Where a ditch, the soil of which was in the plaintiff, ran between his property and that of the defendant, with a hedge on the plaintiff's side of the ditch and the plaintiff's predecessor laid drain pipes in the ditch, which drain was used by the plaintiff and defendant, and the ditch was filled in and thereafter used by the defendant as part of his garden, it was held that he had sufficient possession to acquire a title, although the plaintiff had on two occasions opened the ditch to clean out the drains and had continued to cut the hedge from the defendant's side; *Marshall v. Taylor* (1895) 1 Ch. 641; but where the defendant had merely cut timber on the land in dispute, and had sapped maple trees for sugar, but had not fenced, his possession was insufficient; *Horton v. Humphries* (1893) 22 S. C. R. 739; see also judgment of *Armour, J.*, in *Shepherdson v. McCullough* (1882) 46 U. C. R. 573, and in *Steers v. Shaw* (1882) 1 O. R. 26. Merely fencing in a lot without putting it to some actual continuous use is not sufficient to make the Statute run; *Stovel v. Gregory* (1894) 21 A. R. 137.

Wild Land. The twenty years' possession of wild land necessary to extinguish the title of the owner applies only in favor of the patentee or parties claiming under him without knowledge of the possession. It does not apply in favor of a tax purchaser; *Brooke v. Gibson* (1896) 27 O. R. 218. Unless the patentee or some one claiming under him has resided upon the land, or has cultivated or improved it or actually used it, the limitation under s. 5 (4) is ten years from knowledge, not exceeding in all twenty years. Clearing or cultivating by trespassers will not shorten the time; *Stovel v. Gregory* (1894) 21 A. R. 137.

Administrator. With respect to interests in land or rent, including legacies charged on land, time runs against an administrator from the accrual of the right, although an interval elapses between the death of the intestate and the grant of administration; *Davies v. Williams* (1886) 34 Ch. D. 558; *Re Bonsor and Smith* (1884) 34 Ch. D. 560 n. This was always the rule as to executors.

Entry. Where the land is vacant, an entry by the owner upon any portion of the land is an entry referring to the whole; *Great Western Ry. Co. v. Lutz* (1881) 32 C. P. 166.

Entries, sufficient to constitute trespass if unlawful, will interrupt the running of the Statute; *Hooker v. Morrison* (1881) 28 Gr. 369. Putting up boards by the owner on the land, stating that it is for sale, is sufficient to vest the legal possession in him to enable him to maintain trespass; *Donovan v. Herbert* (1884) 4 O. R. 635; and entering into possession and granting a lease to one of the persons in possession is sufficient to make the possession that of the owner; *Arnold v. Cummer* (1888) 15 O. R. 382; *Canada Co. v. Douglas* (1877) 27 C. P. 339. An entry by the lord of the manor in the absence of the possessor of a hut and piece of land, but in the presence of his family, coupled with a statement that he took possession in his own right, was insufficient, although he caused a stone to be taken from the hut; *Doe v. Coombs* (1850) 9 C. B. 714. When the only ad-

verse possession is the erection of a fence, knocking down the fence by the owner is a sufficient retaking of possession; *Worsam v. Vandenbrande* (1869) 17 W. R. 53.

S. 8 of the Statute applies to a mere entry, such as stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession. If the possession is taken *animo possidendi*, whether retained for an hour or a week, is immaterial; *Randall v. Stephens* (1853) 2 E. & B. 641; *Canada Co. v. Douglas* (1877) 27 C. P. 339. But merely visiting a lot yearly, and staying on it with the party in possession, as a visitor, is insufficient; *Williams v. McDonald* (1873) 33 U. C. R. 423; *Brook v. Benness* (1898) 29 O. R. 468. The commencement of an action to recover the land will prevent the further running of the Statute; *Young v. Hobson* (1879) 30 C. P. 431.

Continual Claim. Formerly a peaceable entry repeated once every year was sufficient to prevent a right of entry being barred; *Ford v. Grey* (1704) 1 Salk. 295.

Tenants in Common, &c. The entry of one co-parcener has not the effect of vesting possession in the other; *Woodroffe v. Doe* (1846) 15 M. & W. 792; *Shaw v. Shaw* (1869) 8 C. P. 373. The possession of one tenant in common is therefore separate from that of his co-tenants not in possession; *Harris v. Mudie* (1882) 7 A. R. 418. Where land was held in trust for five persons and four of them received the rents for twenty years, the fifth was held to be barred; *Burroughs v. McCreight* (1844) 1 J. & L. 290; *Bolling v. Hobday* (1883) 31 W. R. 9. Where a father held possession of land, one undivided share in which belonged to an adult child, the title of that child was extinguished at the expiration of the statutory period; *Hobbs v. Wade* (1887) 36 Ch. D. 553; but where for some years a tenant in common had accounted for a moiety of the rents a presumption was raised, in the absence of evidence, that a similar accounting had been made previously; *Sanders v. Sanders* (1881) 19 Ch. D. 373. The possession of a tenant in common will not be limited to the part actually occupied, but will extend to the whole lot; *Meyers v. Doyle* (1860) 9 C. P. 376. Where a tenant in common out of possession acquired a share by the death of a tenant in common in possession, the right of entry as to both shares was held to accrue at the time of the acquisition of the latter share; *Hill v. Ashbridge* (1892) 20 A. R. 44. Land acquired by two persons by length of possession will be held by them as tenants in common; *Brook v. Benness* (1898) 29 O. R. 468.

Relations. Possession by the widow to the exclusion of the heirs will give her a good title, and her possession will not be treated as in the capacity of doweress; *Johnson v. Oliver* (1883), 3 O. R. 26.

Acknowledgments.

There are several kinds of acknowledgments provided for by the Statute :

(1) By a trespasser or tenant in possession or in receipt of the rents and profits.

(2) By a mortgagor in possession.

(3) By a mortgagee in possession.

(4) By a person to whom any arrears of rent or of interest on a legacy or money charged on land are payable.

By Whom to be Signed. An acknowledgment given to the true owner of land or rent must, to be effectual, be signed by the person in possession, or in receipt of the profits or rent; s. 13; *Ley v. Peter* (1858) 3 H. & N. 101. An acknowledgment which will preserve the right to redeem a mortgage must be signed by the mortgagee or the person claiming through him; s. 19. An acknowledgment to keep alive the right of a mortgagee must be signed by the person by whom the mortgage money is payable, or his agent; s. 23. If signed by a trustee or his agent an acknowledgment is sufficient under s. 23, although it does not impose any personal liability on the trustee; *St. John v. Boughton* (1838) 9 Sim. 225. If signed by an agent the agency may be proved by parol; *Coles v. Trecothick* (1804) 9 Ves. 250; *Jones v. Bright* (1829) 5 Bing. 533; *Toft v. Stephenson* (1851) 1 D. M. & G. 28. An acknowledgment of arrears of rent or of interest on a legacy of money charged on land which will entitle

the person to whom the same is payable to more than six years' arrears must be signed by the person by whom the same is payable, or his agent; s. 17. These words include all the persons against whom the payment of such arrears might be enforced; *Bolding v. Lane* (1863) 1 D. J. & S. 122, but an acknowledgment by a mortgagor of more than six years' arrears will not deprive a mortgagee or purchaser who became such before the acknowledgment of the benefit of the Statute; *ib.*; *Colquhoun v. Murray* (1899) 26 A. R. 204.

To Whom to Be Made. In all cases under this Statute the acknowledgment must be made to the person who is to benefit therefrom or his agent; *Fursden v. Clegg* (1842) 10 M. & W. 572; *Goode v. Job* (1859) 28 L.J.Q.B. 1; *Markwick v. Hardingham* (1880) 15 Ch. D. 339. A statement of the amount due on a mortgage in a conveyance to a purchaser is not an acknowledgment of which a mortgagee can take the benefit; *Colquhoun v. Murray* (1899) 26 A.R. 204. The keeping of accounts by a mortgagee in possession is not an acknowledgment to the mortgagor; see *Baker v. Whetton* (1845) 14 Sim 426; *Re Allison* (1879) 11 Ch. D. 293. A conveyance by a mortgagee in possession to a purchaser "subject to the equity of redemption" is not an acknowledgment so as to make the estate redeemable; *Lucas v. Denison* (1843) 13 Sim. 584. It is not necessary, however, that an agent should at the time of receiving the acknowledgment have authority to act; *Trulock v. Robey* (1841) 12 Sim. 402; a subsequent ratification will be sufficient; *Jones v. Bright* (1829) 5 Bing. 533; see *Lyell v. Kennedy* (1889) 14 App. Cas. 437. An affidavit in the suit may be sufficient under s. 17; *Tristram v. Harte* (1841) 1 Long & T. 186. In some Irish cases it has been held that s. 23 only bars the remedy and does not extinguish the right. If this were so an acknowledgment after the Statutory period would be sufficient to restore the mortgagees title. Under our Statute it has been held that the right is extinguished; *Court v. Walsh* (1882) 1 O.R. 167; and a subsequent acknowledgment would be ineffectual; *Sanders v. Sanders* (1881) 19 Ch. D. 373.

A mortgagor will be treated as an agent of the mortgagee; *Hooker v. Morrison* (1881) 28 Gr. 369. An acknowledgment to a trustee is sufficient; *McIntyre v. Canada Co.* (1871) 18 Gr. 367.

Sufficiency of. A letter proposing terms stating "This being done it is hoped the judgment will be satisfied" was held to be sufficient; *Vincent v. Willington* (1841) 1 Long & T. 456. A letter stating "I will comply with your request for the repayment of \$500 I borrowed from you, and until payment I will execute anything you wish me to do for its security," is sufficient; *Barwick v. Barwick* (1874) 21 Gr. 39.

A letter by a mortgagee in possession stating the amount due and that "no part of that sum has been paid to me but the rents I have received have nearly kept down the interest" is sufficient; *Miller v. Brown* (1882) 3 O.R. 210.

A mortgage of the whole lot to a third person by the party in possession reserving the piece in dispute, is not an acknowledgment of the title of the owner to the piece in dispute; *Williams v. McDonald* (1873) 33 U.C.R. 423.

The construction of a document given in evidence as an acknowledgment is for the Court and not for the jury; *Doe d. Curzon v. Edmond* (1840) 6 M. & W. 295; *Fursden v. Clegg* (1842) 10 M. & W. 572.

The acknowledgment should be made with the intention of rendering the party making it liable to the demand; *Holland v. Clark* (1842) 1 Y. & C.C.C. 15.

An agreement to purchase the land from the true owner is sufficient; *Cahuac v. Cochrane* (1877) 41 U.C.R. 439, and so is an unqualified offer; *Pentington v. Brownlee* (1868) 29 U.C.R. 189. But if the party is in possession under an imperfect paper title and wishes merely to strengthen such title by getting in an outstanding claim the offer will not amount to an acknowledgment; *Drake v. North* (1857) 14 U.C.R. 476; see *Beigle v. Dake* (1877) 42 U.C.R. 261.

If an acknowledgment contains nothing but the simple truth, i.e., truly acknowledges the title of the true owner, it cannot be set aside upon the pretence of being obtained by fraud; *Ferguson v. Whelan* (1877) 28 C.P. 116.

Effect of Acknowledgment. An acknowledgment of title in writing makes the possession of the person making the acknowledgment the possession of the person to whom it is made; *Cahuac v. Cochrane* (1877) 41 U.C.R. 539.

Arrears of Dower, Rent and Interest.

As against land, the Statute prevents the recovery of more than six years arrears of dower. No arrears of rent or interest can be recovered except by action commenced or distress made within six years after the same accrued or were acknowledged in writing. Only the recovery against the land is affected. If any personal obligation for payment thereof exists, *e.g.*, a covenant, the limitation in respect of the personal remedy is governed by other Statutes, *e.g.*, R.S.O. c. 72. *Hunter v. Nockolds* (1850) 1 Mac. & G. 640; *Paget v. Foley* (1836) 2 Bing. N.C. 679; *McMicking v. Gibbons* (1897) 24 A.R. 586.

Rent. The rent referred to is rent charged on land; *Paget v. Foley* (1836) 2 Bing. N.C. 679; and by virtue of s. 2 (3) includes annuities; *Hughes v. Coles* (1884) 27 Ch. D. 231; *Francis v. Grover* (1847) 5 Hare 39, but where an annuity was charged upon a reversion,—an interest in land—the Statute was held not to apply so long as the interest continued reversionary; *Wheeler v. Howell* (1856) 3 K. & J. 198.

Money Payable Out of Land. These words include all mortgages and securities upon land. They also include a mortgage upon a share in the proceeds of land; *Boywer v. Woodman* (1867) L.R. 3 Eq. 313, and a mortgage on canal works; *Hodges v. Croydon Coal Co.* (1840) 3 Beav. 86. But a mortgage of a fund will not be restricted to six years arrears although the fund may be invested on mortgage of land; *Smith v. Hill* (1878) 9 Ch. D. 143. In actions of foreclosure or redemption no more than six years arrears will be allowed in the absence of agreement or acknowledgment; *McMicking v. Gibbons* (1897) 24 A.R. 586; *Colquhoun v. Murray* (1899) 26 A.R. 204; *Hunter v. Nockolds* (1850) 1 Mac. & G. 640, *Sinclair v. Jackson* (1854) 17 Beav. 405; *Shaw v. Johnson* (1860) 1 Dr. and Sm. 412, although the interest mortgaged may be reversionary; *Vincent v. Going* (1844) 1 J. & Lat. 697; see *Smith v. Hill* (1878) 9 Ch. D. 143; except against a defendant liable on a covenant; *Macdonald v. McDonald* (1886) 11 O.R. 187. If by agreement the interest has been converted into principal, the Statute would seem not to apply, but if the agreement to capitalize the interest formed part of the original mortgage transaction, it may be invalid as a clog on the redemption; see per Moss, J.A., *Colquhoun v. Murray* (1899) 26 A.R. 219, but an agreement to that effect was held to be valid in *Clarkson v. Henderson* (1880) 14 Ch. D. 348. Where a mortgagee has sold lands under his power of sale he may retain out of the proceeds more than six years arrears; *Edmunds v. Waugh* (1866) L.R. 1 Eq. 418; *Ford v. Allen* (1869) 15 Gr. 565; *Re Marshfield, Marshfield v. Hutchings* (1887) 34 Ch. D. 721; but where the surplus is payable to a subsequent incumbrancer or purchaser not personally liable for the excess of arrears beyond six years it is possible in the present state of the law as to the price of redemption that the mortgagee would be restricted to six years arrears. And where to prevent a sale under the power, the amount claimed by the mortgagee is paid into Court, he will only be entitled to receive out of the fund, for interest, six years arrears; *McMicking v. Gibbons* (1897) 24 A.R. 586.

Express Trusts. The existence of an express trust formerly entitled persons entitled to annuities charged on land the subject of the trust to the full amount of arrears, but s. 24 now places such annuitants as to arrears on the same basis as if no trust existed.

Exception. Where a prior encumbrancer is in possession the right of a subsequent encumbrancer to all his arrears is preserved if he takes proceedings within one year after the prior encumbrancer's possession ceases. A prior encumbrance within the exception is one which affects the estate upon which the subsequent encumbrance exists: *Vincent v. Going* (1844) 1 J. & Lat. 697. The reason of the exception is that the possession of the prior encumbrancer excludes the subsequent mortgagee from being entitled to the possession of the land: *Chinnery v. Evans* (1864) 11 H.L.C. 136. If the owner of the equity of redemption is in possession the section has no application although he may be also the assignee of prior charges attending the inheritance; *ib.*

Mortgages.

Mortgagee's Title Extinguished After 10 Years. A mortgagee's title will be extinguished at the expiration of ten years from the time he became entitled to receive the money or from the last payment or acknowledgment provided

the land has not been vacant during that time. When the land is vacant the mortgagee is considered to be constructively in possession by virtue of his legal title: *Delaney v. Canadian Pacific Ry. Co.* (1891) 21 O.R. 11; *Bucknam v. Stewart* (1897) 11 Man. L. R. 625.

Action on Covenant. The cases in Ontario settle that although the mortgagee's right to the land may be extinguished he will still be entitled to his action upon the covenant unless that remedy is barred by R. S. O. c. 72: *Allan v. McTavish* (1878) 2 A. R. 278; *McDonald v. Elliott* (1886) 12 O. R. 98; *Macdonald v. McDonald* (1886) 11 O. R. 187.

Judgment. It was settled in *Boice v. O'Loane* (1878) 3 A. R. 167, that a judgment debt was not irrecoverable by virtue of this Statute, and the subsequent legislation has adopted this construction by omitting the word "judgment" from s. 23: *Mason v. Johnstone* (1893) 20 A. R. 412.

Legacy. Unless a legacy is vested in an executor on express trusts, a suit to recover the same must be brought within ten years from the time the right to receive it accrued: *Re Davis, Evans v. Moore* (1891) 3 Ch. 119, see notes to R. S. O. c. 72 *ante* p. 208.

Present Right to Receive. A present right to receive is not in ordinary English the same as a present right to enforce payment. The moment that the time of the coming into existence of a charge is ascertained the period of limitation will begin to run. Where, therefore, local improvement rates became charged on certain property the "present right to receive" was held to accrue on the completion of the work and not upon its apportionment among the frontagers: *Hornsey Local Board v. Monarch Investment Building Society* (1889) 24 Q.B.D. 1. Where a mortgage contains an acceleration clause making the principal due on default in payment of interest a present right to receive the principal accrues on default in payment of interest: *Reeves v. Butcher* (1891) 2 Q. B. 511.

Absence of Redemise Clause. If the mortgage contains no redemise clause entitling the mortgagor to possession until default and there is no payment or acknowledgment, time runs against the mortgagee from the making of the mortgage: *Doe d. Roylance v. Lightfoot* (1841) 8 M. & W. 553; *Delaney v. Canadian Pacific Ry. Co.* (1891) 21 O. R. 11.

Payment. A payment to be effectual must be made by a person bound or entitled to pay, or by some person concerned to answer the debt: *Lewin v. Wilson* (1886) 11 App. Cas. 639. Payments made by a mortgagor of one property will be sufficient to keep alive a mortgage on another property owned by another mortgagor, who gave a separate mortgage as a surety for the same debt; *ib.*; and a payment by a receiver appointed at the instance of the mortgagee over several mortgaged estates is sufficient to prevent time running with regard to all the estates, though the receiver enters into possession of one estate only, and others have been sold by the mortgagor and his grantees have been in possession for over 10 (in the particular case 70) years: *Chinnery v. Evans* (1864) 11 H. L. C. 115. Payment by a surety is sufficient: *Cann v. Taylor* (1859) 1 F. & F. 651. A payment by a person who has become bound to the debtor to pay is good; as where a second mortgagee took over the mortgaged property from the mortgagor's assignee in insolvency and made payments on the first mortgage, notwithstanding he had conveyed away the property to a third person: *Trust and Loan Co. v. Stevenson* (1892) 20 A. R. 86. Payment of interest by a tenant for life is sufficient: *Barclay v. Owen* (1889) 60 L. T. 222. Where a person is entitled as *cestui que trust* to the interest on a mortgage and is also entitled as tenant for life to an equitable estate in the land, her receipt of the rents from the land will be sufficient to keep the mortgage alive notwithstanding that the rents were payable to one set of trustees and the interest to another set: *Topham v. Booth* (1887) 35 Ch. D. 607. A payment by a mere stranger will be insufficient: *Homan v. Andrews* (1850) 1 Ir. Ch. R. 106; *Chinnery v. Evans* (1864) 11 H. L. C. 115, or by a tenant to whom the mortgagee gives notice: *Harlock v. Ashberry* (1882) 19 Ch. D. 539; *Cockburn v. Edwards* (1881) 18 Ch. D. 449, 457.

The fact that the legal estate is outstanding in a first mortgagee will not keep the title of a second mortgagee from being extinguished: *Kibble v. Fairthorne* (1895) 1 Ch. 219.

In *Newbould v. Smith* (1886) 33 Ch. D. 127, it was held that the assignee of the equity of redemption would not be deprived of the benefit of the statute

by payments made by the mortgagor. This is directly opposed to *Lewin v. Wilson* (1889) 11 App. Cas. 647, but the latter case settles the law for the colonies: *Trust and Loan Co. v. Stevenson* (1892) 20 A. R. 66. *Newbould v. Smith* was affirmed by the House of Lords on other grounds; (1889) 14 App. Cas. 42., and the learned Lords in their judgments carefully guarded themselves against adopting the proposition laid down by the Court below.

Foreclosure. A judgment of foreclosure will give a new starting point: *Heath v. Pugh* (1881) 6 Q.B.D. 345, 7 App. Cas. 235.

Dower.

Agreement in Lieu of Dower. An agreement between the widow and the heir, under which the lessee of the land was to pay the widow one-third of the rent, prevented the running of the Statute; *Fraser v. Gunn* (1879) 27 Gr. 63.

Possession by Widow. If the widow remains in possession of the land without having dower assigned, her possession is not as dower; *Johnston v. Oliver* (1883) 3 O. R. 43, and accordingly before 5th March, 1880, when s. 26 was enacted, a widow who had been in possession with her infant daughters, without having dower assigned, for more than ten years, lost her dower entirely.

Estates Tail.

Estates Tail. Possession by a grantee of a tenant in tail under a conveyance insufficient to bar the issue will not, during the lifetime of the tenant in tail, be adverse so as to ripen into a title under s. 27: *Rimington v. Cannon* (1853) 12 C.B. 1; *Peany v. Allen* (1855) 7 D.M. & G. 109; *Morgan v. Morgan* (1870) L. R. 10 Eq. 99; but if the conveyance is sufficient to bar the issue, but not the parties entitled in remainder, i. e., to create a base fee, the remainders over will, under s. 29, be barred at the expiration of ten years from the time when a disentailing assurance, effectual to bar such estate, might have been executed by the tenant in tail, unless such possession can be referred to an intervening life estate; *Mills v. Capel* (1875) L. R. 20 Eq. 692. Where time has commenced to run against a tenant in tail it will not stop at his death, though his issue may be under disability; *Murray v. Watkins* (1890) 62 L. T. 796. Possession by a tenant in tail after he has forfeited his estate for non-compliance with a condition is not adverse; *Astley v. Essex* (1874) L. R. 18 Eq. 290.

Equitable Claims.

Trusts. S. 30 is confined to express trusts: "There must be a trustee in whom the land is vested; there must be an express trust, by which I understand the Legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself. Therefore these three things must concur—there must be land, there must be the trustee of the land and there must be the *cestui que trust*, for whose benefit in this respect the land is to be held, and all that must be found upon the construction of the instrument with which you have to deal," per Lord Cairns, *Cunningham v. Foot* (1878) 3 App. Cas. 974, 984. Resulting trusts are not within the section; *Dickinson v. Teesdale* (1863) 1 D. J. & S. 52; nor are trusts arising from the acts of parties; *Sands v. Thompson* (1883) 22 Ch. D. 617. Where a testator devised a house and all other his real estate to his executors upon trusts, but the declaration of the trusts extended to the house only and he died seized of two other houses, it was held that the executors were express trustees for the heir-at-law; *Patrick v. Simpson* (1889) 24 Q. B. D. 129; *Salter v. Cavanagh* (1838) 1 Dru. & Walsh 668. An acting trustee of a will containing express trusts of realty not vested in him will be in the position of an express trustee; *Life Assn. of Scotland v. Siddal* (1860) 3 D. F. & J. 58. The trust of the surplus in the ordinary form of power of sale is an express trust; *Re Bell, Lake v. Bell* (1886) 34 Ch. D. 462; *Biggs v. Frechold L. and S. Co.* (1899) 26 A. R. 232. Though trustees may pay the rents of land to the wrong person, their possession will not be adverse as against the real *cestui que trust*; *Lister v. Pickford* (1865) 34 Beav. 589; and the fact that a trustee believes that he is entitled beneficially will not enable him to acquire title by

possession; *Houghton v. Bell* (1892) 23 S.C.R. 498; *Wright v. Bell* (1890) 18 A. R. 25. Trustees in possession under a void deed will acquire title by length of possession; *Churcher v. Martin* (1889) 34 Ch. D. 312.

Where the *cestui que trust* and his trustee are both out of possession the extinction of the trust does not prevent the operation of the Statute.

A conveyance by a trustee to a purchaser for value gives a start to the Statute, even if the purchaser has notice of the trust; *Atty.-Gen. v. Magdalen College* (1857) 6 H. L. C. 189.

Trusts for charities are within s. 30, and the Attorney-General stands only in the same situation as those who are entitled to the benefit of the charity; *Atty.-Gen. v. Magdalen College* (1857) 18 Beav. 223, 6 H. L. C. 189.

Concealed Fraud The principal cases under ss. 31 and 32 are referred to ante p. 677.

Disabilities.

The disabilities allowed for in actions to recover land or rent are (1) infancy, (2) idiocy, (3) lunacy, (4) unsoundness of mind. Coverture and absence from Upper Canada were disabilities until 1874; see C. S. U. C., c. 88, s. 45; 38 Vict. c. 16.

Mortgages. The disability clauses do not apply to mortgage actions; *Kinsman v. Rouse* (1881) 17 Ch. D. 104; *Forster v. Patterson* (1881) 17 Ch. D. 132; *When Faults v. Harper* (1882) 2 O. R. 405, 11 S. C. R. 655, was before the Courts the Statute in force was R. S. O. (1877) c. 108, s. 43, and the words of the section then read, "If at the time at which the right . . . to bring an action . . . first accrues as aforesaid," and the italicised words were held to extend to all the sections of the Statutes respecting the recovery of land or rent, and the English cases were therefore distinguishable. The case followed the earlier decision in *Hall v. Caldwell* (1862) 8 U. C. L. J. 93, which was a decision upon C. S. U. C. c. 88, s. 45, which contained instead of the italicised words the words "as hereinbefore mentioned." The collocation of the various sections has been consistently maintained in Canadian legislation. The equivalent English sections were 3 & 4 W. IV. c. 27, s. 16, and 37-38 V. c. 57, s. 3, which preceded the mortgage sections. In the revision of 1887 s. 43 was restricted to cases arising under ss. 4, 5 and 6, with the object apparently of adopting the English rule.

Disability Must Exist when Right Accrues. When time once begins to run under the Statute it never stops, notwithstanding subsequent disability of the party entitled or of some person claiming under him.

Twenty Years Utmost Limit. Under s. 44, twenty years is the utmost limit allowed for disabilities. If a party is under disability at the time his right accrues, and continues thereunder more than twenty years, it seems a strong thing to deprive him of a right which he has had no opportunity of exercising, but the terms of the section are unequivocal; *Hicks v. Williams* (1888) 150 R. 228; *Doe d. Corbyn v. Branston* (1835) 3 A. & E. 63.

Succession of Disabilities. The same person may be under successive disabilities such as infancy when the right accrues, and subsequent lunacy. In such cases the right is preserved until five years after the removal of the latter disability, provided the twenty years is not exceeded; *Borrows v. Ellison* (1871) L. R. 6 Ex. 128. But if a person under disability dies, five years from his death will under s. 45 be the longest period by which the limitation of ten years may be exceeded, although his right may pass to some other person under disability.

Easements.

Prescription. Under English law prescription is properly applicable only to incorporeal hereditaments. Every prescription supposes a grant. For such things as can have no lawful beginning nor be created at this day by any manner of grant, or reservation or deed, that can be supposed, no prescription is good; *Potter v. North* 1 Vent. 387, quoted by Lord Selborne in *Dalton v. Angus* (1881) 6 App. Cas. 740, 795. Before the Prescription Act, 10 & 11 V. c. 5 (C. S. U. C. c. 88, ss. 38-44) the enjoyment must have existed time out of mind, which in England meant from before the reign of Richard I. But a

regular usage from 20 years not explained or contradicted was sufficient in many cases to enable a presumption of a legal origin to be made; *Campbell v. Wilson* (1803) 3 East 294; 7 R. R. 462. The jury in such cases was directed to presume a grant, but this was so heavy a tax on the consciences and good sense of juries that the Legislature intervened and made that possession a bar or title of itself which was so before only by the intervention of a jury; *Per Parke B., Bright v. Walker* (1834) 1 C. M. & R. 211; 40 R. R. 536.

"As of Right." The easement must in all cases be enjoyed "as of right," i.e., openly and in the manner that a person rightfully entitled would have used it, and not by stealth as a trespasser would have done, nor by violence, nor by occasionally asking permission; *Tickle v. Brown* (1836) 4 A. & E. 369; *Bright v. Walker* (1834) 1 C. M. & R. 211, 40 R. R. 536; *Mills v. Colchester* (1867) L. R. 2 C. P. 486; *De la Warr v. Miles* (1881) 17 Ch. D. 535, 591. The enjoyment "as of right" is in other words, of the kind required by the civil law, *nec clam, nec vi, nec precario*; *Eaton v. Swansea Waterworks Co.* (1851) 17 Q. B. 267; *Wood v. Waud* (1849) 3 Ex. 748; *Dalton v. Angus* (1881) 6 App. Cas. 740; *Warin v. London and Canadian Loan Co.* (1885) 7 O. R. 706. No easement can be acquired by the occupier of two tenements over either of them, the enjoyment is in such cases not "as of right" but by virtue of his occupation of the soil; the law does not allow the co-existence of an easement in land with the possession of the land itself; *Harbidge v. Warwick* (1849) 3 Ex. 552; *Ladyman v. Grave* (1871) L. R. 6 Ch. 763. The owner of two tenements therefore can have no easement over one in respect of the other; *Atrill v. Platt* (1883) 10 S. C. R. 425; *Roe v. Siddons* (1889) 22 Q. B. D. 236. The mere unity of possession of the dominant and servient tenement ever though the possession of one should be the possession of a disfeisor will operate to make the enjoyment not "as of right" so as to prevent the acquisition of an easement under the Statute; *Innes v. Ferguson* (1894) 21 A. R. 323, 23 S. C. R. 703, and the same result follows where the same tenant occupies both premises; *Battishill v. Reid* (1856) 18 C. B. 696; *Outram v. Maude* (1881) 17 Ch. D. 391. Where the owner of the alleged dominant tenement is also the owner of the alleged servient tenement inasmuch as he could not himself acquire an easement over the servient tenement, neither can his tenants of the dominant tenement; *Warburton v. Parke* (1857) 2 H. & N. 64. The unity of possession of a tenant under different landlords prevents the enjoyment from being "as of right"; *Clay v. Thackrah* (1839) 9 C. & P. 47.

The right must be as of right against the land, not against the individual; per *Bramwell B., Warburton v. Parke* (1857) 2 H. & N. 70. Unity of seisin will extinguish an easement or prevent its existence when the estates in the two tenements are of an equally "high and perdurable" character, or where the estate in the dominant tenement is less in quantum and duration than the estate of the same person in the servient tenement; *Co. Litt* 313 a, b; *Re Cockburn* (1897) 27 O. R. 450, 459; *Backus v. Smith* (1880) 5 A. R. 341; and where the estate in the servient tenement is less than the estate in the dominant tenement will be suspended during the unity of seisin; *Id.* But such unity is not the unity of possession, which prevents enjoyment "as of right" under the Statute. A tenancy for even a week of the servient tenement by the owner of the dominant tenement will stop the acquisition of an easement under the Statute; *England v. Wall* (1842) 10 M. & W. 609; *Warburton v. Parke* (1857) 2 H. & N. 64; or at any rate suspend it; *Stothard v. Hilliard* (1890) 19 O. R. 542. Unity of seisin is, however, in all cases *prima facie* evidence of possession; *Clayton v. Corby* (1843) 5 Q. B. 415.

Enjoyment permitted only so long as some particular purpose is served; *Arkwright v. Gell* (1839) 5 M. & W. 203; *Mason v. Shrewsbury Ry. Co.* (1871) L. R. 6 Q. B. 578; *Wood v. Waud* (1849) 3 Ex. 748, or by occasional permission; *Monmouth Canal Co. v. Harford* (1834) 1 C. M. & R. 614; 40 R. R. 648; is not "as of right." So contentious user is not "as of right"; *Eaton v. Swansea Waterworks Co.* (1851) 17 Q. B. 267. An enjoyment by the occupier of rights of property, e.g., to the use of an artificial watercourse over adjoining property of which he is also tenant will be referred to his enjoyment under his tenancy whether strictly authorized or not, or to the friendly comity which exists between landlord and tenant, and will not be "as of right"; *Chamber Colliery Co. v. Hopwood* (1880) 32 Ch. D. 549.

Where parties used water which escaped from the locks of a canal, the enjoyment was held not to be "as of right," but rather by permission, which the owners might have withdrawn at pleasure; *Staffordshire Canal Co. v. Birmingham Canal Navigation Co.* (1860) L. R. 1 H. L. 254; and it is clearly settled that the owner of a dominant tenement having the right to discharge water on a

servient tenement cannot be compelled to continue to do so, although the owner of the servient tenement may make some use of the water: *Arkwright v. Gell* (1839) 5 M. & W. 203; *Mason v. Shrewsbury Ry. Co.* (1871) L. R. 6 Q. B. 578; *Oliver v. Lockie* (1894) 26 O. R. 28. Where a building stood upon land which the owner was bound on demand to macadamize as a street he was held not to enjoy "as of right" an easement to the support of a wall for the building; *Tone v. Preston* (1883) 24 Ch. D. 739.

Where a parcel permission extends over the whole 20 years the user is "as of right," while user by occasional permission is not; *Kinloch v. Neville* (1840) 6 M. & W. 795; *Monmouth Canal Co. v. Harford* (1834) 1 C. M. & R. 614, 40 R. R. 648, but user originating in agreement may be presumed to continue under a similar agreement; *Gaved v. Martyn* (1865) 19 C. B. N. S. 732; *Malcolm v. Hunter* (1884) 16 O. R. 102.

Though an interruption will not, unless acquiesced in for one year, be sufficient to prevent as a matter of law the acquisition of an easement, an interruption acquiesced in for less than a year is evidence that the enjoyment is not "as of right"; *Eaton v. Swansea Waterworks Co.* (1851) 17 Q. B. 275.

No prescriptive right can be acquired where there is any concealment and probably none where the enjoyment has not been open; per Lord Blackburn, *Dalton v. Angus* (1881) 6 App. Cas. 827.

Easements outside Statute. The Statute has not taken away any of the modes of claiming easements which existed before; *Aynsley v. Glover* (1875) L. R. 10 Ch. 283; *Dalton v. Angus* (1881) 6 App. Cas. 814; so that evidence of user for 20 years may be evidence of a grant even in a case where the statutory right cannot be acquired under 30 years; *Hammer v. Chance* (1865) 34 L. J. Ch. 413. And a lost grant will be inferred from 20 years user of a shaft for the free passage of air from a cellar; *Bass v. Gregory* (1890) 25 Q. B. D. 481.

Easements in Gross. To acquire an easement under the Statute it must be appurtenant to some other land. An easement in gross is not within the Statute; *Shuttleworth v. Le Fleming* (1865) 19 C. B. N. S. 687; *Saunders v. Latham* (1856) 4 W. R. 97.

There must be a Dominant and a Servient Tenement. There can be no easement properly so called unless there be both a servient and a dominant tenement; *Ranley v. Midland Ry. Co.* (1868) L. R. 3 Ch. 306, 310. The easement must be connected with the dominant tenement; *Ackroyd v. Smith* (1850) 10 C. B. 164. A dominant tenement in one of which the owner has an easement or privilege over another tenement, which is called the servient tenement.

Novel Easement. An easement must be of a known and usual kind. An exclusive right to let boats on a canal cannot be granted so as to bind the land; *Hill v. Tupper* (1863) 2 H. & C. 121. So rights which are too vague and uncertain cannot be acquired by prescription such as the right to use a way for purposes unconnected with the enjoyment of the land to which it is annexed; *Ackroyd v. Smith* (1850) 10 C. B. 164; *Bailey v. Stephens* (1862) 12 C. B. N. S. 91; or a right to the free passage of air to a windmill; *Webb v. Bird* (1861) 10 C. B. N. S. 268, 13 C. B. N. S. 841; or to subterranean water flowing in no defined channel; *Chasemore v. Richards* (1859) 7 H. L. C. 349, or the right to the access of air to a chimney; *Bryant v. Lefever* (1879) 4 C. P. D. 172.

Requisites of Valid Prescription. A prescription must be (1) certain (2) reasonable (3) annexed to land. A claim to carry away so much clay as may be required at a certain kiln is bad; *Clayton v. Corby* (1843) 5 Q. B. 415. "The servitude must not be so large as to preclude the ordinary use of the servient tenement; *Dyce v. Hay* (1852) 1 Macq. H. L. 305. The right to the whole of the coal under the land cannot be claimed by prescription, but the right to take coal may be so claimed; *Wilkinson v. Proud* (1843) 11 M. & W. 33.

Insufficiency of Enjoyment. Until the owner of the alleged dominant tenement does some act with respect to the alleged servient tenement which the owner thereof could, if so minded, stop, either physically or by action, he has imposed no servitude thereon and time does not commence to run. The right to make a noise so as to annoy a neighbor cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance; *Sturges v. Bridgman* (1879) 11 Ch. D. 852; and a prescriptive right cannot be gained by a riparian proprietor to use the water so as to damage his neighbor without proof of an unreasonable use of water to the injury of such neighbor for twenty years; *Ellis v. Clemens* (1891) 21 O. R. 227, 22 O. R. 216.

Term of Enjoyment. The following terms of enjoyment are prescribed by the Statute:—

Profit à prendre, 30 years, indefeasible after 60 years. Right of way or other easement; 20 Years, indefeasible after 40 years. Right to water, 20 years, indefeasible after 40 years.

Defeasible as Before. Until the easement becomes indefeasible a claim thereto may be answered by proof of a grant, or of a license written or parol for a limited period comprising the whole or part of the period of user, or of the absence or ignorance of the parties interested in opposing the claim and their agents during the whole time that it was exercised; *Bright v. Walker* (1834) 1 C. M. & R. 211, 40 R. R. 536. If it be shewn that it would have been *ultra vires* of a railway company to grant an easement over their land the easement which would otherwise have been acquired by 20 years enjoyment will be defeated; *Re Canada Southern Ry. Co. and Lewis* (1884) 20 C. L. J. 241; *Canada Southern Ry. Co. v. Niagara Falls* (1892) 22 O. R. 41. Where during the first half of the period of enjoyment of an easement the servient tenement was unoccupied, or in a state of nature, and its owners were out of the country, the prescriptive right was not maintained; *McKay v. Erue* (1891) 20 O. R. 709. The mere knowledge of a tenant will be insufficient; *Daniel v. North* (1809) 11 East 372; unless for such a length of time that the knowledge of the landlord may be presumed; *Jamieson v. Coulter* (1873) 21 W. R. 852; *Gray v. Bond* (1821) 2 Brod. & B. 667, 23 R. R. 530.

Enjoyment under Deed or Writing. The time during which the enjoyment of an easement is by some consent or agreement expressly made or given for that purpose by deed or writing will not be reckoned in the time necessary to acquire a prescriptive right although the easement has been enjoyed for the full period which otherwise would make it indefeasible; ss. 34, 35. The deed or writing need not be signed by the owner of the servient tenement. A document signed by the owner of the dominant tenement is sufficient; *Bewley v. Atkinson* (1879) 13 Ch. D. 283; but a mere exception of the easement out of a grant of the dominant tenement is not an agreement preventing the acquisition of the easement by prescription; *Mitchell v. Cantrill* (1887) 37 Ch. D. 56.

Profit à Prendre. S. 34 applies to a profit à prendre which is a right to take something out of the soil of another and is not an easement; *Manning v. Wasdale* (1836) 5 A. & E. 764. The right to cut down and carry away trees or to take stones and sand, or to cut and carry away litter is a profit à prendre; *Bailey v. Stevens* (1862) C. B. N. S. 91; *Constable v. Nicholson* (1863) 14 C. B. N. S. 230; *De la Warr v. Miles* (1881) 17 Ch. D. 535. The right cannot be claimed on behalf of a large and indefinite class such as the owners and occupiers of several tenements; *Gatewards case* (1607) 6 Rep. 59 b; *Tilbury v. Silva* (1890) 45 Ch. D. 98.

Ways, Easements and Water Courses. S. 35 includes all easements properly so called except the right to light; *Dalton v. Angus* (1881) 6 App. Cas. 740, 798; *Simpson v. Godmanchester* (1897) A. C. 696, 709. A right to lateral support from adjoining land may be acquired by 20 years uninterrupted enjoyment for a building proved to have been newly built or altered so as to increase the lateral pressure at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed from the building; *Dalton v. Angus* (1881) 6 App. Cas. 740; see *Backus v. Smith* (1880) 5 A. R. 341; and such a right may be enforced by the tenant; *McCann v. Chisholm* (1883) 2 O. R. 506. The ways covered by the section are private rights of way and not public highways. No private easement by prescription can be acquired over a public highway; *Warin v. London and Canadian Loan Co.* (1885) 14 S. C. R. 232. A more extended right cannot be acquired than that which has been enjoyed for 20 years *Buell v. Read* (1849) 5 U. C. R. 546; *McNab v. Adamson* (1850) 6 U. C. R. 100; *Ruttan v. Winans* (1856) 5 C. P. 378. A right of way is commensurate only with the user, so that user for carriages will not prove a right of way for cattle; *Ballard v. Dyson* (1808) 1 Taunt. 279, 9 R. R. 770 and an user for agricultural purposes will not support an easement for mineral purposes; *Bradburn v. Morris* (1876) 3 Ch. D. 812. Such a right cannot be increased by imposing on the servient tenement an additional burden, so that a right of way to one place cannot be used for the purpose of going elsewhere; *Williams v. James* (1867) L. R. 2 C. P. 577. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm-house and rebuild a cottage on the farm, and for carting away sand and gravel out of the farm it was held that a

right of way for carting the materials required for building a number of new houses on the land was not established; *Wimbledon and Putney Conservators v. Dixon* (1875) 1 Ch. D. 302. The question whether an alleged excessive use is in the ordinary and reasonable use of the land to which the right of way exists, or is a mere colorable use of the way for purposes other than those to which the right extends, is for the jury; *Skull v. Glenister* (1864) 16 C.B.N.S. 81; *William v. James* (1867) L.R. 2 C.P. 577; *Robinson v. Purdom* (1899) 26 A.R. 95, 19 C.L.T. 374. Opening a small shop in a dwelling house to which a way exists does not render the user of the way excessive; *Sloan v. Holliday* (1874) 30 L. T. 757, but by hanging a cottage into a tan yard a right of way restricted to the purposes of the cottage would be extinguished; *Heming v. Burnett* (1852) 8 Ex. 192.

The right of diverting or penning back water which, in its natural course, would flow over or along the land of a riparian owner may be acquired by prescription under the Statute; *Mason v. Shrewsbury Ry. Co.* (1871) L.R. 6 Q.B. 587; *Stothart v. Hilliard* (1890) 19 O.R. 542. The right will be confined to the height of water actually used and will not extend to the height of the dam; *McKechnie v. McKeyes* (1852) 10 U.C.R. 37. The right to use bracket boards on a mill dam may be acquired; *Campbell v. Young* (1871) 18 Gr. 97. A plainly defined channel of a permanent character through which water flows either from a perennial living source or periodically from natural sources is a water-course; *Beer v. Stroud* (1888) 19 O.R. 10; *Arthur v. Grand Trunk Ry.* (1894) 25 O.R. 37, 22 A.R. 89. A right to discharge rain water from a house upon the adjoining land may be acquired by 20 years user; *Thomas v. Thomas* (1834) 2 C.M. & R. 34, and will not be lost by raising the house in the absence of evidence of increased servitude; *Harvey v. Walters* (1873) L.R. 8 C.P. 162. But a right to have rain fall from the eaves will not justify the erection of a spout so as to discharge the water in a body; *Reynolds v. Clarke* (1725) 2 Ld. Raym. 1399. A right to pollute a stream may be acquired; *Baxendale v. McMurray* (1867) L.R. 2 Ch. 790; but the injury must be perceptible for the full period; *Goldsmid v. Tunbridge Wells Commissioners* (1866) L.R. 1 Ch. 349. The right to discharge sewage through a drain may also be acquired; *Attorney-General v. Dorking* (1882) 20 Ch. D. 590. Prescriptive rights may be acquired in permanent artificial watercourses; *Rameshur Pershad Narain Singh v. Koonji Behari Pattuk* (1878) 4 App. Cas. 121.

Whether a right can be acquired to the access of air to the dominant tenement under the Statute must now be deemed unsettled. A number of cases commencing with *Webb v. Bird* (1863) 13 C.B.N.S. 841, and followed by *Bryant v. Lefever* (1879) 4 C.P.D. 172, *Harris v. De Pinna* (1886) 33 Ch. D. 238, and *Chastey v. Ackland* (1895) 2 Ch. 389, had decided that the right to the access of air did not come within the act, but on the latter case coming before the House of Lords, several of their Lordships dissented from the reasoning and decision of the Court of Appeal, but a settlement being effected no judgments were delivered; see (1897) A. C. 155.

Effect of Being Indefeasible. When rights have been enjoyed for the respective periods of 60 and 40 years as the case may be, they are indefeasible notwithstanding any disability of the owners of the servient tenement from time to time, save that a reversioner may within 3 years after the termination of a estate for life, or a term of years exceeding 3 years, resist the claim under s. 41. In two Irish cases, *Beggan v. McDonald* (1878) 2 L.R. Ir. 560 and *Fahey v. Dwyer* (1879) 4 L.R. Ir. 271, it was held that an enjoyment by a tenant of a right of way over land leased by another tenant from the same landlord for an indefeasible period, gave him an easement against the tenant though not against the landlord. In *Harris v. De Pinna* (1886) 33 Ch. D. 238, 253, Chitty, J., thought that the Irish cases should, if they would have disposed of the case, be followed. But an easement for a term of years though capable of being created by grant cannot be gained by prescription. Unless the enjoyment gives a title against all it will give no title at all; *Bright v. Walker* (1834) 1 C.M. & R. 211; *Wheaton v. Maple* (1893) 3 Ch. 48; *Stothart v. Hilliard* (1890) 19 O.R. 542. A tenant cannot acquire an easement under s. 35 against other property of his landlord; *Garford v. Moffatt* (1868) L.R. 4 Ch. 133. Easements of light for a building were capable of being acquired by a tenant for a long term against his landlord; *Frowen v. Phillips* (1862) 11 C.B.N.S. 440; *Mitchell v. Cantrill* (1887) 37 Ch. D. 56; *Robson v. Edwards* (1893) 2 Ch. 146 and against a landlord by user while the lands were occupied by his tenant; *Simperv v. Foley* (1862) 2 J. & H. 555; but it is to be observed that the enjoyment of the easement of light was

not required to be "as of right"; *London Corporation v. Pewterer's Co.* (1842) 2 M. & Rob. 409; *Truscott v. Merchant Tailor's Co.* (1856) 11 Ex. 865.

Statute Operates as a Conveyance. When a prescriptive right such as the Statute requires is shown the claimant is entitled to succeed without the exercise of any discretion on the part of the jury; the Statute serves as a kind of parliamentary conveyance of the easement; *McKeehn v. McKeyes* (1852) 10 U.C.R. 37, 56.

Light. Before the Prescription Act a consensual origin of the right to the access and use of light for windows was presumed from 20 years user; *Lewis v. Price* (1761) 2 Wms. Saund. 504; *Cross v. Lewis* (1824) 2 B. & C. 689. The easement in such a case was negative in its character because unlike a right of way it did not begin in acts of enjoyment which were *prima facie* an encroachment upon the neighbor's soil; per Bowen, J., *Dalton v. Angus* (1881) 6 App. Cas. 784.

By the Prescription Act, the right to light was until 1880, given by positive enactment, and it was said by Lord Westbury in *Tapling v. Jones* (1865) 11 H. L. C. 290, that it thereby became matter *juris positivi* and did not require, and therefore ought not to be rested on any presumption of grant or fiction of a license. In subsequent cases, however, it was held that the Act had not taken away any of the former modes of obtaining the right; *Aynsley v. Glover* (1875) L.R. 10 Ch. 283, and see *Norfolk v. Arbutnot* (1880) 5 C.P.D. 390; *Ecclesiastical Commissioners v. King* (1880) 14 Ch. Div. 213. The grantee of a house has a *prima facie* right to light as against the grantor; *Broomfield v. Williams* (1897) 1 Ch. 602. In *Burnham v. Garvey* (1879) 27 Gr. 80, the Court said, "it is worthy of consideration whether any such provision as is made by our Act (R. S. O. 1877, c. 108) is suitable to the conditions and exigencies of a Canadian Town," and in the following year the present section 36 was enacted and the acquisition of the right to light, by prescription, thenceforward became impossible. Claiming under a lost grant is not claiming by prescription, and it may be that a jury may still properly be directed to presume a grant upon proof of enjoyment for 20 years. Such presumption ought to be made if the enjoyment has, for twenty years, been consistent with a grant; *Dalton v. Angus* (1881) 6 App. Cas. 745, 751, 756, 766, 771, 779, 814, 828; *Goodman v. Saltash* (1882) 7 App. Cas. 633; *Phillips v. Halliday* (1891) A. C. 228, 231.

Enjoyment must be next before some Action. To acquire a right under the Statute, the enjoyment must have been for the necessary period next before the commencement of some suit in which it is brought in question; *Hunt v. Hespeler* (1857) 6 C. P. 269; *McKeehn v. McKeyes* (1852) 10 U. C. R. 37. Any action is sufficient, the section not being limited to the pending action only; *Cooper v. Hubluck* (1862) 12 C. B. N. S. 456. An action which was compromised is sufficient; *Beytagh v. Cassidy* (1868) 16 W. R. 403. An action therefore has to be brought before the title to the easement is perfect; *Wright v. Williams* (1836) 1 M. & W. 98. Where the enjoyment extended down to a period within four years from the action, a title under the Statute had not been acquired; *Parker v. Mitchell* (1840) 11 A. & E. 788. Enjoyment for the necessary period before the act complained of will be insufficient if no action is brought until after the expiration of a year from the cessation of the enjoyment; *Ward v. Robins* (1846) 15 M. & W. 242; *Richards v. Fry* (1838) 7 A. & E. 707.

Where in an action of trespass, the defendant proved user for 48 years before action, with the exception of the last 14 months, his defence of a right of way under the Statute was held not to be sustained; *Lowe v. Carpenter* (1851) 6 Ex. 825. So long as the requisite period has elapsed from the first enjoyment at the time of the action, the right exists notwithstanding that it may have been interrupted before that period expired and the action is in respect of such interruption unless the interruption has been acquiesced in for one year. Enjoyment therefore for any period in excess of 19 years will confer a right under s. 33 though actually obstructed during the 20th year, so long as an action is brought after the 20 years have elapsed and within one year from the interruption; *Flight v. Thomas* (1840) 11 A. & E. 688, 8 Cl. & F. 231; *Burnham v. Garvey* (1879) 27 Gr. 80. But although an effectual interruption may be impossible, the court will not protect the inchoate right by injunction during the 20th year; *Bridewell Hospital v. Ward* (1892) 62 L. J. Ch. 270; *Battersea v. Commissioners of Sewers* (1895) 2 Ch. 708.

Enjoyment must be Continuous. The whole requisite period must be next before the action. *Hunt v. Hespeler* (1857) 6 C. P. 269. Two periods each less than 20 years but separated from one another by unity of possession cannot be added together; *Re Cockburn* (1896) 27 O. R. 450; *Onley v. Gardiner* (1838) 4 M. & W. 496; *Battishill v. Reid* (1856) 18 C. B. 696. A contrary opinion was expressed in *Ladyman v. Grave* (1871) L. R. 6 Ch. 763. These cases must be distinguished from those under ss. 40 and 41 where the running of the Statute is in a sense interrupted by the fact that the owner of the servient tenement is under disability or by the existence of a tenancy for life or years thereof. In the case of a discontinuous easement like a right of way it is extremely difficult, if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of 20 years as the Statute requires to establish the right; *Hollins v. Verney* (1884) 13 Q. B. D. 304, 308. It was said in some of the earlier cases that some enjoyment in each year of the required period must be shown; *Parker v. Mitchell* (1840) 11 A. & E. 788; *De la Warr v. Miles* (1881) 17 Ch. D. 535, 593. But the cases now establish that actual enjoyment for the full period may be established by evidence which falls short of proving actual user for the whole of that period without any cessation; *Flight v. Thomas* (1840) 11 A. & E. 688, 8 Cl. & F. 231; *Hollins v. Verney* (1884) 13 Q. B. D. 304, 307. Evidence proving user more than 20 years before action is admissible though no evidence can be given of enjoyment during the year the requisite period must have commenced; *Lawson v. Langley* (1836) 4 A. & E. 890, and cessation of the user of a watercourse during three years because no water was then running therein followed by user for 19 years, will not prevent the right from being acquired; *Hall v. Swift* (1838) 4 Bing. N. C. 381. Where there was a cessation of the user 18 years before action of a right of common of pasture for 2 years, because the owner had then no commonable beasts, it was held that the cessation of enjoyment was accounted for in such a way as to justify an inference that the right was actually enjoyed for the requisite period; *Carr v. Foster* (1842) 3 Q. B. 581. Whether the temporary non-user occurs at the beginning or end or at any part of the statutory period is immaterial. But the total absence of user for any year will be fatal unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user; *Hollins v. Verney* (1884) 13 Q. B. D. 304. User of a way at long intervals, namely on three occasions the first 24 years before action, the second 12 years thereafter and the third in the year before action is not such an uninterrupted enjoyment as is necessary to acquire the right; *Hollins v. Verney* (1883) 11 Q. B. D. 715, 13 Q. B. D. 304.

Interruption. An interruption is an adverse obstruction acquiesced in for more than a year, not a mere discontinuance of user; *Carr v. Foster* (1842) 3 Q. B. 581; *McKechnie v. McKoyes* (1852) 10 U.C.R. 37. It may be the act of a stranger; *Davies v. Williams* (1852) 16 Q. B. 546. An interruption in fact which does not exist a year, or is not acquiesced in, does not destroy the continuity of the enjoyment; *Flight v. Thomas* (1840) 11 A. & E. 688, 8 Cl. & F. 231. If the interruption is of a permanent character, the onus is on the party claiming the easement to show that it did not in fact last for a year, but if it is a fluctuating obstruction, not likely to be of a permanent character, or one which from its very nature is not of a permanent character, it lies upon the servient owner to show that there has been an interruption existing and acquiesced in for more than a year; *Preshud v. Bingham* (1889) 41 Ch. D. 268. Acquiescence in an interruption for more than a year prevents any right from being acquired under the Statute; *Tilbury v. Silva* (1890) 45 Ch. D. 98; *Parker v. Mitchell* (1840) 11 A. & E. 788; *Lowe v. Carpenter* (1851) 6 Ex. 825. Whether or not there has been acquiescence is a question of fact for a jury. It is not necessary for an action to be brought within a year to prevent the loss of the right. Where correspondence was going on and the plaintiff was protesting against his rights being interfered with, it was held that the jury might infer that he had not acquiesced although the obstruction had existed more than a year; *Bennison v. Cartwright* (1864), 5 B. & S. 1; and the same decision was reached where the protests were merely verbal; *Glover v. Coleman* (1874) L. R. 10 C. P. 108. A promise by the servient owner to remove the obstruction will keep the right alive at least for a year from the promise; *Gale v. Abbott* (1862) 10 W. R. 748. It will be observed that the year begins only when the party interrupted has notice of the interruption, and of the person making or authorizing the same to be made. The mere existence of the physical obstruction without notice of by whose authority it is made is

therefore insufficient; *Seddon v. Bank of Bolton* (1882) 19 Ch. D. 462. Payment of rent for the use of lights was held not to be an interruption of the easement of light; *Plasterers' Co. v. Parish Clerks' Co.* (1851) 20 L.J. Ex. 262; and a payment made for the use of a right of way by a tenant of the dominant tenement, without the knowledge of his landlord, will not defeat the right which the latter has, by enjoyment for the full period, acquired before the payment; *Ker v. Little* (1898) 25 A.R. 387.

Pleading. The party claiming a right under the Statute must plead that his enjoyment has been as of right; *Buel v. Ford* (1860) 10 C.P. 206; *Holford v. Hankinson* (1844) 5 Q.B. 584. Under s. 38 a denial that the enjoyment was "as of right" is sufficient to raise the issue of unity of possession; *Onley v. Gardiner* (1838) 4 M. & W. 496; *Outram v. Maude* (1881) 17 Ch. D. 391, 405 or that the enjoyment was by occasional license; *Beasley v. Clark* (1836) 2 Bing N.C. 705, but a license covering the whole period of enjoyment should be set up specifically; *Tickle v. Brown* (1836) 4 A. & E. 369. The license should be shewn to be co-extensive with the right claimed; *Colchester v. Roberts* (1838) 4 M. & W. 760. If the intervention of a life estate or term of years is relied on it should be specially pleaded; *Stuart v. Spence* (1853) 10 U.C.R. 486; *Pye v. Mumford* (1848) 11 Q.B. 666. It was formerly necessary to prescribe in a *que estate*, i.e. by pleading that A.B., the owner of the fee, and all those whose estate he had, had from time immemorial the easement. S. 38 (2) makes it sufficient to allege the enjoyment as of right by the occupiers of the dominant tenement for the requisite period; *Smith v. Wallbridge* (1856) 6 C.P. 324; *Bechtel v. Street* (1861) 20 U.C.R. 15. All disabilities must be specially pleaded. To provide against statutory defences defeating the right, it is proper to set up the right as arising under a lost grant; *Bailey v. Stevens* (1862) 12 C.B.N.S. 91; *Bass v. Gregory* (1890) 25 Q.B.D. 481. It will also be found advisable to plead both the qualified and indefeasible rights by alleging enjoyment for the 20 or 30 and 40 or 60 years; *Stamford v. Dunbar* (1845) 13 M. & W. 827.

Disabilities. The following disabilities are allowed in respect of enjoyments for the shorter periods, (1) infancy, (2) idiocy, (3) lunacy, (4) tenancy for life; *Hale v. Oldroyd* (1846) 14 M. & W. 736, (5) pendency of an action. It is possible to suppose cases in which the disabilities have not been removed when the longer period expires. In such cases the right is indefeasible, notwithstanding the disabilities under s. 40 except in the one case of a tenancy for life of a servient tenement under s. 35 and a reversion expectant thereon. Enjoyment both before and after the disability arose may be taken into account e.g. 25 years before and 5 years after a life estate; *Clayton v. Corby* (1843) 5 Q.B. 415. This does not mean that two discontinuous periods of enjoyment may be united but that the period of continuous enjoyment must be extended by the length of the period of disability; *Onley v. Gardiner* (1838) 4 M. & W. 496, 500. A lease for more than 3 years will not prevent a right from being acquired by 20 years enjoyment, but the right will not become indefeasible at the expiration of 40 years if the reversioner within 3 years from the termination of the term resists the right; *Palk v. Skinner* (1853) 18 Q.B. 568. The right to exclude a tenancy for life from the term of 40 years is given only to a reversioner, not to a remainderman; *Symons v. Leaker* (1885) 15 Q.B.D. 629, and the pleading should show that the party is entitled to the expectant reversion; *Wright v. Williams* (1836) 1 M. & W. 100. The privilege given to a reversioner extends to his tenant, even to a tenant at will; *Laird v. Briggs* (1880) 16 Ch. D. 440, see S.C. 19 Ch. D. 22. In the English section corresponding to s. 41 the words in the second line are "way or other convenient watercourse." Our Statute has adopted what was evidently intended, see *Laird v. Briggs* (1881) 19 Ch. D. 22, 33. If under s. 40 or 41 an easement is not acquired against the owner of the fee, no easement exists, as an easement under the Statute must be absolute and not for a term of years; *Bright v. Walker* (1834) 1 C.M. & R. 211, 40 R.R. 536; *Wheaton v. Maple* (1893) 3 Ch. 46; *Stothart v. Hilliard* (1890) 19 O.R. 542.

Crown Bound by Statute. Except in unsurveyed territory the Crown is bound by rights acquired under ss. 34 and 35, *Bowlby v. Woodley* (1852) 8 U.C.R. 318. It was never bound as to easements for the access of light; *Perry v. Eames* (1891) 1 Ch. 685; *Wheaton v. Maple* (1893) 3 Ch. 48.

CHAPTER 134.

An Act to amend the Law of Vendor and Purchaser
and to Simplify Titles.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts
as follows:—

1. This Act may be cited as *The Vendors and Purchasers Short title.*
Act.

2. In the completion of any contract of sale of land made after the 10th day of February, 1876, the rights and obligations of vendors and purchasers shall (subject to any stipulation in such contract to the contrary), be regulated by the following rules, namely:—

Rights of
vendors and
purchasers in
contracts of
sale of lands.

1. Recitals, statements and description of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

Recital, etc.,
20 years old,
of facts, etc.,
prima facie
evidence.

2. Registered memorials of discharged mortgages shall be sufficient evidence of the mortgages without the production of the mortgages themselves, unless and except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power.

Memorials of
discharged
mortgages.

3. In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, or in other cases, if possession has been consistent with the registered title, the memorials shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the original instruments unless they appear to be in his possession or power; and the memorials shall be presumed to contain all the material contents of the instruments to which they relate.

Memorials
20 years old,
when, and of
what, evi-
dence.

4. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to the title in case the pur-

Inability to
furnish cove-
nant to pro-
duce and fur-

nish documents of title.

chaser will, on the completion of the contract, have an equitable right to the production of such documents. R. S. O. 1887, c. 112, s. 1.

Evidence in actions.

3. In actions it shall not be necessary to produce any evidence which, by section 2 of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such actions. R. S. O. 1887, c. 61, s. 49; c. 112, s. 2.

Summary applications to High Court in respect to requisitions, objections or compensation, etc.

Costs.

4. A vendor or purchaser of real or leasehold estate or their representatives respectively may at any time or times and from time to time apply in a summary way to the High Court, or a Judge thereof, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract except a question affecting the existence or validity of the contract; and the Court or Judge shall make such order upon the application as appears just, by reference to the Master or otherwise, and shall order how and by whom all or any of the costs of and incidental to the application shall be borne and paid. R. S. O. 1887, c. 112, s. 3.

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NOTES.

Object of Act. The act was passed to facilitate the transfer of land; see Preamble to 37-38 Vict. c. 78. Where the contract is inconsistent with any of the rules prescribed in s. 2 the contract governs.

Recitals. S. 2 (1) is substantially similar to 37-38 Vict. c. 78 s. 2 (2). A recital in a conveyance 20 years old that the grantor was seised in fee simple was held to be such proof of that fact as to make that conveyance a good commencement of title for a solicitor's abstract though otherwise the purchaser would have been entitled to have title deduced for a period of 40 years; *Bolton v. London School Board* (1878) 7 Ch. D. 766. This decision has been adversely criticised; 1 Byth & Jarm. 253; 2 ib. 678; *Armour on Titles*, 2nd Ed., 34. It has however been followed in Ontario; *Macklin v. Dowling* (Ferguson J. Sept. 20th, 1888) see 19 O. R. 444.

A recital in a deed by trustees that the sale is made "in pursuance of the trust for sale conferred on them" is sufficient evidence that the trust deed had not been revoked either by the exercise by the settlor of a power of revocation or by a sale by him for value during his lifetime; *Re Marsh and Earl Granville* (1883) 24 Ch. D. 11.

Memorials of Discharged Mortgages. In verifying an abstract, it is in strictness necessary to produce every deed material to the title unless the contract absolves the vendor from that obligation. S. 2 (3) makes it unnecessary to produce mortgages not in his possession, which were registered by memorials, if they have been discharged. The registered memorials are made good primary evidence of the mortgages themselves. See *Van Velsor v. Hughson* (1882) 9 A. R. 390, 401.

Memorials. Prior to 29 Vict. c. 24 (1865) registration in Upper Canada was effected by memorial. The memorial was required to contain the date of the Instrument or Will, the names and additions of all the parties to the Instrument or of the Devisor, Testator or Testatrix; the names and additions of all the witnesses, and their places of abode, and a description of the lands. An Instrument other than a Power of Attorney or a Will was further required to be under the hand and seal of the grantors, or one or more of them, or of the grantees or one or more of them, or their or his representatives, and to be attested by two witnesses, one of whom was a witness to the original. C. S. U. C. c. 89 ss. 19, 20. Before the Statute a memorial signed by a grantee was not good even as secondary evidence of the deed; *Gough v. McBride* (1861) 10 C. P. 166. Such a memorial is now good evidence if the possession of the very land in question is consistent with the registered title; *Van Velsor v. Hughson* (1882) 9 A. R. 401. Possession of other lands comprised in the same memorial will not be sufficient to justify the admission of the memorial as evidence of the title to land of which such consistent possession has not been had; *ib.*

The memorials are presumed to contain all the material contents of the instruments to which they relate. This presumption may be rebutted by long enjoyment of rights consistent only with a reservation or regrant of an easement by the deed. Where a grantor of land conveyed to a Railway company, and had for more than 20 years enjoyed the use of a subway under the track, it was presumed that the conveyance contained a reservation of the subway, though the registered memorial did not mention it and the conveyance itself was lost; *Wells v. Northern Ry. Co.* (1887) 14 O. R. 594. A recital, in a memorial, of trusts will avoid the necessity of producing the original trust deed if it is not in the vendor's possession; *Re Ponton and Swanston* (1889) 16 O. R. 669.

Upon the subject as to how far memorials are evidence see 4 L. J. N. S. 1; *Leith R. P. Statutes* 427; *Armour on Titles*, 2nd Ed. 120.

Covenant for Production. S. 2 (4) is similar to 37-38 Vict. c. 78 s. 2 (3). Formerly specific performance would not be granted against a purchaser if the vendor could not furnish him with a legal covenant i. e. a covenant running with the land, for the production of the title deeds; *Barclay v. Raine* (1823) 1 Sim. & St. 449, 24 R. R. 206. Where a party is not exclusively entitled to the possession of the title deeds he cannot maintain an action of detinue for them, but he may have an equitable right to their production; *Wright v. Robotham* (1886) 33 Ch. D. 106.

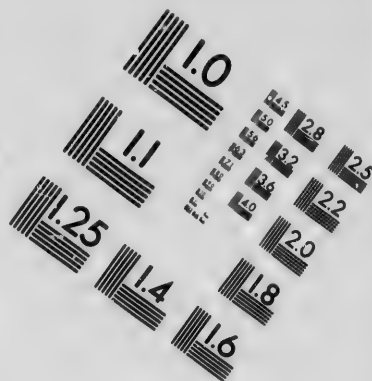
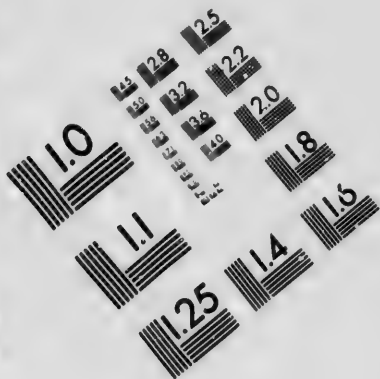
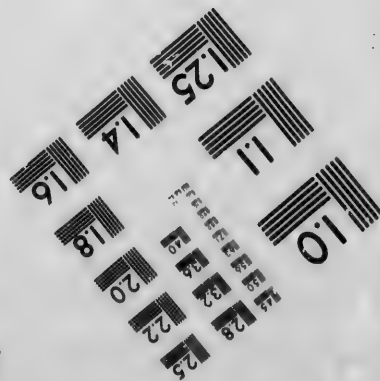
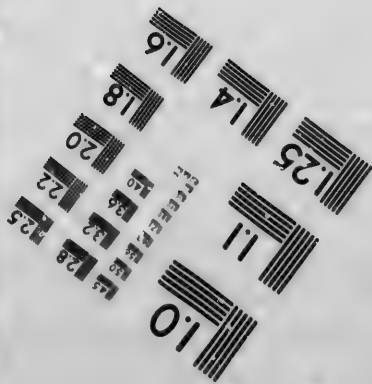
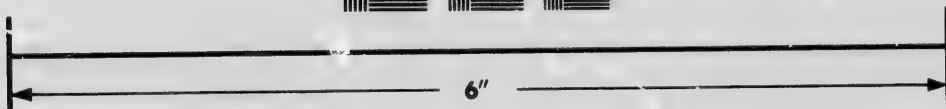
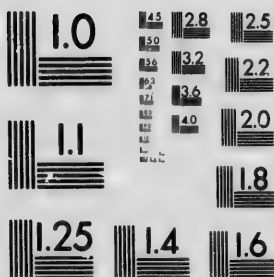


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Summary Application to Court. S. 4 is substantially the same as 37-38 Vict. c. 78 s. 9. The application is made by Petition. It is desirable that an agreed statement of facts should be brought in whenever practicable; Daniels, Ch. Forms, 4th Ed. 654.

Parties. The only parties who need be represented are those who would be parties to a suit for specific performance; *Re Eaton Estate* (1878) 7 P. R. 386. The Court cannot decide a question in which the purchaser is not interested e.g. the disposition of the purchase money as between a married woman and her trustees; *Re Tippet and Newbould* (1888) 37 Ch. D. 444. All the parties to the contract should be made parties but no one else. Mortgagees should not be made parties, though they may be necessary parties to the conveyance; *Re McNabb* (1882) 1 O. R. 97. Other parties may it seems come in and agree to be bound; *Re Naylor and Spendla* (1886) 34 Ch. D. 217.

Service out of Jurisdiction. There is no power to allow service out of the jurisdiction; see *Re Busfield* (1886) 32 Ch. D. 123; *Re Benfield and Stevens* (1897) 17 P. R. 300, 339.

Jurisdiction. Where the existence or validity of the contract is in dispute, the Court has no jurisdiction under s. 4. It will therefore decline to enter upon a question of the validity of the title until it is decided that the contract is binding; *Re Robertson and Daganeau* (1882) 9 P. R. 288; but see *Re Lauder and Bayley* (1892) 3 Ch. 41. If the purchaser claims the return of his deposit, and his right is based on misrepresentations of the vendor justifying rescission, the Court has no jurisdiction; *Re Davis and Cavey* (1889) 37 W. R. 217. In *Henderson v. Spencer* (1881) 8 P. R. 402, it was decided that the question of the abandonment of the contract could not be raised by the purchaser respondent and the question as to title was answered by the Court, and costs awarded against the purchaser, but Boyd, C. declined to follow this case in *Re Robertson and Daganeau* (1882) 9 P. R. 288. It is clear that the validity of a vendor's notice to rescind may be decided; *Re Jackson and Woodburn* (1887) 37 Ch. D. 44; *Hardman v. Child* (1885) 28 Ch. D. 712; *Re Dames and Wood* (1885) 29 Ch. D. 626; *Re Starr-Bowkett Building Society and Sibun* (1889) 42 Ch. D. 375; *Re Arbib and Glass* (1891) 1 Ch. 601; *Re Deighton and Harris* (1898) 1 Ch. 458, and it is said that the words of the exception in s. 4 refer to the validity or existence of the contract in its inception only; *Re Jackson and Woodburn* (1887) 37 Ch. D. 44. The right to a rescission of the contract on the ground of fraud cannot be determined; *Re Hargreaves and Thompson* (1886) 32 Ch. D. 454; *Re Sandbach and Edmondson* (1891) 1 Ch. 99, 102.

The purchaser cannot on the proceeding recover damages for loss occasioned to him by delay in the completion of the purchase; *Re Wilson and Stevens* (1894) 3 Ch. 546. There must be a sale—a voluntary gift is not within the section; *Re Marquis of Salisbury* (1875) 23 W. R. 824, but counsel may confer jurisdiction by admitting a nominal consideration; *ib.*

What may be Done. Whatever could be done in the Master's office upon a reference as to title, where the contract has been established, can be done by proceeding under s. 4; *Re Burroughs and Lynn* (1877) 5 Ch. D. 601. The section was not intended to apply to cases where there are questions of controverted fact; *Re Popple* (1877) 25 W. R. 248, and it would seem that a preliminary question of fact cannot be determined; *Re Gray and Metropolitan Ry.* (1881) 44 L. T. 567, but evidence by affidavit and cross-examination thereon is admissible as to the vendor's title; *Re Burroughs and Lynn* (1877) 5 Ch. D. 601.

Any short point of law or construction arising upon the abstract or the purchaser's requisitions may be disposed of; *Re Hargreaves and Thompson* (1886) 32 Ch. D. 454. In *Re Bingham and Wriggleworth* (1884) 5 O. R. 611, by consent of parties, FERGUSON, J. answered a question on a petition under the section as to whether a good title could be made on the construction of a trust deed, but guarded himself against making a precedent, as he foresaw undesirable consequences if all questions of title were to be settled in this way. Where the law upon the point submitted appeared to be in a state of uncertainty, if not of transition, the Court said that any experiment had better be made in a contested case, where all parties interested would be represented, and declined to make an order; *Re Hamilton* (1889) 18 O. R. 195, and the Court will, if the title is doubtful, dismiss with costs a vendor's petition; *Re McNab* (1882) 1 O. R. 1882, but see *Osborne and Rowlett* (1880) 13 Ch. D. 774, where it is said it is incumbent on the Court to decide questions of law between a vendor and a purchaser, but it must be borne in mind that any such decision

does not technically bind any one else than the parties actually before the Court, and does not prevent any person not bound from bringing fresh litigation upon the purchaser with reference to the same title. Nevertheless a doubtful question must be left open and not answered in such a way as would force the title on a purchaser or prejudice the vendor's title; *Re Thackway and Young* (1888) 40 Ch. D. 34, and see *Re Briggs and Spicer* (1891) 2 Ch. 127.

Construction of Contract. The Court has on applications under the section construed the contract, e.g. by determining what price was payable; *Re Popple* (1877) 25 W. R. 248, whether the contract accurately described the encumbrance to be assumed by the purchaser; *Re Booth and McLean* (1891) 21 O. R. 452; by determining when the term should commence under an agreement for a lease; *Re Lander and Bagley* (1892) 3 Ch. 41; whether a condition of sale was so misleading as not to be binding on the purchaser; *Re Marsh and Earl* (1883) 24 Ch. D. 11; whether the purchaser is entitled to a right of way; *Re Lavery and Kirk* (1888) 33 S. J. 127; to what a condition as to mode of description applied; *Re Beyfus and Masters* (1888) 39 Ch. D. 110.

Illustrations of Questions Answered. Almost every conceivable kind of question arising upon an investigation of a title has been answered in proceedings taken under s. 4. It is not considered necessary to exhaust the authorities—a few illustrations will suffice. The Court has decided whether an abstract is complete; *Re Ford and Hill* (1879) 10 Ch. D. 365; whether an execution bound lands; *Re Trusts Corporation and Medland* (1892) 22 O. R. 538; *Re Trusts Corporation and Behmer* (1894) 26 O. R. 191; *Re Lewis and Thorne* (1887) 14 O. R. 133; whether local improvement rates not matured were an incumbrance which the vendor was bound to commute and remove; *Re Graydon and Hammill* (1890) 20 O. R. 199; what amount of taxes a vendor should pay; *Re Wilson and Houston* (1891) 20 O. R. 532; what interest a purchaser should pay; *Re Dingman and Hall* (1890) 17 A. R. 398; *Re Woods and Lewis* (1898) 2 Ch. 211; whether trusts of land were extinguished by a conveyance from the *cestuique trust*; *Re Rathbone and White* (1892) 22 O. R. 550; whether a vendor was bound to apply under the provision equivalent to R. S. O. c. 119, s. 15 (ante p. 590), for a discharge of encumbrances; *Re Great Northern Ry. Co. and Sanderson* (1885) 25 Ch. D. 788; whether the consent of two out of three executors to a sale under a power requiring the consent of executors was sufficient; *Re McNabb* (1882) 1 O. R. 94; whether certificates *Lis Pendens* should be removed and who should pay for copies of documents; *Re Bohier and Ontario Investment Co.* (1888) 16 O. R. 259; what is the proper construction of a will; *Re White and Hindle* (1877) 7 Ch. D. 201; *Re Bain and Leslie* (1894) 25 O. R. 136; whether a devise amounted to an estate tail which could be barred; *Re Fraser and Bell* (1891) 21 O. R. 455; whether a power of sale could be exercised by a surviving executor; *Re Koch and Wideman* (1894) 25 O. R. 262; whether the executor of a deceased lessor could renew a lease; *Re Canadian Pacific Ry. Co. and National Club* (1893) 24 O. R. 205.

Questions of Conveyance. Many of the foregoing were questions of conveyance and not of title. The Court may settle the form of the conveyance on an application under the act; *Re Grey and Metropolitan Ry. Co.* (1881) 44 L. T. 567; *Re Pigott and Great Western Ry. Co.* (1881) 18 Ch. D. 146; *Re Agg-Gardner* (1884) 25 Ch. D. 600, and whether the concurrence of a husband is necessary; *Re Thompson and Curzon* (1885) 39 Ch. D. 177; or of a *cestuique trust*; *Re Cooke* (1877) 4 Ch. D. 454; and whether trustees can be required to personally receive the purchase money; *Re Bellamy and Metropolitan Board of Works* (1883) 24 Ch. D. 387.

Compensation. Express power is given to decide questions of compensation. This power has been exercised in *Re Orange and Wright* (1885) 52 L. T. 606; *Re Aspinalls and Powell* (1889) 60 L. T. 595; *Re Herbolt and Chaytor* (1888) 57 L. J. Ch. 421, and even after completion in *Re Turner and Skelton* (1879) 13 Ch. D. 130. It may not be decided whether the purchaser is entitled to receive moneys which the vendor has recovered from a tenant for non-repair of the premises; *Re Edie and Brown* (1888) 58 L. T. 307.

Consequential Relief. The Court is to make such order as shall appear just. This confers power to make such order as would be just as the natural consequence of what is decided; *Re Smith and Stott* (1883) 48 L. T. 512. Therefore on deciding that a vendor had not shewn a good title the Court ordered

the return of the deposit with such damages as naturally flowed from the vendor's failure, viz. statutory interest on the money paid and the cost of investigating the title; *Re Hargreaves and Thompson* (1886) 32 Ch. D. 454; *Re Ellsworth and Tidy* (1889) 42 Ch. D. 53; *Re Bryant and Barningham* (1890) 44 Ch. D. 218; *Re Lyon and Carroll* (1896) 1 Ir. R. 383, and the Court may order the costs to be charged on the vendor's interest in the property; *Re Higgins and Hitchman* (1892) 21 Ch. D. 95; *Re Yielding and Westbrook* (1886) 31 Ch. D. 344. Interest paid under protest may be ordered to be returned; *Re Young v. Harston* (1885) 31 Ch. D. 168, but *quære* if this jurisdiction can be exercised without consent.

Where the result of the answer to the question is that a good title can be made, the court may order the purchaser to carry out the contract, and may further order that he pay the costs of a resale and any deficiency thereon; *Re Craig* (1883) 10 P.R. 33, and an action for specific performance will not be entertained, upon the ground that the parties having once applied to the Court, all questions thereafter arising must be summarily disposed of; *Thompson v. Ringer* (1881) 44 L.T. 507. Where a trustee had an absolute discretion as to forfeiting an estate for the benefit of the settlor and tenant for life, and he (the settlor and tenant for life) was on the retirement of the original trustee appointed trustee, the court although it answered the questions submitted in favor of the vendor trustee, was of opinion that the appointment was one which the Court would not have made and refused to compel the purchaser to accept the title; *Re Treleven and Horner* (1881) 28 Gr. 624. Leave may however be given to institute a action for specific performance; *Re Boustead and Warwick* (1886) 12 O.R. 488, where leave was given so that evidence proving a title by possession might be given on affidavit, and be subject to cross-examination.

Reference. A reference to the Master may be directed to carry out the terms of any order, e.g. to ascertain the amount of compensation; *Re Aspinalls and Powell* (1889) 60 L.T. 595; or to settle the form of the conveyance; *Re Mouton and Gilzean* (1884) 27 Ch. D. 564.

Costs. The costs are in the discretion of the Court; *Givins v. Darvil* (1880) 27 Gr. 507; but generally they will follow the event; *Re Mercer and Moore* (1880) 14 Ch. D. 287; *Re Davis and Cavey* (1888) 40 Ch. D. 601; *Re Starr-Bowkett Society and Sibun* (1889) 42 Ch. D. 375; except where the decisions are conflicting; *Re Osborne and Rowlett* (1880) 13 Ch. D. 774, or there is a fair point for discussion; *Lucas v. Hamilton Real Estate Association* (1879) 26 Gr. 284; *Re Coward and Adams* (1875) L.R. 20 Eq. 179; *Re Metropolitan District Railway Co. and Cash* (1880) 13 Ch. D. 607, and see *Re Edwards and Green* (1888) 58 L.T. 789. Extra costs occasioned by the fault of either party may be ordered to be paid by the party in fault; *Re Bobier and Ontario Investment Co.* (1888) 16 O.R. 250. It has been said by Jessel, M.R., that when the Court decides that a good title can be made, the general rule is to order the purchaser to pay the costs so as to assure his title and show that the Court entertains no doubt upon it; *Re Osborne and Rowlett* (1880) 14 Ch. D. 774. If the vendor relies on a possessory title and the question arises whether it has been made out the Court will order that if the vendor makes out such a title there shall be no costs, but if he fails he must pay costs; *Re Boustead and Warwick* (1886) 12 O.R. 488.

Appeals. An appeal may be made either to a Divisional Court or to the Court of Appeal; Judicature Act (R. S. O. s. 51) ss. 75, 76, *ante* p. 187; *Re Dingman and Hall* (1890) 17 A.R. 398.

CHAPTER 136.

An Act respecting the Registration of Instruments
relating to Lands.

(As amended by 62 V. c. 16.)

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- SHORT TITLE, s. 1.**
INTERPRETATION, ss. 2, 61 (6).
REGISTRY OFFICES, ss. 3-9.
REGISTRARS AND DEPUTIES :
 Appointment, security of, etc., ss. 10-23.
 Duties, ss. 24-28.
BOOKS OF OFFICE—
 To be furnished by County, ss. 29-31.
 Transfer of, upon alteration in limits of the Registry Division or removal of Registrar, ss. 32-34.
 Copies of, when too old for use, s. 35.
ABSTRACT INDEX, s. 36.
ALPHABETICAL INDEX, s. 37.
INSTRUMENTS THAT MAY BE REGISTERED, ss. 38, 39.
PROOF FOR REGISTRATION, ss. 40-58.
WHERE IN FOREIGN LANGUAGE, s. 59.
MANNER OF REGISTERING, ss. 60-67.
REGISTRATION OF—
 Crown grants, s. 68.
 Orders in Council, s. 69.
 Wills, s. 70-71.
 Other instruments, s. 72.
 Instruments executed before 1st Jan. 1866, ss. 73, 74.
REGISTRATION OF INSTRUMENTS IN FULL: "WHEN MEMORIALS PREVIOUSLY REGISTERED, s. 75.
DISCHARGES OF MORTGAGES, ss. 76-84.
DISCHARGE OF LIEN NOTES, s. 85.
BY-LAWS, ETC., OPENING ROADS OR CHANGING MUNICIPAL LIMITS, s. 86.
REGISTRATION AND ITS EFFECT, ss. 87-99.
 Unregistered instruments after grant from the Crown void against subsequent registered purchaser, s. 87.
 Powers of Attorney, s. 88.
 Wills to be registered within twelve months after death, s. 89.
 Deeds on sales for taxes, ss. 90, 91.
 Registration as notice, ss. 92, 93.
 Unauthorized alterations in entries, ss. 94, 95.
 When instrument to be deemed to be registered, s. 96.
 Actual notice, s. 97.
 Equitable liens invalid as against registered instruments, s. 98.
 Tacking not allowed as against registered instruments, s. 98.
 Subsequent advances on mortgages, s. 99.
REGISTRATION OF PLANS, ss. 100-112.
PROVISIONS FOR RE-REGISTRATION IN CASE OF LOSS ETC., OF REGISTRY BOOKS, s. 113.
DEFECTS IN REGISTRATION, ss. 114-117.
FEEs OF REGISTRARS, ss. 118-134.
INSPECTOR OF REGISTRY OFFICES, ss. 135-138.
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Registry Act.*" 56 V. Short title.
 c. 21, s. 1.

Interpreta-
tion

2. Where the following words occur in this Act, or in the schedules thereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

"Instru-
ment."

1. "Instrument" shall include every Crown grant, Order in Council of the Dominion or of this Province, deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, bond, release, discharge, power of attorney, or substitution thereof, under which any such deed, conveyance, assurance, discharge of mortgage or other instrument is executed, bonds or agreements for sale or purchase of land, letter of attorney, will, probate of will, grant of administration, municipal road by-law, certificate of any proceedings in any Court, judgment of foreclosure, and every other certificate of judgment of any Court affecting any interest in or title to land; also, certificates of payment of taxes, granted under the corporate seal of the county, city, or town by the treasurer; every sheriff's and treasurer's deed of lands sold by virtue of his office; every contract in writing; every commission and proceeding in lunacy, bankruptcy and insolvency; and every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered or affected in any wise, affecting land in Ontario.

"Land."

2. "Land" shall include lands, tenements, hereditaments, appurtenances and real estate.

"Will."

3. "Will" shall include probate of will and exemplification, or notarial or prothonotarial copies of probate of will, and letters of administration with the will annexed, and any devise whereby lands are disposed of or affected.

4. "County" shall include a union of counties, a city, junior county and any part of a county or counties set apart for judicial or registration purposes. 56 V. c. 21, s. 2.

Registry
Divisions.

3. The Registry Divisions at present existing, as set forth in Schedule Q, are hereby continued; and whenever any county is separated for judicial purposes from a union of counties, or a new county is formed and set apart for judicial purposes, there shall be a separate Registry Office established therein by the Lieutenant-Governor in Council, which office shall be kept in the county town in like manner as in other county towns. 56 V. c. 21, s. 3.

Registry Divi-
sions in
Toronto.

4. There shall be separate registry divisions for the city of Toronto, to be called respectively, East Toronto and West Toronto. 56 V. c. 21, s. 4.

Registry
offices in
Toronto.

5. The registry building now on Richmond Street West in the City of Toronto, shall be and continue to be the offices of the Registry Divisions of East and West Toronto. The former Registrar of the City of Toronto shall, during pleasure and without new appointment, be Registrar for the registry division of West Toronto. 56 V. c. 21, s. 5.

6. The Council of the City of Toronto shall, by addition thereto to be approved by the Lieutenant-Governor in Council provide in or in connection with the present registry building, or otherwise, sufficient safe and proper fire-proof offices and vaults for the Registry Offices for both divisions of East and West Toronto, and for the Office of Land Titles for the said City, and shall furnish the same in accordance with the provisions of this Act and *The Land Titles Act* respectively. 56 V. c. 21, s. 6.

Provision for registry and land titles offices in Toronto.

Rev. Stat. c. 138.

7.—(1) The registry books, and all books of indexes, which have been kept exclusively for the Registry Division of East Toronto, and likewise all original memorials, all original duplicates, and all deeds, conveyances and wills, and all other instruments, and all maps or plans lodged according to law in his office, and relating exclusively to lands within the Division of East Toronto, shall remain in the custody of the Registrar of East Toronto.

What books, etc., to remain in custody of Registrar of East Toronto.

(2) All other abstracts, index books and registry books original memorials and original duplicates, and all deeds, conveyances and wills, and all other instruments and maps or plans, affecting lands in both Registry Divisions, shall remain and continue with the Registrar of the Registry Division of West Toronto.

What books, etc., to be kept by Registrar of West Toronto.

(3) All wills and instruments in which there is a general devise, conveyance or power affecting lands in the City of Toronto without local description, shall be registered in the Registry Division of West Toronto.

General registry in West Toronto office

(4) The Registrar of the Registry Division of West Toronto is hereby authorised and empowered to certify to all abstracts of title and copies of instruments from such books retained in his office, and affecting lands in the Registry Division of East Toronto, and he shall permit searches to be made therefrom, whenever required to do so, upon being paid the ordinary fees.

Duty of Registrar of West Toronto as to matters affecting lands in East Toronto.

(5) The present Abstract Clerk shall be the Abstract Clerk of the two Divisions, during the pleasure of the Lieutenant-Governor, and shall perform such other duties as the Lieutenant-Governor may direct. His salary shall be paid by the two Registrars, one-half by each, or in such other proportions as the Lieutenant-Governor may from time to time direct.

Abstract Clerk.

(6) The Master of Titles is to be at liberty to inspect, by himself or his clerks, all books and papers in the said offices for his own information as such Master, without payment of fees, subject to any general rules to be made under the authority of *The Land Titles Act*. 56 V. c. 21, s. 7.

Inspection of books, etc., in Toronto registry offices by Master of Titles.
Rev. Stat. c. 138.

8. Where the Registry Office in any Division appears to the Lieutenant-Governor in Council to be inconveniently situated, he may by proclamation order the same to be removed to any other place in the Division. 56 V. c. 21, s. 8.

Registry office may be removed.

County Councils to provide fire-proof offices and vaults.

9. For the safe-keeping and protection of all books, memorials, duplicates, and other instruments of whatever description, and plans, belonging to the office of Registrar, the council of every county where, at any time there are no safe and proper fire-proof offices and vaults provided by the council, or where hereafter any Registry Office is established, shall provide, furnish and maintain, and keep in good repair, a safe and fire-proof Registry Office, fire-proof vaulted, upon a plan and on a site to be approved by the Lieutenant-Governor in Council: and the said council shall keep the said Registry Office furnished with fuel and furniture and in good repair, and towns separated from counties for municipal purposes, and cities in which no separate Registry Offices exist, shall bear a ratable proportion of the expense thereof, based on the assessment of all the municipalities within the jurisdiction of the county. 56 V. c. 21, s. 9.

REGISTRARS.

Registrar.

10. Every Registry Office shall be kept by an officer to be called the Registrar. 56 V. c. 21, s. 10.

Registrars, how appointed, etc.

11. The Lieutenant-Governor shall, as occasion may require from time to time, by commission, under the Great Seal of the Province, appoint a fit person to the office of Registrar, and shall, in like manner, fill any vacancy occurring by the death, resignation removal or forfeiture of office of any Registrar, and every Registrar heretofore appointed or hereafter to be appointed shall hold office during pleasure only. 56 V. c. 21, s. 11.

Amount of security to be given.

12. The Lieutenant-Governor may from time to time by Order in Council fix and determine the amount of the security to be given, as hereinafter mentioned, by each Registrar; but the amount of such security shall be not less than \$4,000, nor more than \$10,000. 56 V. c. 21, s. 12.

[As to security of Registrars in the Unorganized Districts, see *Cap. 109, sec. 79.*]

Security to be given by Registrars. Rev. Stat c. 16.

13.—(1) Subject to the provisions of section 24 of *The Act respecting Public Officers*, before any Registrar is sworn into office, he shall execute and enter into a joint and several covenant in duplicate with two or more sufficient sureties to be approved by the Lieutenant-Governor in Council for such amounts as may be fixed and determined by Order in Council in that behalf as aforesaid.

(2) Such covenant may be in the form of Schedule A to this Act, or to the like effect; and to each of such covenants shall be attached an affidavit in the form of Schedule B to this Act, or to the like effect, made by each of the sureties therein mentioned.

(3) One of the duplicates with the affidavits appended shall be forthwith transmitted to the Provincial Secretary, to be by him retained, and the other duplicate with the affidavits aforesaid, shall be by the Registrar forthwith filed in the office of the Clerk of the Peace for the said county or union of counties where the same shall remain on record. 56 V. c. 21, s. 13.

14. Any Registrar, whether appointed before or after the passing of this Act, may at any time be required by the Inspector of Registry Offices, with the approval of the Lieutenant-Governor in Council, to execute new covenants in the form and to the effect hereinbefore provided, or to furnish other sureties as may be deemed expedient, or both, and in default thereof shall be subject to the penalties mentioned in section 25 of this Act. 56 V. c. 21, s. 14.

New covenants may be required by Inspector.

15. Any person may examine and obtain a copy of the Registrar's covenant and affidavits on payment to the Clerk of the Peace of a fee for the copy and search, of one dollar, or for the search, of twenty-five cents. 56 V. c. 21, s. 15.

Copies may be obtained by any person.

16. Sections 15 to 20 inclusive of *The Act respecting Public Officers*, shall apply to securities given by Registrars. 56 V. c. 21, s. 16. See also *Cap. 16, secs. 24-27*.

Rev. Stat. c. 16, ss. 15-20 to apply to securities.

17. The Lieutenant-Governor, upon the application of any county or city interested, or without such application if he thinks fit, may require any Registrar to give security in such form and for such an amount as the Lieutenant-Governor in Council determines to be sufficient to secure the due payment of any moneys payable by the Registrar to the county or city. 56 V. c. 21, s. 17.

Lieutenant-Governor may require Registrars to give security.

18.—(1) A surety for a Registrar who is no longer disposed to continue his responsibility, may give notice thereof to the Registrar and to the Provincial Secretary, and in such case the Registrar shall, under penalty of forfeiture of his office, furnish a new surety in lieu of the surety so giving notice, and shall complete and transmit the necessary covenant in that behalf to the Provincial Secretary within one month after the notice, and shall procure the approval of the new security within two months after the notice.

Sureties of Registrars.

(2) All accruing responsibility on the part of the person giving the notice shall continue until the perfecting and approval of the new security, and shall thereupon cease. 56 V. c. 21, s. 18.

19. The Registrar and his sureties shall be jointly and severally liable on their covenant to any aggrieved person or persons to indemnify him or them against any damage or loss sustained by him or them, by or through the neglect or misconduct of the

Liability of registrars and their sureties.

Registrar or his deputy in the performance of the duties of his office, not exceeding the penalty named therein, but this provision shall not exempt the Registrar from any further responsibility to persons sustaining damage or loss as aforesaid. 56 V. c. 21, s. 19.

Registrar's
oath of office.

20. Every Registrar, before he enters upon the execution of his office shall, before two or more Justices of the Peace for the county, take the oath given in the form of Schedule C to this Act, which shall be transmitted to the Provincial Secretary, together with the recognizance and covenant aforesaid. 56 V. c. 21, s. 20.

Appointment
of deputies.

21.—(1) The Registrar may by writing under his hand and his seal of office, nominate a deputy or deputies in his office, who may perform all the duties required under this Act, in the same manner and to the like effect as if done by the Registrar; and any Registrar may remove his deputy and appoint another in his place whenever he thinks it necessary; and in case of the death, resignation, removal or forfeiture of office of the Registrar, the Deputy Registrar, or in case of their being more than one, the senior Deputy Registrar, shall do and perform all and every act, matter, and thing necessary for the due execution of the said office, until a new appointment of Registrar is made by the Lieutenant-Governor. 56 V. c. 21, s. 21.

Removal.

Power of dep-
uty in case of
death or
removal of
registrar.

Where vacan-
cies occur in
office of
registrar and
there is no
deputy,
county
attorney to
act.

(2) In the case of the death, resignation or removal of a Registrar, if there be at the time no Deputy Registrar, the County or District Attorney for the county or district, as the case may be, shall *ex-officio* be the Registrar *pro tempore*, until another person is appointed Registrar and the County or District Attorney on becoming Registrar *pro tempore* may appoint a Deputy-Registrar, and shall do and perform every other act, matter or thing necessary for the execution of the office. 58 V. c. 6, s. 1, part.

Temporary
officer to be
responsible.

(3) The Registrar *pro tempore* shall be answerable for the execution of the office in all respects and to all intents and purposes whatsoever, during such interval as the Registrar so dying, resigning or having been removed, would by law have been if he had been living or continuing in office, and any security given on or after the 16th day of April 1895 by a Registrar so afterwards dying, resigning or being removed as aforesaid shall be a security to the Queen, her heirs and successors, and to all persons whatsoever, for the due and faithful performance of the duties of his office by the Registrar *pro tempore*. 58 V. c. 6, s. 2, part.

Deputy's oath
of office.

22. Every Deputy Registrar before he enters on the execution of his office, shall, before two or more Justices of the Peace for the county take the oath appointed to be taken by the Registrar, or an oath to the like effect, which oath shall be

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forthwith transmitted to the Provincial Secretary. 56 V. c. 21, s. 22.

23.—(1) No Registrar or Deputy Registrar or clerk in his office shall, directly or indirectly, act as the agent of any corporation, society, company, person or persons investing money and taking securities on real estate within his county, nor shall the Registrar or Deputy Registrar, or any clerk in the office advise, for fee or other reward, or otherwise, upon titles of land, or practise as a conveyancer, or act as an agent for the sale of land, within his county, nor shall he carry on or transact within the Registry Office, any other business or occupation whatever, upon pain of forfeiture of office. 56 V. c. 21, s. 23 (1); 60 V. c. 14, s. 19.

Registrars or
Deputies, etc.,
not to act as
agents, for
persons taking
securities on
real estate, or
in selling land
or advise as to
titles, etc., in
their Counties.

(2) No Registrar appointed on or after the 27th day of May, 1893, shall practise for gain as a Barrister, Solicitor, Physician or Surgeon; nor shall any Registrar appointed before the said date where the net income from his office is more than \$1,000, nor shall any Deputy Registrar or clerk in the office of the Registrar, carry on a practice as a Physician or Surgeon during office hours other than a consulting practice, or out of office hours other than a consulting or office practice at his home, nor take any proceedings under the power of sale in any mortgage or other instrument affecting land either as solicitor or agent, nor shall he personally or as a member of a firm carry on a loaning business or be in any way connected with any firm having business to transact in the office of such Registrar.

Registrars not
to engage in
certain call-
ings.

(3) The work of the Registry Office shall be conducted and carried on in all cases under the direction and immediate supervision of the Registrar, whether heretofore or hereafter appointed. 56 V. c. 21, s. 23 (2, 3).

Work in reg-
istry office to
be personally
supervised by
Registrar.

DUTIES OF REGISTRARS.

24. Every Registrar shall reside within ten miles of his office and shall keep his office at the place named in his commission or otherwise as appointed by the Lieutenant-Governor in Council, or by any Act in force respecting the same. 56 V. c. 21, s. 24.

Residence of
Registrars.

25. If a Registrar in any manner misconducts himself in his office or neglects to perform his duty in every respect as required of him by this Act, or commits or suffers to be committed any undue or fraudulent practice in the execution thereof, then such Registrar may, at the discretion of the Lieutenant-Governor in Council, be dismissed, and he shall, moreover, together with his sureties, so far as their covenants extend, be liable to pay all damages, with full costs of suit, to any person injured thereby, to be recovered by action in the High Court; and any Deputy executing the office of Registrar during any vacancy by death, resignation, or forfeiture of the

Removal for
misconduct.

Liability of
Registrar.

Deputy
executing
office.

Registrar, shall, together with the sureties of the Registrar as far as their covenants extend, be for the same cause, and in like manner liable as the Registrar and his sureties are in this section declared to be liable. 56 V. c. 21, s. 25.

Hours of
attendance at
office.

26.—(1) Except as hereinafter in this section provided the Registrar or his Deputy shall, for the discharge of all duties belonging to the said office attend at his office from the hour of ten in the forenoon until four in the afternoon, every day in the year, holidays excepted, and no instrument shall be registered by him on any holiday, nor shall any instrument be received for registration by him except within the hours above named. 56 V. c. 21, s. 26 (1).

Of registrars
for Toronto
and York on
Saturday.

(2) The Registrars for the East and West Divisions of the City of Toronto and the Registrar of the County of York, or their respective deputies, shall attend at their offices for the transaction of business on Saturday, from the hour of ten in the forenoon until one in the afternoon and no longer, and no instrument shall be received by them for registration on that day except within the hours above named. 56 V. c. 21, s. 26 (2).

Office hours
of other regis-
trars on Sat-
urday during
long vacation.

(3) None of the other Registrars shall, after one o'clock in the afternoon on Saturdays during the long vacation, namely, from the 1st day of July to the 31st day of August, both days inclusive, register any instrument, nor shall any instrument be received for registration by them, nor shall it be obligatory to attend at their offices for the transaction of business after the said hour of one o'clock on Saturdays during the said period of the long vacation. 59 V. c. 29, s. 6.

Registrars to
make searches
and abstracts.

27.—(1) The Registrar shall, when required, and upon being tendered the legal fees for so doing, make searches and furnish copies and abstracts of or concerning all instruments or memorials registered, mentioning any lot of land as described in the patent thereof from the Crown, or any lot described by number or letter on any registered map or plan subsequent to the registration of the map or plan, or any part of a lot where the same is clearly described and can be identified in connection with the chain of title, or has been ascertained by actual survey; and of and concerning all wills, deeds, orders, or other instruments recorded, as may be requested of him in writing, if a writing is demanded by the Registrar; and he shall exhibit the original registered instrument, and also the books of the office relating thereto when the party desires to make a personal inspection thereof, and shall give certificates of all copies and extracts under his hand of and concerning the parties to any of such documents, or of the witnesses to the same, or any other particulars which may be required, but no Registrar shall allow any such book or instrument to be taken out of his possession or custody.

To exhibit ori-
ginals of in-
struments, etc.

To certify
copies, etc.

Registrar as
and in
in this

(2) Every abstract furnished by a Registrar shall be commenced and certified to in the words following:—

Certificate of
Registrar on
abstracts.

Ontario, Registry Office, County of

Abstract of title

I certify that the above (or the following) are correct extracts from the only instruments recorded in this office which mention or refer to (*describe property sufficiently for identification*). This abstract does not purport to give entries from the General Register.

Dated at this day of A. D. at the hour of

Registrar, or Deputy-Registrar.

{ L. S. }

(3) No Registrar shall be liable in respect of entries of instruments or errors or mistakes in the entries of instruments or in respect of omissions by any of his predecessors in the office of Registrar, nor for any defect or inaccuracy in any abstract or certificate arising from such error, mistake or omission, unless he had become aware or had knowledge of the error or mistake in the said entries, or unless such abstract or certificate shall be defective or inaccurate to the knowledge of the Registrar or his deputy or the clerk by whom such abstract or certificate is made or signed. 56 V. c. 21, s. 27.

Non-liability
for certain
errors or
omissions.

28. Every Registrar under this Act shall have a seal of office, to be approved of by the Inspector, and on request of any person, shall furnish an exemplification or certified copy under his hand and seal of office, of any instrument or memorial deposited, registered, or filed, and kept in his office as Registrar, which exemplification or certified copy shall, subject to section 47 of *The Evidence Act*, be received as *prima facie* evidence in every Court in Ontario, in the same manner and with the same effect as if the original thereof, in his office, was produced; and no Registrar or Deputy Registrar shall be required to produce any paper in his custody as Registrar or Deputy Registrar, unless ordered by a Judge of one of the Courts of Ontario, which order shall be produced to the officer issuing the subpoena requiring such production, and shall be by him noted in the margin of the subpoena, and signed by such officer. 56 V. c. 21, s. 28.

Registrar to
have a seal
of office.

Rev. Stat.
c. 78.

Not bound to
produce any
papers, except
on order of
a Judge.

[As to filing a certified copy in Court in lieu of original produced on subpoena, see Cap. 73, sec. 48.]

BOOKS OF OFFICE.

29.—(1) The treasurer of the county or city shall provide a fit and proper registry book for each township, reputed township, city, town, town plot laid out by the Crown, and incorporated village, the limits whereof are defined by law, and all index and other books required for the business of the office; and all registry books shall be as nearly as may be of the like size and description as those heretofore furnished, and shall continue to be of one uniform size as nearly as practicable;

Treasurer to
provide proper
books.

and from the time the books are so provided and received at the Registry Office, the person who holds and executes the office of Registrar, shall keep and cause to be used for that purpose, a separate registry book for and of each township, reputed township, city, town, town plot laid out by the Crown, and incorporated village, the limits whereof are defined by law, within the county for which he holds office; and he shall also keep and cause to be used for that purpose a general registry book for the whole county, in which shall be recorded all wills, probates, grants of administration and instruments in which there is a general devise, conveyance, release, acknowledgment or power affecting lands without local description, and in which book an alphabetical index of the names of all the parties mentioned by name in every such instrument shall also be kept; and whenever any Registrar requires a new registry book, or any other book for the use of his office, the same shall, on his application therefor, in writing, be furnished to him by the treasurer, and all books so furnished, shall be paid for by the treasurer out of the county or city funds, as the case may be and all books so furnished, used and kept, shall be deemed to be the property of Her Majesty for the use and benefit of the public; and the Inspector shall have power, when, for the despatch of business, he finds it necessary, by order in writing, to permit more than one registry book to be in use at the same time for the same municipality. 56 V. c. 21, s. 29. 59 V. c. 29, s. 1.

General
registry book.

New books.

Index of wills
omitted from
general reg-
istry book.

(2) Where prior to the 7th day of April, 1896, wills had been recorded in the separate books of a registry division, but not in the general registry book thereof when the same ought to have been recorded therein, the Inspector shall have the power, by order in writing, to direct that an alphabetical index of the names of all parties mentioned by name in such wills and designating the book or books and the pages thereof in which such wills are recorded shall be prepared and kept, and the county or city treasurer shall, for such index and the preparation thereof, pay such sum as the Inspector may order in writing. 59 V. c. 29, s. 5.

General regis-
try book, what
to be used for.

(3) From and after the first day of July, 1899, the general registry book shall be used for recording wills, probates, grants of administration, and powers of attorney, in which there is a general devise or power affecting lands without local description, and after the said date, except as aforesaid, no other instrument which affects lands without local description, shall be registered unless the instrument when offered for registration, in addition to the ordinary proofs for registration, has attached to it a statutory declaration by one of the parties to the instrument, or by his attorney under registered power of attorney or by the heirs, executors or administrators of such party, to the effect that the instrument affects lands within the county, and giving a local or general description of such lands, sufficient to enable the same to be traced or ascertained by a

surveyor, and thereupon such instrument shall be registered in the proper separate registry book and particulars thereof entered in the abstract index and in all other books in the same manner as if the instrument itself had contained the local description of the lands. 62 V. c. 16, s. 1.

30. If the treasurer refuses or neglects to furnish such books within thirty days after application therefor, the Registrar may provide the same and recover the cost thereof from the municipal corporation of the county or city in default. 56 V. c. 21, s. 30.

If the treasurer neglects to provide books.

31. The Judge of the County Court or Warden of the county, or Mayor of a city, or the Stipendiary Magistrate of the district shall give a certificate respecting each registry or other book, so furnished or provided, in the form of Schedule D to this Act, or to the like effect, and in case of refusal shall be liable to the same penalties as are imposed by section 34 of this Act. 56 V. c. 21, s. 31.

County judge, warden or stipendiary magistrate certify books.

32.—(1) Where any county, city, town, town plot laid out by the Crown, incorporated village, township, reputed township or place, making part of a county wherein a separate Registry Office is or has been kept, is or has been detached from some union or county and set apart for registration purposes, or attached to or made part of another county for which a separate Registry Office is also kept, or where a separate Registry Office is established in any county or junior county, according to the provisions of this Act, the Registrar of the county from which such localities are so detached, shall deliver to the Registrar of the county set apart, or of the county whereunto the same is attached, the registry book or books and all other books and indexes which have been kept according to the statute, exclusively for such county, city, town, town plot, incorporated village, township or reputed township or place, the original memorials and original duplicates of all deeds, conveyances and wills of, or relating exclusively to, any lands within the same, and all other instruments, and all maps of cities, towns or villages within the same, lodged according to law in his office.

Provision when any place is separated from a County.

Certain books, etc., to be transferred.

(2) Such first mentioned Registrar shall also deliver an abstract index book of all titles to lands within each of the detached localities, registered before separate registry books were kept for each township or place; and also a proper registry book containing full and complete copies of all memorials and other registered documents affecting such lands, which by reason of their relating to two or more localities, cannot be delivered, or which though affecting one locality are entered in a registry book that is not delivered over, such copies being entered in the book in the same order and relation in which they were originally inserted, and there being inserted on the margin of the book opposite to each memorial or instrument, the number thereof and the particular time at

Delivery of abstract index books, registry books, etc.

which the memorial or instrument was originally recorded as endorsed on the back thereof by the Registrar or his Deputy, at the time of the original registration thereof, and the book shall be accompanied by an alphabetical index of names.

Copies of instruments in general registry book, etc.

(3) Such first mentioned Registrar shall also deliver as aforesaid a proper registry book containing a copy of every will and other instrument registered in any general registry book in which the names of any of the parties thereto have been entered in the alphabetical index kept for the locality so being detached; and shall also deliver a true copy of the alphabetical index attached to any general registry book; he shall also carefully compare all such entries with the original entries in the registry books in his office and indorse a certificate to that effect in each book before delivering the same. Instruments received by the Registrar of one county or Registry Division from the Registrar of another after the year 1885, shall be copied by the Registrar by whom they were or are received.

How such books dealt with.

(4) The Registrar receiving such books, and his successors shall keep the same among the registry books of his office, and shall deal with them in all respects in like manner, as those originally supplied to and kept therein. 56 V. c. 21, s. 32.

Penalty on registrar refusing to deliver books, etc.

33. Any Registrar who refuses to deliver the books, plans, duplicates, indexes or memorials, aforesaid, within six months after demand in writing therefor, made upon him by the Registrar entitled to receive the same, shall upon conviction thereof, before any Court of Oyer and Terminer and General Gaol Delivery, forfeit his office, and be liable to a fine, in the discretion of the Court, not exceeding \$400. 56 V. c. 21, s. 33.

Registrar removed or resigning to deliver up books to new registrar, etc.

34. In case a Registrar is removed from or resigns his office, he shall forthwith deliver up all books, plans, instruments, memorials and indexes in his possession as Registrar to the person who is appointed Registrar in his stead, or to any other person who may be specially appointed in writing, by Her Majesty's Attorney-General of Ontario to receive the same, and if the Registrar refuses to do so, the Attorney-General may direct the sheriff of the county to seize and take immediate possession of the same wheresoever found, and the Registrar so offending shall be liable to a fine, in the discretion of the Court, not exceeding \$2,000, and to any term of imprisonment, if the Court thinks fit to impose it, in addition to the fine, not exceeding one year. 56 V. c. 21, s. 34.

Proceedings in case of refusal.

When any book becomes unfit for further use copy to be made.

35. Where in any Registry Office, any book from age or use, is becoming obliterated or unfit for future use, the Inspector shall, by directions in writing under his hand, order such book to be re-copied in a book of the same description as that required under section 29 of this Act, so far as the same can be deciphered by examination thereof and of the original

memorials relating thereto, which book having the order of the Inspector for the copying thereof, under the hand of the Inspector, inserted at the beginning of the book, and having the affidavit or declaration of the Registrar or his deputy, at the end of the book, to the effect that the book so copied is a true copy of the original book of which it purports to be a copy, shall be to all intents and purposes, accepted and received as the original book, and as *prima facie* evidence that the copy is a true copy of the original book; every original book shall nevertheless, be carefully preserved, notwithstanding a copy thereof has been made, and every Registrar or his Deputy, shall be obliged to make his affidavit or declaration in this section mentioned; and the Inspector shall have power to order any book which is out of repair and unfit for use to be repaired in such manner as he thinks necessary; and he shall also have power to order plans and maps deposited in any Registry Office, to be copied, mounted or bound, to be preserved in such manner as he thinks necessary: and he shall in like manner have power to order as many counterparts or copies of any abstract index book to be made as he shall deem necessary for the public convenience; also to order new plans and surveys to be made of any locality or territory in any Registry Division which in his judgment have become necessary, whether such locality or territory has been heretofore subdivided according to registered plan or not, and to order new abstract indexes to be made when the indexes in use have become complicated or otherwise inconvenient. 56 V. c. 21, s. 35; 57 V. c. 35, s. 4; 62 V. c. 16, s. 2.

Original to be preserved.

Repairs of books, maps, etc.

Abstract index of lots.

36. The Registrar shall, in a proper book kept for the purpose, and called the "Abstract Index," keep entered under a separate and distinct head each separate lot or part of a lot of land as originally patented by the Crown, or as defined on any plan of the subdivision of such land into smaller sections or lots after such plan has been filed in the Registry Office; and every instrument registered on and after the first day of January, 1866, mentioning such parcel or lot of land or other subdivision, and the names of every person to each instrument, and the nature of it (such as a "Will," "Grant," "Lease," "Power of Attorney,") the numbers of registration of all such instruments, for each municipality in which the land mentioned therein is situate, and the day, month, and year, of their registration, and the consideration or mortgage money mentioned therein, and such a sufficient description of the land therein mentioned as will readily identify its location, shall, by the Registrar, in addition to all entries by law required, be entered in regular order and rotation under the proper heading of each such separate parcel or lot of land mentioned in such instrument, and the book or books, to be so kept by each Registrar, for the purpose of making the said entries, shall be in the form as nearly as may be of Schedule E to this Act. 56 V. c. 21, s. 36.

Alphabetical
index of names
for each
locality.

37. Every Registrar shall also, for each township, city, town, and incorporated village, keep an Alphabetical Index of names, exhibiting in columns the number of each instrument, the names of the different grantors, and the names of the grantees, according to the form of Schedule F to this Act. 56 V. c. 21, s. 37.

INSTRUMENTS THAT MAY BE REGISTERED.

Instruments
which may be
registered.

38. Subject to the provisions of the next section, all instruments mentioned in section 2 of this Act may be registered. 56 V. c. 21, s. 38.

Registration
of leases.

39. This Act shall not extend to any lease for a term not exceeding seven years, where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years. 56 V. c. 21, s. 39.

Proof of
registration.

40.—(1) In the case of an instrument other than a will, grant from the Crown, Order in Council, by-law or other instrument under the seal of any corporation, or certificate of judicial proceedings, a subscribing witness to the instrument shall in an affidavit setting forth his name, place of residence, and addition, occupation or calling in full, swear to the following facts:

- (a) To the execution of the original, and of the duplicate if any there be;
- (b) To the place of execution;
- (c) That he knows the parties to the instrument, if such be the fact; or that he knows such one or more of them, according to the fact;
- (d) That he is a subscribing witness thereto.

Form of
affidavit.

(2) The affidavit may be in the form of Schedule G to this Act, or to the like effect. 56 V. c. 21, s. 40.

Affidavit to be
registered.

41. The affidavit shall be made on the instrument or securely attached thereto, and the instrument and affidavit shall be copied at full length in the Registry Book. 56 V. c. 21, s. 41.

When differ-
ent witnesses
see different
grantors
execute.

42. Where an instrument is executed by one or more of the parties thereto, but not by all of them, in presence of a witness or witnesses, and by one or more of the other parties thereto in presence of another witness or other witnesses, then and in such case the witness or one of the witnesses, whether the same be so executed in the same or in different places, shall make an affidavit in accordance with section 40 of this Act as to each separate and distinct execution of the instrument before the same is registered. 56 V. c. 21, s. 42.

43. An instrument within the meaning of section 2 of this Act, not purporting to convey the land therein mentioned

but which in its nature is, or purports to be given as a security for the payment of a debt or liability incurred by the person giving the same in respect of a purchase or delivery of any goods or in respect of an advance or loan of any money, shall not be registered unless the affidavit of execution states that the instrument was read over and explained to the owner or person executing the same, and that he appeared perfectly to understand the same, and was informed that it might be registered as an incumbrance on his land, such affidavit to be in the form of Schedule H to this Act or to the like effect. 56 V. c. 21, s. 43.

Affidavit of execution in case of instruments given in respect of purchase or delivery of goods.

44. No registration under this Act of any instrument shall be deemed or adjudged void, or defective by reason of the name, place of residence, addition, occupation or calling of the subscribing witness thereto not being set forth in full, or being improperly or insufficiently given or described in the affidavits mentioned in and required by sections 40 and 43, nor by reason of any clerical error or omission of a merely formal or technical character in the affidavit. 56 V. c. 21, s. 44.

Certified defective affidavit not to invalidate registration.

45. Any instrument may be registered under this Act, notwithstanding that the Christian name or names of the subscribing witness making the affidavit is or are only set forth therein by initial letter or letters, or abbreviation or abbreviations, and not in full. 56 V. c. 21, s. 45.

Name of Witness need not be set forth in full in affidavit.

46.—(1) Every affidavit made under the authority of this Act shall be made before some one of the following persons:

Before whom to be sworn

1. If made in Ontario, it shall be made before—

In Ontario.

The Registrar or Deputy Registrar of the county in which the lands lie,

Or before a Judge of the Supreme Court of Judicature,

Or, before a Judge of the County Court within his county,

Or, before a Commissioner authorized by the High Court to take affidavits,

Or, before any Justice of the Peace for the county in which the affidavit is sworn,

Or, before a Notary Public having authority in Ontario;

2. If made in Quebec, it shall be made before—

In Quebec.

A Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court,

Or, before a Commissioner authorized under the laws of Ontario to take, in Quebec, affidavits in and for any of the Courts of record in the Province of Ontario,

Or, before any Notary Public in Quebec, certified under his official seal ;

In United
Kingdom.

3. If made in Great Britain or Ireland, it shall be made before—

A Judge of the Supreme Court of Judicature in England, or Ireland, or of the Court of Session or the Justiciary Court in Scotland,

Or, before a Judge of any of the County Courts within his county,

Or, before the Mayor or Chief Magistrate of any city, borough or town corporate therein, and certified under the common seal of the city, borough or town corporate,

Or, before a Commissioner authorized to administer oaths in the Supreme Court of Judicature in England or in the Supreme Court of Judicature in Ireland or before a Commissioner authorized by the laws of Ontario to take, in Great Britain or Ireland, affidavits in and for any of the Courts of Record of the Province of Ontario,

Or, before a Notary Public, certified under his official seal ;

In a British
Colony,

4. If made in any British Colony, or Possession, it shall be made before—

A Judge of a Court of Record, or of any Court of Supreme Jurisdiction in the Colony,

Or, before the Mayor of any city, borough or town corporate, and certified under the common seal of the city, borough or town,

Or, before a Notary Public, certified under his official seal,

Or, if made in the British Possessions in India, before any Magistrate or Collector, who is certified to be such under the hand of the Governor of such Possession,

Or, before a Commissioner authorized by the laws of Ontario to take in such British Colony, or Possession, affidavits in and for any of the Courts of Record of the Province of Ontario ;

In a Foreign
Country.

5. If made in any Foreign Country, it shall be made before—

The Mayor of any city, borough or town corporate of such country, and certified under the common seal of the city, borough or town corporate,

Or, before a Consul, Vice-Consul, or Consular Agent of Her Majesty, resident therein,

Or, before a Judge of a Court of Record or a Notary Public, certified under his official seal,

Or, before a Commissioner authorized by the laws of Ontario to take, in such country, affidavits in and for any of the Courts of Record of the Province of Ontario.

(2). Where an affidavit of execution is required to be made out of the Province before any of the officers mentioned in clauses 2, 3 and 4 of this section, and the officer has not an official seal, it shall be sufficient for him so to certify.
56 V. c. 21, s. 46.

47. Every subscribing witness shall be compellable, when necessary, by order of the Judge of the High Court or of a County Court, to make affidavit or proof of the execution of any instrument for the purpose of registration under this Act and to do all other acts necessary for the same purpose, upon being paid or duly tendered his reasonable expenses therefor.
56 V. c. 21, s. 47.

Witnesses compellable to make affidavit.

48. The proof may be either by affidavit or by affirmation or declaration, when by the law of the country where the proof is made an affirmation or declaration may be substituted for an affidavit; and the Registrar shall receive the instruments so proved without any other or further proof of their due execution. 56 V. c. 21, s. 48.

Affirmation or declaration in certain cases.

49. None of the persons authorized to take affidavits by this Act shall take an affidavit of the execution of an instrument in case he is a party to the instrument; nor shall such affidavit for the proof of an instrument executed after the 1st day of January, 1866, be taken from a witness, unless the witness has subscribed his name in his own handwriting as such witness. 56 V. c. 21, s. 49.

Parties not to take affidavits.

Witnesses to sign.

50. Where the witnesses to an instrument are dead or are out of this Province, or have become insane, idiotic, imbecile, or of unsound mind or understanding, and whether so found by inquisition or not, or where an instrument, not by law requiring an attesting or subscribing witness thereto, has been executed without an attesting or subscribing witness thereto, or in case it is proved to the satisfaction of the Judge in this section mentioned that the place of abode or residence of such first above mentioned witnesses is unknown, any person who is or claims to be interested in the registration of the instrument, may make proof before a Judge of a County Court in Ontario, of the execution of the instrument, and upon a certificate (according to the form of Schedule I to this Act)

Witnesses insane, absent, etc.

being indorsed on the instrument and signed by the Judge, that the Judge is satisfied by the proof adduced of the due execution of the instrument, the Registrar shall register the instrument and certificate. 56 V. c. 21, s. 50.

Seal of Court
or seal of Cor-
poration with
signature of
officer to
suffice for
registration.

51. The seal of any Court of Record affixed to an instrument in writing, of itself, and the seal of any corporation affixed to any such instrument with the signature of the secretary or presiding officer thereof, shall be sufficient evidence of the due execution of the instrument by the Judge, Registrar, Clerk or officer of the Court signing the same, or by the corporation respectively, for all purposes respecting the registration thereof, and no further evidence or verification of the execution shall be required for the purpose of registration. 56 V. c. 21, s. 51.

Judgment
affecting lands
may be
registered.

52. Every judgment affecting land may be registered in the Registry Office of the county or other Registry Division where the land is situate, on a certificate signed by the proper officer of the Court setting forth the substance and effect of the judgment, and the land affected thereby. 56 V. c. 21, s. 54.

[As to registering and vacating certificates of lis pendens, see Judicature Act, Cap. 51, secs. 97 to 100.]

Registrar to
deliver
certified copy
of power of
attorney
registered

53. Where a power of attorney or any substitution thereof is registered, the Registrar shall deliver a certified copy or copies of such power or substitution as may be required of him, and of all the documents aforesaid connected with or relating to the same, under his signature and seal of office, in which certificate he shall declare the time, place and other particulars of registration as in other cases under this Act, and he shall also declare that the copy, which he so delivers, is a true copy of the power or substitution, and of all the other documents connected with or relating to the same of which they respectively purport to be copies, and that the originals have been duly deposited in his office according to the statute in that behalf. 56 V. c. 21, s. 55.

Registration
of certified
copy.

54. Every such certified copy where the original power or substitution is certified to be deposited as aforesaid, may be registered in any other Registry Office, by deposit thereof, without production of the original power or substitution, and without proof of any kind other than the production of the copy so certified as aforesaid. 56 V. c. 21, s. 56.

Registration
of powers of
attorney
deposited in
land titles
offices.

55. Where a power of attorney or any substitution thereof is deposited in an Office of Land Titles, a copy thereof certified by the Master, or a Local Master, may be registered in any Registry Office in the same manner as a copy of a power of attorney certified by a Registrar may be registered under section 54 of this Act. 56 V. c. 21, s. 58.

56. A copy of a power of attorney or substitution, certified as required by the three next preceding sections, shall be received in all cases in place of the original as *prima facie* evidence of the original power or substitution and of due execution, provided that notice has been given in the manner set forth in section 47 of *The Evidence Act*. 56 V. c. 21, s. 57.

Copy *prima facie* evidence.

Rev. Stat. c. 72.

57. Where it is desired to register an instrument, other than a will, in more than one registry office, the same may be registered in like manner as is provided as to powers of attorney by sections 53 and 54 of this Act, and a certified copy of such instrument shall be received as evidence to the same extent as provided for in section 56 of this Act, respecting powers of attorney. 56 V. c. 21, s. 59.

Registration of instrument in several registry offices.

58. Every notarial copy of any instrument executed in the Province of Quebec, the original of which is filed in any notarial office according to the law of Quebec, and which cannot therefore be produced in Ontario, and every prothonotarial copy of any instrument executed in Quebec shall be received in lieu of and as *prima facie* evidence of the original instrument, and may be registered and treated under this Act for all purposes as if it were in fact the original instrument, and such notarial or prothonotarial copy with the seal of the Notary or Prothonotary attached, shall be registered without any other or further proof of the execution of the same, or of the original thereof. 56 V. c. 21, s. 60.

Registration of notarial copies of instruments executed in Quebec.

INSTRUMENT IN FOREIGN LANGUAGE.

59. Where an instrument is written in any language other than English, it shall be necessary to produce with the instrument and the affidavit of execution required by this Act a translation into English of such instrument, together with an affidavit by the translator, stating that he understands both languages and has carefully compared the translation with the original instrument of which it purports to be a translation, and that the same is in all respects a true and correct translation of such original instrument, and the Registrar shall not enter the said instrument in the language in which it is written as aforesaid, but may copy from the said translation. 58 V. c. 22, s. 1; 60 V. c. 15; Sched. A (70).

Registering instruments in foreign languages.

MANNER OF REGISTERING.

Generally.

60. Unless where otherwise provided every instrument that may be registered under this Act shall be registered by the deposit of the original instrument or by the deposit of a duplicate or other original part thereof with all necessary affidavits and the same shall be registered at full length, including every certificate and affidavit, excepting certificates by the Registrar,

Instruments to be registered in full unless otherwise provided.

accompanying the same, upon and by the delivery to the Registrar of the original instrument, but when one is executed, or when such instrument is in two or more original parts, upon and by delivery of one of such parts. 56 V. c. 21, ss. 61, 72.

Mortgages not
registered
in full.

61.—(1) The mortgagee named in any mortgage, executed on or after the 5th day of May, 1894, or the solicitor or agent of such mortgagee, may endorse thereon the words "Not to be registered in full," and in such case the Registrar shall register the mortgage in the manner provided by this Act, in the case of mortgages affecting lands, except that such mortgage shall not be copied into the books kept for that purpose in the Registry Office. The mortgage shall be numbered as other instruments are required to be numbered in the proper registry book in its proper order, and the marginal note made as required by section 67 of this Act. The Registrar shall at the time of the registration of a mortgage not copied in full, enter opposite the number in the registry book the words "Mortgage not copied in full" and shall also give the date and names of parties thereto. 57 V. c. 35, s. 1 (1); 58 V. c. 22, s. 2.

Effect of.

(2) Registration under this section shall have the same effect and consequences as and shall be equivalent to a registration under sections 60 and 96 of this Act, and all other sections thereof relating to the registering of instruments which are registered at full length, and in cases where a mortgage has not been copied in full the mortgagee and those claiming through or under him shall be entitled to all the benefits and advantages, and to all the legal and equitable rights which would accrue to him or them had the mortgage been registered at full length. This subsection shall apply to all registered mortgages not copied in full, whether registered before or after the passing of this Act. 58 V. c. 22, s. 8.

Fee on
registration.

(3) Upon registration in the manner provided by subsection 1 of this section, the fee payable for registration of any mortgage, not including more than four distinct parcels of land, having a separate heading in the abstract index, shall be \$1, and for each additional lot or part of lot thereafter requiring entry to be made under a separate heading in the abstract index, 5 cents; and where the instrument embraces two lots or parcels of land situate in different municipalities in the same county there shall be paid a further fee for each additional municipality of twenty-five cents. 62 V. c. 16, s. 3.

Subsequent
registry in
full.

(4) After the registration of any mortgage in the manner in this section provided, the Registrar, upon the application of any person claiming to be interested in the mortgaged lands, and upon payment of the fees prescribed, less the amount already paid for registration, shall cause such mortgage to be copied out in full in the book kept for that purpose in the Registry Office.

(5) The Registrar shall indicate in the abstract index, in the case of the registration of every mortgage hereafter endorsed "Not to be registered in full," that the same has not been registered in full. 62 V. c. 16, s. 4.

Entry in abstract index where mortgage not registered in full.

(6) In this section the word "mortgagee" shall include the assignee of a mortgage, and the word "mortgage" shall include an assignment of a mortgage. 60 V. c. 14, s. 18.

62.—(1) Where any instrument, signed or executed by any person by attorney, shall hereafter be registered, it shall be the duty of the Registrar on registration thereof to enter a note of the fact of such signature or execution by attorney, giving the name of the attorney or attorneys, as the case may be, on the abstract indexes and on all abstracts of title thereafter furnished by him relating to the lands affected thereby. 56 V. c. 21, s. 62.

Special entry to be made when instrument executed by attorney.

(2) From and after the first day of January, 1900, no instrument purporting to be signed or executed by any person by attorney, shall be registered in any registry office, unless at the time of the registration of such instrument, or prior thereto, the original power of attorney, or a copy thereof certified for registration, is registered in the same registry office; provided, however, that this clause shall not apply to instruments purporting to be executed by attorneys or commissioners for the Canada Company or the Trust and Loan Company, provided that when such power of attorney, or a copy thereof, is lost and cannot be produced, application may be made to a judge for an order directing the registration of such instrument, and thereupon the same may be registered. 62 V. c. 16, s. 5.

Registration of power of attorney when instrument executed by attorney.

63. In case an instrument in two or more original parts is registered, the Registrar shall endorse upon each of such original parts a certificate of the registration, in the form of Schedule J to this Act, and any original so certified shall be received as *prima facie* evidence of the registration and of the due execution of the same. R.S.O. 1897, c. 61, s. 44. 56 V. c. 21, s. 63.

Instruments in two or more parts.

64. Where an instrument includes different lots or parcels of land situate in different municipalities in the same county, it shall only be necessary to furnish one duplicate original of such instrument with an affidavit of its execution, and the duplicate original and affidavit shall be copied into the registry book pertaining to each city, town, incorporated village, township, or place wherein the lands therein mentioned are situate, and the Registrar shall make the necessary entries and certificates accordingly. 56 V. c. 21, s. 64.

Instruments relating to several lots in different localities.

65. Every deed executed prior to the 4th day of March, 1868, affecting lands situate in more than one county, and of

Registration of deeds containing lands

situate in more than one county and of which no memorial has been executed.

which said deed no memorial has been executed, may be recorded in any one of the counties in which some of the lands are situate, upon proof made in accordance with this Act, and in the other counties by deposit of a copy of every such deed and proof certified as is provided with respect to powers of attorney in sections 53 and 54 of this Act. 56 V. c. 21, s. 65.

Copying into registry book.

66.—(1) The Registrar or Deputy Registrar of the county in which the lands are situate shall, upon production to him of the original instrument, duplicate or other original part thereof, together with an affidavit of execution, make an entry thereof in the abstract and alphabetical index books, and enter the said instrument in the registry book, in the order in which it is received, and he shall file the same with the affidavit of execution, and he shall endorse a certificate on every such instrument and upon every duplicate of the instrument in the form of Schedule J to this Act, and shall therein mention the certain year, month, day, hour and minute in which the instrument is entered and registered, expressing also in what book the same has been entered, and the number of registration; and the said Registrar or his Deputy shall sign the said certificate when so endorsed, which certificate shall be allowed and taken as evidence of the respective registries in all courts.

Filing instrument and affidavit.

Certificate and its effect.

Registrar to see that all copies in registers are correct.

(2) It shall be the duty of the Registrar or his Deputy or clerk appointed for that purpose, to see that all copies of instruments in the registers are true copies, and the Registrar or his Deputy or clerk shall certify all such copies by writing a memorandum containing the words "examined (*date*) certified true copy" in the margin opposite each copy in the register, such memorandum to be signed by the initials of the Registrar or his Deputy or clerk making the examination. When a register is completed, the Registrar or his Deputy or clerk, as the case may be, shall at the end thereof show by statutory declarations that the copies contained in such register and certified by them respectively, are true copies of the original instruments of which they purport to be copies. 56 V. c. 21, s. 66.

Pages and instruments to be numbered.

67. Every page of the registry book, and every instrument entered therein, shall be numbered, and the certain year, month, day, hour, and minute of registration shall be entered in the margin of the registry books in the form of Schedule K to this Act; and the entry shall be signed by the Registrar or his Deputy. 56 V. c. 21, s. 67.

Minute of registration in margin.

Crown Grants.

Crown Grants.

68. Grants from the Crown shall be registered by producing the grant or an exemplification thereof to the Registrar, with a true copy sworn to by any person who has compared the same with the original; and the copy shall be filed with the Registrar. 56 V. c. 21, s. 68.

Orders in Council.

69. Orders of the Governor-General in Council or of the Lieutenant-Governor in Council may be registered in the Registry Office of the county or other Registry Division in which any land to which the Order in Council relates is situate, by a deposit of a copy of the Order certified by the Clerk of the Council. 56 V. c. 21, s. 69.

Wills.

70.—(1) Every will shall be registered at full length by the production of the original will and the deposit of a copy thereof, with an affidavit sworn to by one of the witnesses to the will, proving the due execution thereof by the testator, or by the production of probate or letters of administration with the will annexed, or an exemplification thereof under the seal of any Court in this Province, or in Great Britain and Ireland, or in any British province, colony, or possession, or in any foreign country having jurisdiction therein, and by the deposit of a copy of the probate, letters of administration, or exemplification with an affidavit verifying such copy.

(2) Where the copy of a will or of letters of probate or letters of administration has attached to it, when left or offered for registry, an affidavit or statutory declaration by the executor or administrator to the effect that after making the will the testator conveyed or parted with lands in the will described by local description, and that it was not intended or desired that the registration of the will should affect such lands, and if, in addition, it appears by the registered entries respecting such lands that the testator had parted with all his interest in or title to the said lands, the Registrar shall not register, copy or enter the will as an instrument affecting such lands, nor shall he be entitled to any fees for registering and making entries and certificates in respect thereof, but shall only be entitled to the same fees in respect of the registry of such will as he would have been entitled to had the will not contained any devise or gift of or reference to such lands by local description.

(3) Where a will is registered by the production of the original will, the affidavit of the subscribing witness or some other person must state that the testator is dead, either to the knowledge of the deponent, or as he has been informed and believes. 56 V. c. 21, s. 70.

(4) After a will which has not been admitted to probate has been registered in the manner hereinbefore provided in any registry division, such will may be registered in any other registry division by the deposit of a copy thereof certified under the hand and seal of the Registrar of the division in which such first mentioned registration took place, to be a true copy of the will as recorded in the said registry division, and the Registrar shall in his certificate state that an affidavit

proving the due execution of the will has been deposited in his office. 60 V. c. 14, s. 20.

Registration
of letters of
administra-
tion.

Rev. Stat.
c. 127.

71. Letters of administration which under *The Devolution of Estates Act* affect lands, may be registered in the same manner as probates of wills are now registered, and the Registrar shall be entitled to charge for registering letters of administration, without a will annexed, including all entries in respect thereof, a fee of one dollar. 56 V. c. 21, s. 71.

Notices of Sale under Mortgages.

Registration
of notice of
sale.

Rev. Stat.
c. 121.

72.—(1) A notice of sale of lands under the provisions of *The Act respecting Mortgages of Real Estate*, and every notice of exercising the power of sale contained in any mortgage may be registered in the Registry Office of the Registry Division in which the lands are situated, in the same manner as any other instrument affecting the land, except that it shall not be necessary to copy the notice or affidavits or declarations attached thereto in any of the registers, and such registration shall have the same effect, and the duties of the Registrar in respect thereof shall be the same as in the case of any other registered instrument except as to the copying thereof, and the fee to be paid such Registrar for registering the same shall be fifty cents.

Proof for
registration.

(2) The affidavit or declaration for the purpose of registering the notice shall be made by the person who served the same, and shall prove the time, place and manner of such service, and that the copy delivered to the Registrar is a true copy of the notice served.

Certified copy
to be evidence.

(3) A copy of such registered notice and affidavit or declaration certified under the hand and seal of office of the Registrar shall in all cases be received as *prima facie* evidence of the facts therein stated. 57 V. c. 35, s. 2.

Proof of
notice of sale
under mort-
gage.

(4) Where the person who served any notice in this clause mentioned is dead or out of this Province, or where it is proved to the satisfaction of the Judge in this clause mentioned, that the place of abode or residence of such person is unknown, or that such person is incapable of making an affidavit or declaration of service, any person who is or who claims to be interested in the registration of the notice may make proof before the judge of any county court of the service of the notice, and upon a certificate of such judge to the effect that from the proof produced by (naming the person producing the proof and stating the evidence given) he is satisfied of the due service of the notice, such certificate to be endorsed on the notice and signed by the judge, the registrar shall register the notice and certificate.

Conveyance
of land under
mortgage not

(5) From and after the first day of January, 1900, no instrument which purports to be a conveyance of lands after notice

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and under power of sale contained in a mortgage, shall be registered until the notice shall have been registered in the registry division in which the lands are situated, pursuant to this section. 62 V. c. 16, s. 6.

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of sale.

[As to Registration of Orders and Judgments for Alimony, see Cap. 51, sec. 35; as to Registration of Notice of Seizure by Sheriff of a Mortgage, see Cap. 77, sec. 23.]

Instruments executed before the 1st January, 1866.

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73. The registration of all instruments executed before the 1st day of January, 1866, may be made through memorials or by certificate or otherwise, as provided by the law in force prior to the Registry Act passed in the year 1865. 56 V. c. 21, s. 73.

Registration
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74. The proof that would before the first day of January, 1866, have been sufficient for the registration of any instrument executed prior to the said date, shall be deemed sufficient for the registration hereafter of any such instrument; but in any such case the instrument shall be registered at full length, and the memorial and affidavit shall be deposited and filed in lieu of an original or duplicate. 56 V. c. 21, s. 74.

Proof of regis-
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75.—(1) Any instrument which has been registered by memorial prior to the 1st day of January, 1866, and has indorsed thereon a certificate of the registration thereof, may be re-registered at full length in the same or any other Registry Division by the production of the original instrument and the deposit of a copy thereof, with an affidavit verifying the copy.

Registration
of instruments
in full when
memorials
previously
registered.

(2) In re-registering such instrument the Registrar shall copy the affidavit of verification and the certificate of former registration, and shall write in the margin of the registry book the words "Original not deposited," and where the former registration was made in the same office, the Registrar shall write upon the entry of the memorial in the registry book a memorandum as follows:—"Re-registered in full at No. " giving a reference to the number and volume where the full registration is entered, and he shall also note the re-registration in red ink wherever in an abstract index the memorial is entered.

(3) The Registrar shall also endorse upon the original instrument a certificate of the re-registration in a form similar to the certificate of registration given in Schedule J to this Act. 56 V. c. 21, s. 75.

Discharges of Mortgages.

no instru-
ter notice

76. Where a registered mortgage has been satisfied, whether such mortgage has been copied in full or not, the

Satisfaction of
mortgage how
registered.

Entry in margin of register.

Effect of such registration.

Registration of discharge when mortgage paid off by a new loan

Registration of discharge given by person other than the mortgagee.

Discharge of mortgage by person other than the mortgagee.

Registering probate or let-

Registrar, on receiving a certificate executed by the mortgagee, or if the mortgage has been assigned, then executed by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage, in the form of Schedule L to this Act, or to the like effect, executed in the presence of one witness, and duly proven by the oath of the subscribing witness thereto, in the same manner as herein is provided for the proof of other instruments affecting lands, shall, if the assignment or other document of title of the assignee or other person executing the discharge has been registered, register the same, and every affidavit attached thereto or endorsed thereon, at full length in its proper order, in the registry book, and shall number it in like manner as other instruments are required to be registered and numbered, and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor. 56 V. c. 21, s. 76 (1); 58 V. c. 22, s. 3, s. 4, part; 59 V. c. 29, s. 2.

77. In any case where a mortgage shall hereafter be paid off by any person advancing money by way of a new loan on mortgage on the same property and the mortgage so paid off or the discharge thereof is held by the mortgagee making the new loan or advance, the discharge of the mortgage so paid off shall be registered within six months from the date thereof, unless the mortgagor shall, in writing, have authorized the retention of the said discharge for a longer period. Such registration shall not affect the right (if any) of any mortgagee or purchaser who may have paid off such mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid. 56 V. c. 21, s. 76 (2).

78.—(1) Where the person entitled to receive the mortgage money and to discharge any registered mortgage is not the mortgagee, he shall at his own expense cause to be registered prior to the registration of the certificate of discharge the instruments or documents through which he claims interest in and title to the mortgage moneys, and until such instruments or documents are registered the Registrar shall not register such certificate or discharge; and such certificate shall be to the effect of schedule L hereto, and shall mention the date of registration and number of each of the instruments or documents through which the person executing the certificate claims interest in and title to the mortgage moneys, and the names of the parties. This section shall apply to powers of attorney where the certificate of discharge or prior instrument or document is executed by attorney. 58 V. c. 22, s. 4; 62 V. c. 16, s. 7.

(2) Where any probate of will or letters of administration, with the will annexed, is required to be registered under the

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preceding sub-section, and the will is over seven folios in length, including probate or letters, and the will does not affect lands in the Registry Division, except in so far as the testator was a mortgagee or assignee of a mortgage, it shall not be necessary to register the will at full length: but for the purposes of the said subsection it shall be sufficient to register so much of the probate or letters of administration, with the will annexed, as to show the grant of probate or such letters and the appointment of executors or administrators, as the case may be, and by the deposit in the Registry Office of a copy of so much of the probate or letters as show the grant thereof and the appointment of executors or administrators, with an affidavit verifying such copy, and an affidavit by the executor or administrator, or by one of them, if there is more than one, or by his or their solicitor, to the effect that there is nothing in the will limiting the right of the executor or the administrator to receive the mortgage money and discharge the mortgage, and that the will does not affect lands in the registry division in which the probate or letters is to be registered, except in so far as the testator was the holder of a mortgage or mortgages comprising land in such Registry Division. 59 V. c. 29, s. 4.

ters of admin-
istration.

79.—(1) In the event of the person whose duty it is under the preceding section to register such instruments or documents refusing or neglecting to register the same within fifteen days after payment of the mortgage moneys to him, then, and in every such case, the person entitled to redeem the mortgage may on giving ten days' notice thereof in writing to the person so neglecting or refusing, apply in a summary manner to any Judge of the High Court or to any Local Judge thereof in the county wherein the lands or any part thereof mentioned in the mortgage are situate for an order directing that the person so refusing or neglecting shall within a time to be fixed by the Judge, register such instruments or documents at his own expense, and the Judge upon being satisfied that the application is a proper one shall make the necessary order hereunder, either upon affidavits or *viva voce* evidence as he shall deem fit, and on being satisfied of the due service of the notice aforesaid may proceed to determine the matter in the absence of the person so neglecting or refusing as aforesaid, and in the event of such person disobeying such order, the Judge shall have the same power to punish for contempt as in any case of disobedience to an order of the Court directing any act to be performed by the person named therein.

Application
to Judge for
order to
register
instruments
authorizing
discharge to be
given.

(2) The Judge shall also have power to award costs of the proceedings to obtain the order and incidental thereto, and to the enforcement thereof, which costs shall be on the High Court scale and shall be enforceable by execution issued on the certificate of one of the taxing masters at Toronto.

(3) The said notice shall by its terms purport to be given in pursuance of this section. 58 V. c. 22, s. 5.

How mortgages to married women discharged.

80.—(1) It shall not be necessary to the validity of any certificate of discharge of mortgage given by a married woman that the husband of such married woman should be a party to or should execute the same; and it is hereby declared that any discharge of mortgage heretofore executed by a married woman alone, and duly registered, shall be as effectual to discharge such mortgage and to re-convey all the estate of such married woman in the mortgaged lands as if the same had been executed by the husband and wife conjointly. 56 V. c. 21, c. 77 (1).

Discharges of mortgage by married women before 18th December, 1868, confirmed.

32 V. c. 9.

81.—(1) All certificates of discharge of mortgage and the registration thereof, where such certificates were executed by married women or registered previously to the 19th day of December, 1868, according to the terms of the Act passed in the 32nd year of Her Majesty's reign, and chaptered nine, shall be as valid and binding as if done after the said date. 56 V. c. 21, s. 78.

Subsequent discharges.

(2) Any such certificate given between the 19th day of December, 1868, and the 29th day of March, 1873, shall be deemed to have been sufficiently executed if it has been executed jointly by such married woman and her husband; and execution on and after the 29th day of March, 1873, either jointly by the married woman and her husband, or by the married woman alone shall be deemed sufficient execution; and it shall not be necessary to produce any certificate of such married woman having been examined before any of the persons authorized by the laws in force between said dates touching her consent thereto in anywise, but nothing in this section contained shall be construed to limit the effect of the preceding section. 56 V. c. 21, s. 77 (2).

Release of part only of lands mortgaged.

82. In case the mortgagee or any assignee of the mortgagee desires to release or discharge part only of the lands contained in the mortgage, or to release or discharge only part of the money specified in the mortgage, he may do so by deed or by a certificate to be made, executed, proven, and registered in the same manner as in cases where the whole lands and mortgage are wholly released and discharged; and such deed or certificate shall contain as precise a description of the portion of lands so released or discharged as would be necessary to be contained in an instrument of conveyance for registration under this Act, and also a precise statement of the amount or particular sum or sums so released or discharged. 56 V. c. 21, s. 79.

Discharge of mortgage seized under execution.

83.—(1) When a Sheriff, Bailiff of a Division Court or other officer, under a writ or warrant of execution against goods, seizes any mortgage belonging to the person against whose effects the writ or warrant has issued, on or affecting land in the Province of Ontario, the payment with or without suit in whole or in part to the Sheriff, Bailiff, or other officer

by the mortgagor or any other person of the mortgage money thereby secured shall discharge the mortgage to the extent of such payment.

(2) After payment of the mortgage or any part thereof, the Sheriff, Bailiff, or other officer shall, at the request and expense of the person requiring the same, give a certificate in the form or to the effect of Schedule M to this Act, under the hand and seal of office of the Sheriff or other officer, or under the hand of the Bailiff, and the seal of the Court of which he is Bailiff.

Form of certificate of discharge.

(3) Upon the written request of the Bailiff the Clerk of the Court shall affix to the certificate the seal of the Court; and he shall file the request of the Bailiff in his office.

Seal of Division Court.

(4) The execution of the certificate shall be proved by the same oath or affirmation, and in the same manner as is provided by law for the proof for registration of other instruments affecting lands, and the certificate shall be registered in the same manner as other certificates of discharge of mortgages are registered.

Proof of execution of certificate.

(5) Every certificate so registered, if the same is of payment in full of the mortgage, shall be as valid and effectual in law as a release of the mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor as if executed by the execution debtor.

Effect of certificate.

(6) Every certificate so registered, if the same is of payment of only a portion of the mortgage, shall be as valid and effectual in law as a release of the mortgage as to such portion, as if executed by the execution debtor.

Effect of certificate of part payment.

(7) The provisions of this section shall extend and apply to all cases in which the seizure or payment was before, or since the 21st day of December, 1874. 56 V. c. 21, s. 80.

Retrospective operation.

84. It shall not be necessary that the residence or occupation of the attesting witness to any certificate of discharge of mortgage be stated in the attestation clause thereof; nor shall any such certificate, registered before the 29th day of March, 1873, be invalid or inoperative by reason of the omission to state in the attestation clause the residence or occupation of such attesting witness. 56 V. c. 21, s. 81.

Residence, etc., of witness to discharge of mortgage need not be given in attesting clause.

85. Instruments of the nature mentioned in section 43 of this Act, registered before as well as after the passing hereof, may be discharged, and the lands affected thereby released therefrom by filing in the Registry Office a certificate of discharge in the form contained in Schedule N to this Act, or to the like effect. 56 V. c. 21, s. 82.

Discharge of instrument given in relation to purchase of goods

By-Laws, etc.

Registration
of by-laws
passed since
29th March,
1873.

86.—(1) Every by-law passed since the 29th day of March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road, or highway has been or is opened upon any private property, shall before the same becomes effectual in law, be duly registered in the Registry Office of the Registry Division in which the land is situate; and for the purpose of registration a duplicate original or copy of the by-law shall be made out, certified under the hand of the Clerk and the seal of the municipality, and shall be registered without any further proof.

As to by-laws
etc., relating
to roads made
before 29th
March, 1873.

(2) Every by-law passed before the said day, and every order and resolution of the Quarter and General Sessions passed before the said day under the authority of which any street, road, or highway, has been opened upon any private property, may at the election of any party interested and at the cost and charges of such party or municipality, be also duly registered, upon the production to the Registrar of a duly certified copy of the by-law under the hand of the Clerk of the municipality and the seal of the municipality, or by a duly certified copy of the order or resolution of the Quarter or General Sessions, given under the hand and seal of the Clerk of the Peace, as the case may be.

By-laws, etc.
affecting
changes in
municipal
boundaries.

(3) All by-laws, proclamations, Orders-in-Council and other instruments of a public, or *quasi* public nature whereby a village, town or city becomes incorporated, or the boundaries of any municipality are enlarged, diminished or in any way altered, shall be registered in the proper registry office by the municipality passing or procuring the same, and a copy of a by-law certified by the seal of the corporation and the signature of the chief officer and the Clerk thereof, and a copy of a proclamation, Order-in-Council or other instrument certified by the chief officer of the department from which the same is issued shall be sufficient proof for registration under this section. 56 V. c. 21, s. 83; 62 V. c. 16, s. 8.

REGISTRATION AND ITS EFFECT.

Unregistered
instruments
after grant
from the
Crown to be
void against
subsequent
registered
purchaser or
mortgagee.

87. After any grant from the Crown of lands in Ontario, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims. 56 V. c. 21, s. 84.

Instruments
giving author-

88. Every instrument within the meaning of section 2 of this Act, which in its nature is, or purports to be, a power of

attorney or authority from one person to another to sell lands, and in which instrument the commission, payment for services, or other remuneration of the attorney or agent therein named, is made a charge on the land, shall not, as against a subsequent purchaser, or the creditors of the person giving the power or authority, have effect to charge the lands with such commission, payment for services, or remuneration, after the lapse of one year from the making of the instrument. 56 V. c. 21, s. 85.

89. All wills or the probates thereof registered within the space of twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death; and in case the devisee, or person interested in the lands devised in any such will, is disabled from registering the same within the said time by reason of the contesting of such will or by any other inevitable difficulty without his or her wilful neglect or default, then, the registration of the same within the space of twelve months next after his attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this Act. 56 V. c. 21, s. 86.

90. Every deed made by a treasurer or other officer for arrears of taxes shall be registered within eighteen months after the sale by such treasurer or other officer; and all deeds of lands sold under process issued from any Court in Ontario, shall be registered within six months after the sale of the lands; otherwise the parties respectively claiming under any of such sales, shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of the deed from the treasurer or other officer. 56 V. c. 21, s. 87. *See also Cap. 224, sec. 204.*

91. Where deeds for lands sold for taxes, or under process of law, before the 4th day of March, 1868, have not been registered within one year after the said day, the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who has acquired priority of registration. 56 V. c. 21, s. 88.

92. The registration of any instrument, under this Act, or any former Act, shall constitute notice of the instrument, to all persons claiming any interest in the lands, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every Registrar not to register any instrument, except on such proof as is required by this Act. 56 V. c. 21, s. 89.

93. So far as by the last preceding section it is provided that notwithstanding any defect in the proof for registration

ity to sell and naming commission, not to bind land after one year from date.

Wills to be registered within twelve months from death of testator.

Registry of deeds on sales for taxes and sales under process of Court.

Sales for taxes or under process before 4th March, 1868.

Registry to be notice.

Retrospective operation of last section.

the registration of an instrument shall constitute notice thereof, the said section shall only apply retrospectively from the 29th day of March, 1873, as to matters and facts within the meaning of section 45 of this Act. 56 V. c. 21, s. 90.

Entries in
index and
corrections.

94.—(1) After an instrument has been entered in the abstract and alphabetical books, and has been copied in the registry book, no entry shall be made in the abstract index or in the alphabetical index respecting such instrument, except in the manner hereinafter provided; nor, except in such manner, shall any alteration or correction be made in any entry previously made respecting any instrument, or in any copy of any instrument in any registry book.

(2) The Registrar or his deputy shall as promptly as possible after becoming aware of any omission or error in copying, cause to be made in red ink the entries, alterations or corrections which are requisite; and a memorandum stating the date of every such entry, alteration or correction shall be made in red ink in the margin of the index or registry book opposite or near thereto; and such memorandum shall be signed by the Registrar or his deputy. 56 V. c. 21, s. 91.

Penalty for
unauthorized
alteration of
entries.

95. Any person (except the Registrar or other officer when such registrar or officer is entitled by law so to do), who alters any of the books, records, plans or registered instruments in any Registry Office, or makes any memorandum, words or figures in writing thereon, and whether in pencil or in ink, or by any other means, or in any way adds to or takes from the contents of such book, record, plan or registered instrument, shall, on summary conviction thereof, before a Justice of the Peace, forfeit and pay a penalty of not less than \$5, and not more than \$100 besides the costs, and in default of payment thereof, he shall be imprisoned in the common gaol of the county in which the offence was committed for a period of not less than three months, and with or without hard labour in the discretion of the convicting justice. 56 V. c. 21, s. 92.

When instru-
ments to be
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96. Every instrument capable of registration and having the proper affidavit of execution attached thereto, shall be deemed to be registered when and so soon as the same is delivered either personally or by letter to and received at his office during office hours by the Registrar or some officer or clerk in his office on his behalf, and a tender or payment made of the proper fees therefor, and thereafter no alteration shall be made by any person whatever in such instrument, and any person altering the same shall be deemed to be guilty of the violation provided for by the preceding section, and may be punished in the manner therein provided. 56 V. c. 21, s. 93.

Actual notice

97. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration. 56 V. c. 21, s. 94.

98. No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act. 56 V. c. 21, s. 95.

As to equitable liens.

Tacking.

99.—(1) Every mortgage duly registered against the lands comprised therein is, and shall be deemed as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him, to be a security upon such lands to the extent of the money or money's worth actually advanced or supplied to the mortgagor under the said mortgage (not exceeding the amount for which such mortgage is expressed to be a security), notwithstanding that the said moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any conveyance, mortgage, or other instrument affecting the said mortgaged lands, executed by the mortgagor or his heirs, executors or administrators, and registered subsequently to such first-mentioned mortgage, unless before advancing or supplying such moneys or money's worth the mortgagee in such first-mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage or other instrument after the registration of such first-mentioned mortgage, shall not constitute actual notice to such mortgagee of such conveyance, mortgage or other instrument. 57 V. c. 34, s. 1.

Mortgages how affected by subsequent registered conveyances, where mortgage moneys paid subsequently.

(2) This section shall not apply to any action pending on the 5th day of May, 1894, and shall not affect any question of priority in respect of advances made by a mortgagee before the said date. 57 V. c. 34, s. 2.

Pending actions, etc.

MISCELLANEOUS PROVISIONS.

Plans.

100.—(1) Where any land is surveyed and subdivided for the purpose of being sold or conveyed in lots, by reference to a plan which has not been already registered, the person making the subdivision shall, within three months from the date of the survey, file with the Registrar a plan of the land on a scale not less than 1 inch to every 4 chains. The plan shall shew the number of the township, town or village lots and range or concession as originally laid out, and all the boundary lines thereof, within the limits of the land, being subdivided except where such plan is a subdivision of a lot or lots on a former plan, in which case it shall show the numbers or other distinguishing marks of the lot or lots subdivided and the boundary lines of such lot or lots. The number or other distinguishing mark and the breadth, both front and rear, shall be marked on each lot of the subdivision, the scale shall also be marked on the plan, and such information as

Registration of plans when land subdivided.

will show the depth of the lots, and the courses of all the boundaries of, or the division lines between the same and the governing line or lines to which said courses are referred shall also be indicated: the position of all the posts or monuments, if any, planted by the surveyor, or of other objects marking the boundaries of any of the said lots or the corners thereof shall also be shown. The plan shall also show all roads, streets, railway lands, rivers, canals, streams, lakes, mill-ponds, marshes or other marked topographical features within the limits of the lands being so subdivided, together with such other information as is required to show distinctly the position of the said lands. R.S.O. 1887, c. 152, s. 63, (1); 56 V. c. 21, s. 96, (1); 62 V. c. 16, s. 9.

Plans to be mounted.

(2) Every such plan shall be mounted on stiff pasteboard of good quality, and in case it exceeds thirty inches in length by twenty-four inches in width shall be folded so as not to exceed that size. 56 V. c. 21, s. 96 (2)

Duty of Registrars thereafter.

(3) Every such map or plan, before being registered, shall be signed by the person or the chief officer of the corporation by whom or on whose behalf the same is filed, and shall also be certified by some Ontario Land Surveyor in the form of Schedule O to this Act; and thenceforth the Registrar shall keep an index of the lands described and designated by any number or letter on the map or plan, by the name by which such person, corporation or company designates the same in the manner provided by this Act; and all instruments affecting the land or any part thereof, executed after the plan is filed with the Registrar shall conform and refer thereto, otherwise they shall not be registered, except in cases provided for in section 108, and except also where a mortgage has been registered prior to the filing of such plan of subdivision in which case any discharge, final order of foreclosure or conveyance under the power contained in the said mortgage or assignment of mortgage shall be registered against the lands as described in the mortgage. R. S. O. 1887, c. 152, s. 63 (2); 56 V. c. 21, s. 96 (3); 58 V. c. 22, s. 6; 62 V. c. 16, s. 10.

Instruments must conform to such plan.

Exceptions.

Provision as to streets.

(4) No part of any street or streets shall be altered or closed up, upon which any lot of land sold abuts, or which connects any such sold lot with or affords means of access therefrom to the nearest public highway, but nothing herein shall in any way interfere with the powers now possessed by municipalities in reference to highways. R. S. O. 1887, c. 152, s. 65 (2, 3).

Power of municipalities not interfered with.

Penalty for refusing to register plan.

101. In the case of refusal by such person, corporation or company, his or their executors, administrators, agents or attorneys or successors, for two months after demand in writing for that purpose, to lodge with the Registrar any map or plan which it is his or their duty to file under the next preceding section or to deposit under section 112 when required by any person interested therein or by the Inspector so to do, he or they shall incur

a penalty of \$20 for each and every calendar month that there-after elapses without the said map or plan being lodged with such Registrar which penalty may be recovered by any person complaining, in any Division Court in the county in which such lands are situated, in like manner as a common debt. R. S. O. 1887, c. 152, s. 63 (3), s. 69 part; 56 V. c. 21, s. 96 (4). 60 V. c. 3, s. 3, c. 15, Sched. A (59).

102.—(1) The signature on a map or plan for the purposes of subsection 3 of section 100 shall be witnessed and verified as other instruments are under this Act. Verification of signature to plans.

(2) The Registrar shall not accept any map or plan for the purposes of this Act which does not comply with the provisions of this Act; and shall not accept any plan on which a road less than sixty-six feet wide is laid out, unless the assent of the proper municipal council is registered therewith, where such assent is by law necessary. Conditions as to registration of plans.

(3) The Registrar shall not receive or file, any plan or map of a subdivision of any land for which the Crown patent has not issued, unless the assent of the Commissioner of Crown Lands to such receipt and filing is endorsed thereon. 56 V. c. 21, s. 96 (5-7). Plans of unpatented lands.

(4) The Registrar shall not receive or file any plan or map of a subdivision of any land, unless the person or the corporation by whom or on whose behalf the same is filed appears on the registry books to be the owner of the land subdivided by the plan, nor unless the consent in writing of all persons and corporations who appear by the said books to be mortgagees of the land is endorsed on the plan and signed by such person or the chief officer of such corporation and such signatures are duly verified by affidavit. 59 V. c. 29, s. 3. Registrar not to file plans for anyone but owner nor without consent of mortgagees.

(5) Whenever any such plan or map has been so made and deposited as aforesaid the Registrar shall make a record of the same, and enter the day and year on which the same is deposited in his office. R. S. O. 1887, c. 152, s. 67. Duty of the Registrar on receiving plan.

103. Sections 100 to 102 of this Act shall apply as well to lands already surveyed or subdivided as to those which may hereafter be surveyed or subdivided, subject to the provisions of section 109 of this Act. R. S. O. 1887, c. 152, s. 63 (4); 56 V. c. 21, s. 97. Application of ss. 100 to 102.

104. Every copy of such plan or map obtained from a registry office, and certified as correct by the Registrar or Deputy Registrar shall be taken in all Courts as evidence of the original thereof and of the survey of which it purports to be a plan or map. R. S. O. 1887, c. 152, s. 66. Copies of plans evidence.

105. The Inspector, where he deems it necessary, shall have power to direct that a plan index book shall be kept Plan index book.

by the Registrar in manner and form directed by the Inspector. 56 V. c. 21, s. 98.

Abstract index to subdivisions of townships, etc.

106.—(1) Whenever from time to time the Inspector of Registry Offices deems that the public convenience so requires, he may direct a Registrar to subdivide any township, park or other lots in a city, town or village into such blocks for abstract purposes as having regard to conveyances registered upon such lots and otherwise, he considers most convenient; and in such case an abstract index shall be prepared by the Registrar for each of the said blocks as if the same had been originally a separate lot; such abstract index shall extend from the Crown Patent onwards, or from or to such other date as the inspector may direct, and shall contain those registrations only that affect the subdivision to which the index relates. 56 V. c. 21, s. 99 (1); 62 V. c. 16, s. 11.

(2) Where the original lines of the lots do not form the boundaries of such blocks, public streets shall be taken as the boundaries thereof, or otherwise as the Inspector of Registry Offices shall approve of and direct. 56 V. c. 21, s. 99 (2); 59 V. c. 29, s. 16.

(3) Where a plan of a lot or part of a lot subdividing the same has heretofore been registered, or where a plan is hereafter registered of a lot or part of a lot not previously subdivided by a registered plan, the Inspector may direct the Registrar to prepare an abstract of all instruments affecting the part subdivided, and to enter the same in the page or pages of the abstract index book immediately preceding the abstract as to the first lot on such plan.

(4) Whenever and as often as a further subdivision of any of the lots on said plan is made, the Inspector may direct the Registrar to prepare and enter in like manner an abstract of all instruments affecting the part so subdivided from the filing of the previous plan onwards.

(5) The Registrar shall be allowed for preparing such abstracts, so far as the same relate to instruments registered prior to the Inspector's directing the subdivision, such amount as the Inspector may determine to be reasonable for the work performed, and the same shall be paid by the owner who registers the plan or by the county or city as the Inspector may direct.

(6) For abstracts prepared for the purposes of plans hereafter registered, the Registrar shall be entitled to receive from the persons registering such plans, the usual fees for preparing such abstracts; such fees to be paid in addition to the fees for registering such plans. 56 V. c. 21, s. 99 (3-6).

Registration of instruments referring to an un-

107. No instrument referring to an unregistered plan shall be registered unless where an instrument referring to such plan has been already registered in respect of the same land;

and in case the Registrar objects to register any instrument on account of its referring to an unregistered plan, he shall be justified in doing so until and unless the person desiring registration of the instrument refers the Registrar to the number of an instrument previously registered in respect of the same land referring to the said unregistered plan. 56 V. c. 21, s. 100.

108.—(1) Where an instrument which does not conform and refer to the proper plan, as required by section 100, has been duly executed and any party thereto has died prior to the registration thereof, or in any case where it would, in the opinion of the Registrar, be impossible or inconvenient to obtain a new instrument containing the proper description, such instrument may be registered if accompanied by an affidavit annexed thereto or endorsed thereon in accordance with the form given in Schedule P.

(2) The Registrar shall thereupon enter such instrument under the lots designated in the affidavit in the abstract index in which the subdivision is entered, and no entry shall be made under the lot or lots prior to the subdivision, 57 V. c. 35, s. 3, part.

109. In sales of lands under surveys or subdivisions made before the 4th day of March, 1868, where such surveys or subdivisions so differ from the manner in which such land was surveyed or granted by the Crown that the parcel so sold cannot be easily identified, the plan or survey shall be registered within six months after the passing of this Act if the plan or survey is still in existence and procurable for registration and filing under section 100, and if it is not, a new survey or plan shall be made by and at the joint expense of the persons who have made such surveys or subdivisions, and of all others interested therein, by some duly authorized Ontario Land Surveyor, or as nearly as may be according to the proper original survey or subdivision, and the same when so made shall be filed as if under section 100 of this Act. R. S. O. 1887, c. 152, s. 64; 56 V. c. 21, s. 101.

110. In no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any other person, unless a sale has been made according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made, at the instance of the person filing or registering the same or his assigns, by the High Court, or by a Judge of the said Court, or by the Judge of the County Court of the county in which the lands lie, if on application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient. An appeal shall lie from any such order to the Court of Appeal. R. S. O. 1887, c. 152, s. 65 (1); 56 V. c. 21, s. 102.

Plans of towns or villages to be registered in certain cases.

111.—(1) Where an incorporated city, town or village, or village not incorporated, comprises different parcels of land owned at the original division thereof by different persons, and the same were not jointly surveyed and one entire plan of such survey made and filed in accordance with section 100 of this Act, the municipal council of the township within which such unincorporated village is situated, or of such incorporated city, town or village, shall, upon the written request of the Inspector or of any person interested, addressed to the clerk of the municipality, immediately cause a plan of such city, town or village to be made upon the scale provided for under this Act, and to be registered in the Registry Office of the Registry Division within which the municipality lies, which map or plan shall have endorsed thereon the certificates of the clerk and head of the municipality and the surveyor, that the same is prepared according to the directions of the municipality and in accordance with this Act, and the corporate seal of the municipality shall be attached to the map or plan.

Registration of plan of unincorporated village situate in more than one township.

(a) Where the unincorporated village as aforesaid is situated in two or more townships, the inspector may, by a written order, cause a plan of such village to be made upon the scale aforesaid, and to be registered in the proper registry office, and where the unincorporated village is situate in two or more registry divisions, a duplicate of such map or plan shall be registered in each of such registry divisions in so far as it affects lands in such division; the map or plan shall have endorsed thereon the certificate of the surveyor that the same has been prepared according to the order of the inspector, and such order or a copy thereof shall be attached to or endorsed on such plan; and any plan of an unincorporated village situate in two or more townships heretofore prepared upon the request of the inspector, may, in like manner, be registered in the proper registry office, and shall, when so registered, be as valid as if the same had been prepared upon the order of the inspector.

Expenses of registering plan of such unincorporated village—how apportioned.

(b) The expense attending the preparing and depositing of any map or plan in the next preceding clause (a) mentioned, shall be paid out of the general funds of the municipalities in which the unincorporated village is situated, in such proportions as the inspector may order, and any municipality may levy its proportion of such expense, or so much thereof as the council of the municipality sees fit, by assessment on all rateable property comprised in the proportion of the unincorporated village situate in such municipality as described by metes and bounds in a by-law to be passed by the municipality for the purpose of levying such rate. 62 V. c. 16, s. 12.

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(2) The expense attending the preparing and depositing of the map or plan shall be paid out of the general funds of the municipality, except in the case of unincorporated villages, where the same may be paid in whole or in part by the municipality out of its general funds, or the same may, in whole or in part at the option of the municipality, be paid by a special rate to be levied by assessment on all ratable property comprised in the unincorporated village, as described by metes and bounds in a by-law to be passed by the municipality for the purpose of levying such rate; and in case of the refusal of the municipality to comply with all the requirements of this section within six months next after being required in manner aforesaid so to do, the municipality shall incur the same penalty, and the same shall be recoverable in the manner provided in section 101 of this Act. R.S.O. (1897) c 136, s. 111 (2); 62 V. c. 16, s. 13.

Payment of expenses.

(3) Where land in a township has been or shall hereafter be sold under surveys or subdivisions made in a manner which so differs from that in which such land was surveyed or granted by the Crown that the parcel sold cannot be easily identified, and the map or plan has not been registered under this or any other Act in that behalf, the council of the township may at the written request of the Inspector, or of any person interested, cause a plan of any such land to be made and registered in the same manner and with the same effect as in the case of an unincorporated village; and the expenses attending the preparation of and filing of the map or plan shall be paid by a special rate to be levied by assessment on the lands comprised in said map or plan, as described in a by-law to be passed by the council for the purpose of levying such rate; and the municipality shall have the like remedies for the recovering of such last mentioned expenses as it has for compelling payment of taxes.

Registration of plans of township subdivisions in certain cases.

3 (a) Any plan prepared under the provision of sections 1 and 3 of this section shall show such subdivisions of original lots as are shown by the registered plans and by the deeds of such lands as are not shown on the registered plans, and the plan so to be made shall be prepared without adding to the costs thereof the expense of any actual survey on the ground except such as may be necessary to connect the subdivisions or parcels of land and to show any natural or artificial boundaries of the same which cannot be shown on the new plan from the information contained in the registered plans and deeds. 62 V. c. 16, s. 14.

Plans of municipalities—what to be shown on.

(4) Nothing in this section contained shall be deemed or construed to relieve any person from any liability, duty, obligation or penalty provided or imposed by or under any of the provisions of sections 100, 101 and 102 of this Act. R. S. O. 1887, c. 152, s. 68; 56 V. c. 21, s 103 (1-4).

Obligations not impaired.

(5) Where any land has been sold or conveyed in lots or parcels by metes and bounds, or in any other manner without w. 1

Power of County Judge

to order new plans to be filed.

a map or plan registered under this or any other Act in that behalf shewing such subdivisions, or where portions of lots shown by any registered plan or subdivision have been sold, and the lots or parcels so sold are not distinguished by numbers or letters, the Judge of the county or district in which the land is situate may, on the application of the Inspector, after such notices as the Judge may think reasonable, on being satisfied that it is expedient so to do, make an order directing the Registrar in whose division such land is situate to have the same, or any part thereof, laid out into lots or parcels in such manner and numbered as he shall think fit, and a plan or plans thereof made in accordance with the records in the Registry Office, or from actual survey, as may be found necessary, and registered in accordance with the provisions of this Act, which plan shall have the order of the Judge endorsed thereon, signed by him. The costs and expenses of and incidental to such application and plan and the registration thereof shall be borne by the person, corporation or municipality to be named by the Judge in the order. Such order shall be entitled in the County Court and in the matter of the lands in question, and on filing the order with the Clerk of the County Court the same may be enforced as if it were a judgment of the Court. The registration of such plan shall be binding on all parties subsequently dealing with the lands or any part thereof included in the plan or any interest in or concerning the same, but shall not affect in any way the rights or interests of any owner or other person entitled at or prior to the date of registration. 56 V. c. 21, s. 103 (5); 62 V. c. 16, s. 15.

Costs.

Effect of registration.

Delivery of plans to municipal treasurers.

112. Every person who is required to lodge with the Registrar a plan or map of any survey or subdivision of land in any municipality shall at the same time deposit with the said Registrar a duplicate of such plan or map, and the Registrar shall endorse thereon a certificate shewing the number of such plan or map and the date when the duplicate original thereof was filed with him, and the same shall upon request and without any fee being chargeable in respect thereof, be delivered by the Registrar to the treasurer or assessment commissioner of the local municipality in which such land is situate. The Registrar shall not register any such plan or map unless and until a duplicate thereof is deposited in accordance with the provisions hereof. R. S. O. 1887, c. 152, s. 69, part; 56 V. c. 21, s. 104.

Re-registration where Registry Books lost, etc.

Re-registration in case registry books or papers are lost or destroyed.

113.—(1) In any case where the registry books and papers were before the 4th day of March, 1868, lost or destroyed, and the memorials are not forthcoming, upon proof being made to that effect before a Judge of any Court of Record in this Province to the satisfaction of the Judge as evidenced by a certificate under his hand, it shall be lawful

for the Registrar for the Registry Division where the lands are situate to register the instrument upon production thereof, and no further proof shall be required by the Registrar than the original certificate of registration endorsed on such instrument; and any such instrument shall have priority according to the date of the original certificate.

(2) The instrument shall be filed away by the Registrar and preserved with the records of his office, and in case memorials have not been copied into the registry books in their proper order, the Inspector may cause the same to be entered in proper books to be procured for the purpose, in the same manner as provided in section 29 of this Act, and the Registrar shall be paid therefor in the same manner as under clause 9 of section 118 of this Act. 56 V. c. 21, s. 105.

Defects in Registration cured.

114. No registration of any deed or other instrument made before the 4th day of March, 1868, shall be deemed or adjudged void by reason of the name or names, residence or residences, addition or additions of the witness or witnesses to the deed or instrument being improperly given or described in the registered memorial thereof, or being either in part or altogether omitted from such memorial, or by reason of any clerical error or omission of a formal or technical character therein; and all registrations before the said day effected in separate registry books of unincorporated villages are hereby confirmed, where the law has been otherwise complied with; and such separate registry books shall be taken and held to form part of the registry books of the municipality of which the unincorporated village forms a part; but such books shall not be further used. 56 V. c. 21, s. 106.

Registration made before 4th March, 1868, not to be deemed void for certain defects.

Registration in books for unincorporated villages.

115. The registration of an instrument had before the 29th day of March, 1873, shall not be deemed void by reason of any defect in the proof for registration; but this section shall not apply to any matter or fact adjudged or decided upon before the said date by any Court of competent jurisdiction in that behalf. 56 V. c. 21, s. 107.

Defective registrations before 29th March, 1873, not to be deemed void.

116. No registration or entry made before the said last mentioned date shall be adjudged or held to be void by reason of the Registrar having failed or omitted to make or sign the certificate of entry, discharge or registration required to be made in the margin of, or elsewhere in, the registry books or other books of entries; and in case of such failure or omission, the certificate may be made or signed by any subsequent Registrar, and shall have the same force and effect as if it had been made or signed by the Registrar whose duty it was to have made or signed it. 56 V. c. 21, s. 108.

Registrations, etc., not to be deemed void by absence of certificates, etc., in margin of books.

The case of part of a township made part of a new township without change of registry books.

117.—(1) In case a part or parts of any township or townships as originally laid out, surveyed and named, had before the said last mentioned date been made or erected into a new township, but nevertheless the registrations of instruments affecting or respecting land in said first mentioned township or townships, and the registry books and indexes therefor and relating thereto continued to be and were on the said date used, made, kept, entered and registered for and of said first mentioned township or townships and as if the same had continued to be as so originally laid out, surveyed and named, then and in every such case, and for and in respect of all matters and purposes of or relating to any such instrument either before or after the said date and any and all such registrations, registry books and indexes, and the description therein of any land or premises, said first mentioned township or townships shall be deemed, considered and taken as if the same had continued to be and remained as so originally laid out, surveyed and named.

Proviso.

(2) Nothing in this section contained shall be deemed or taken as relating to or affecting any incorporated town or village, or the land therein, or the registration of any instrument respecting the same, from or after the time of the incorporation of said town or village.

Proviso.

(3) Nothing in this section contained shall impair or make defective any instrument or the registration thereof, because of any land being therein described or mentioned as situate in such new township. 56 V. c. 21, s. 109.

[As to list of Crown Grants being furnished to Registrar, see Cap. 28, sec. 39 and as to proceedings where land patented is in territory under The Land Titles Act, see Cap. 138, sec. 169.]

Fees of Registrars.

Fees.

118. Every Registrar shall be allowed the following fees for the following services, and no more:

For registrations general.

1. For the necessary entries and certificates in registering every instrument other than those hereinafter specially provided for, including among such certificates the certificate on the duplicate, if any, forty cents; and for registering every instrument other than those hereinafter specially provided for, \$1;

But in case the said instrument exceeds seven hundred words, then at the rate of fifteen cents for each additional one hundred words or the fractional part thereof, up to fourteen hundred words, and at the rate of ten cents for each additional hundred words or fractional part thereof over fourteen hundred;

If the instrument includes different lots

And if the said instrument embraces different lots or parcels of land, situate in different municipalities in the same county,

the registration and copying of such instrument together with all necessary entries and certificates in connection therewith, shall be considered separate and distinct registrations for each municipality in which the land is situate, and shall be paid for as follows: Where the aggregate copying does not exceed seven hundred words, \$1.40; where the aggregate copying exceeds seven hundred words, the sum of fifteen cents for every hundred words or fractional part thereof up to fourteen hundred words, in addition to the said sum of \$1.40; and where the aggregate copying exceeds fourteen hundred words, the sum of ten cents for every hundred words or fractional part thereof in addition to the above charges; the said fees shall include all certificates and necessary entries but in case the said instrument embraces more than four different lots or parcels of land in the same municipality, the Registrar shall be allowed a fee of 5 cents for entering each lot or parcel in excess of four, but not to exceed \$5 for such entries; 56 V. c. 21, s. 111, (1).

in different
localities.

2. For searching the registry books and indexes relating to the title of any lot or part of a lot of land as originally patented by the Crown, or as afterwards subdivided into smaller lots, shewn by any registered map or plan thereof, when not exceeding four references, twenty-five cents, and five cents for every additional reference up to 50 references, and five cents for every additional two references over 50; but in no case shall a general search into the title to any particular lot, piece or parcel of land exceed the sum of \$3. "A reference" under this subsection shall mean a search of a copy of an instrument in the register, and if the abstract indexes only are examined, the total fee for searching any such lot or part of a lot including four references, shall be 25 cents. The word "lot" shall mean one parcel of land as originally patented by the Crown and where such parcel has been subdivided shall include any one of the lots in any such subdivision or re-subdivision, a plan of which has been registered. No person shall make copies of or extracts from any instruments, documents, books, papers or records in the Registry Office, or of any matter contained therein, to an extent in the aggregate exceeding 800 words for any one lot or part of a lot, except on payment (in addition to the fees for search) of five cents for each 100 words or fraction thereof in excess of said 300 words. No person other than the registrar, his officer or employees, shall use ink, or other indelible fluid or substance, for the purpose of making copies of or extracts from any instruments, documents, books, papers or records in the registry office or of any matter therein contained. Where subsequent to the registration of a mortgage the lands in such mortgage have been subdivided by a plan and searches are made for the purpose of ascertaining subsequent grantees or incumbrancers in sale, foreclosure or other proceedings under such mortgage, the person searching, on producing a statutory declaration that the searches are being made for the purposes

For searches
as to title.

Indelible
materials not
to be used in
making copies,
extracts, etc.

Search to
ascertain
persons inter-
ested in lands
divided subse-
quently to
registration of
mortgage.

aforesaid, shall be entitled to make such searches on all the lots in the subdivision on payment of a fee of ten cents for each lot, but so that the whole fee for searches shall not exceed \$2; 56 V. c. 21, s. 111 (2); 58 V. c. 22, s. 7; 60 V. c. 14, s. 21; 62 V. c. 16, ss. 16, 17.

Searching
alphabetical
index.

General
search.

3. For searching, if specially required, the alphabetical index of names referred to in section 37 as to each name in the books of any one township, or other legally defined municipality in the county, twenty-five cents; but if a general search as to any such name is made throughout the county, the aggregate of fees for such search shall not exceed \$1; 56 V. c. 21, s. 111 (3).

4. For searching, if specially required, the general registry book for the whole county, referred to in section 29, as to each name in the said book the sum of twenty-five cents; 59 V. c. 29, s. 7.

Abstract
titles.

5. For every abstract of title to any specific parcel of land certified by the Registrar containing such particulars as to any number of the registered instruments affecting such parcel of land as the party searching may require, twenty-five cents; and when such abstract exceeds one hundred words, fifteen cents for every additional hundred words; and for copies of instruments when required, ten cents for each hundred words; The seals for every abstract shall appear on the face there and shall show the items making up the amount of such fees. Where there are two or more lots for which abstracts are required and the entries on such lots are identical, the Registrar shall not be entitled to make an abstract for each lot separately, but the abstracts of title of such lots shall be included in one abstract, and the fees therefor shall be the same as if the abstract applied to one lot only, except that the Registrar shall be entitled in addition thereto to a fee of twenty-five cents as for a search on each lot after the first lot, and for the first lot he shall be entitled to the same fees as are now payable under this Act in respect of one lot; and where there are two or more lots for which abstracts are required and the entries on such lots are partly identical, the registrar shall make a full abstract for one of the lots and enter in the same all the lots to which each instrument refers, and in the abstract of the other lots he shall only include entries affecting those lots separately. 62 V. c. 16, s. 18.

Fees for
abstracts of
title.

Certificates.

6. For each certificate furnished by the Registrar, except those made under clauses numbered 1 and 5 of this section, twenty-five cents;

Plans.

7. For registration of any plan of town or village lots, including all necessary entries connected therewith, \$1; but in case the plan embraces more than 20 lots, the Registrar shall be allowed a fee of 5 cents for each lot in excess of 20, not to exceed in the whole \$5; 56 V. c. 21, s. 111 (4-6).

8. For searches as to the names of registered owners and as to mortgagees under subsection 4 of section 102 of this Act, in connection with the registration of any plan, the sum of \$1; 59 V. c. 29, s. 8.

9. For furnishing the copies required under sections 32 and 35 of this Act, to be paid by the treasurer of the county to which any city, town, township, village or place belongs or is attached, the sum of 10 cents for every folio of one hundred words contained in the copies so made; and the county treasurer shall also pay such sum as the Inspector may order in writing, specifying the nature of the service under any section of this Act, for repairing any book, or copying, mounting, or binding plans, or for new plans and surveys, or for new abstract indexes, under the provisions of section 35 of this Act; and towns separated from counties for municipal purposes, and cities in which no separate Registry Office exists shall bear a ratable proportion of the expense thereof, based on the assessment of all the municipalities within the jurisdiction of the county; or the inspector may order the expenses of new plans and surveys and the registration thereof under the provisions of section 35 of this Act, to be paid by the treasurer of any local municipality concerned, or in part by the county treasurer and in part by the treasurer of any local municipality, and the local municipality may, subject to the order of the inspector, cause such expenses or part thereof to be levied by assessment on all rateable property comprised in the portion of the municipality affected by such plan or survey. 56 V. c. 21, s. 111 (7); 59 V. c. 29, s. 9; 62 V. c. 16, s. 19.

Statements
under sections
32 and 35.

Fees for pre-
paring plans,
etc., for muni-
cipalities.

10. For drawing each affidavit and swearing the deponent thereto, twenty-five cents; the same fee to be allowed for administering the oath when that only is required;

Affidavits.

11. For exhibiting in the office each original registered instrument, including search for same, ten cents; and for producing each original registered instrument, including search for the same, in pursuance of a judge's order or subpoena, the sum of ten cents in addition to the registrar's ordinary witness fees. 62 V. c. 16, s. 20.

Showing
originals.

Fees for pro-
ducing
original in-
struments in
court.

12. For registering each certificate of payment of mortgage money, and every other certificate excepting certificates provided for in the next succeeding clause, including all entries and certificates thereof, fifty cents; but in case the said certificate affects more than four different lots or parcels of land, the Registrar shall be allowed a fee of five cents for each lot in excess of four; and in case the certificate embraces two or more lots or parcels of land situate in different municipalities in the same county, or in case the certificate or aggregate copying thereof exceeds three hundred words, the registrar shall be allowed at the rate of ten cents per folio for each additional 100 words or fractional part thereof of copying

Certificates of
discharge of
mortgage.

Fees on regi-
stering dis-
charge of
mortgage.

over three hundred words, but not to exceed five dollars in the whole for the registration of such certificate. 62 V. c. 16, s. 21.

Certificate of discharge of lien.

13. The Registrar shall be entitled to charge for registering a certificate under section 85, including all entries in respect thereof, the same fees as are chargeable for registering a certificate of discharge of mortgage;

Of payment of taxes.

14. For registering each certificate of payment of taxes, twenty-five cents;

Figures.

15. In abstracts and certificates where figures are used instead of words to denote dates, numbers and quantities, the same shall be charged as if each number, though composed of several figures, were but one word. 56 V. c. 21, s. 111 (8 13).

Fees in cases not provided for.

16. Where any Act of this Province, or of the Dominion of Canada requires or permits any instrument or plan to be deposited, filed or registered in the registry office, but omits to provide fees to the registrar for his services in connection therewith, and no fees therefor are provided by this or any other Act, the registrar shall, in the absence of any express provision requiring him to perform such services gratuitously, be entitled to reasonable fees therefor, the amount of such fees to be named and fixed by the inspector of registry offices. 62 V. c. 16, s. 22.

Disputes as to fees.

119 When any dispute arises in regard to any question of fees under this Act, the Registrar shall forthwith submit the same to the Inspector, and shall thereupon notify the person interested or his agent of such submission, and the decision of the Inspector upon the question submitted shall be final, unless appealed from and varied upon appeal as hereinafter mentioned. All decisions given by the Inspector shall be in writing, and the appeal therefrom shall be in like manner, and subject to the same rules of practice as nearly as may be as an appeal from the Master in Chambers or a Local Master. 56 V. c. 21, s. 112.

Table of fees to be posted in Registrar's office.

120. Every Registrar shall keep posted up in some conspicuous place in his office a printed schedule of the fees and charges authorized under this Act. 56 V. c. 21, s. 113.

Registrar to give statement of fees payable in any matter.

121. Every Registrar shall upon request of the person for whom the service is performed, furnish a statement in detail of the fees charged by him in respect of any matter for which fees are payable under the provisions of this Act. 56 V. c. 21, s. 114.

Recovery of fees from municipal corporations.

122. Should the treasurer of any county or city in which a separate Registry Office is established, on the request of the Registrar for the duties performed according to this Act, refuse to pay the fees and allowances for any services required by

this Act, the Registrar may prove and recover the same and the cost thereof from the corporation of the county or city in any Court of Record in Ontario; and the Inspector's certificate of the amount and of the services rendered shall be *prima facie* evidence of the right to recover. 56 V. c. 21, s. 115.

123. The Registrar shall not be compelled to register any instrument unless the fees authorized by this Act are first paid thereon. 56 V. c. 21, s. 116.

124.—(1) Every Registrar shall keep a separate book in which he shall enter from day to day, all fees and emoluments received by him by virtue of his office, shewing separately the sums received for registering each instrument, and for searches, and for extracts or copies.

(2) Every Registrar shall make up to and including the 31st day of December of the previous year, a return under oath to the Lieutenant-Governor annually on or before the 15th day of January, and such return in addition to any other information which may be required in connection therewith, shall show :

1. Total number of instruments registered and fees therefor;
2. Number uncopied and uncomparred;
3. The number of patents registered and fees therefor;
4. The number of deeds registered and fees therefor;
5. The number of mortgages registered and fees therefor;
6. The number of discharges of mortgages registered and fees therefor;
7. The number of wills registered and fees therefor;
8. The number of leases registered and fees therefor;
9. The number of abstracts and fees therefor;
10. The number of searches and fees therefor;
11. The number of mechanics' liens and fees therefor;
12. The number of all other instruments registered or filed and fees therefor;
13. Amount received for work done for which county, city, or other municipality is liable;
14. Amount received for other services not enumerated above;
15. Fees earned and not received;
16. Gross amount of fees earned for the year;
17. Gross amount for the previous year;
18. Amount paid to Deputy Registrar for services and amount of other charges in connection with the office paid by Registrar;

19. Amount of surplus paid to the county or city for the year and when paid;
20. Amount of such surplus for the previous year;
21. Net amount received by Registrar.

(3) The return shall show the number of mortgages registered during the year classified as follows:—

Class 1—The number of mortgages where the consideration is nominal or the amount not specified.

Class 2—The number of mortgages where the consideration is \$1,000 or under.

Class 3—The number of mortgages where the consideration is over \$1,000 and not exceeding \$2,000.

Class 4—The number of mortgages where the consideration is over \$2,000 and not exceeding \$5,000.

Class 5—The number of mortgages where the consideration is over \$5,000.

The return shall also show the aggregate amount of such mortgages. 56 V. c. 21, s. 117 (1-3.)

Registrar to furnish clerk or assessment commissioner with list of conveyances.

125. The Registrar shall, upon request, furnish to the clerk or the assessment commissioner of a city, a list of all absolute conveyances whereby property has been transferred, which have been registered in his office during the next preceding month, and in such list shall include the names of the grantor, the grantee, the consideration shown in each transfer, and a short description of the land conveyed; provided that such list shall not include leases for less than twenty-one years, mortgages, discharges of mortgage, or other like instruments, and that the Registrar shall be entitled to have and receive therefor a fee of five cents for every instrument included in the said list. 56 V. c. 21, s. 118.

Payments by Registrars on gross income.

126.—(1) Every Registrar shall be entitled to retain to his own use in each year all the fees and emoluments received by him in that year up to \$1,500.

(2) Of the fees and emoluments received by each Registrar, other than the Registrars for East and West Toronto, in each year, such Registrar, subject to the provisions of section 129 of this Act and of section 162 of *The Land Titles Act*, shall pay to the treasurer of the county or city for which or for part of which he is Registrar, the following percentages:—

Rev. Stat. c. 138.

(a) On the excess over \$2,500 and not exceeding \$3,000, ten per cent.

(b) On the excess over \$3,000 and not exceeding \$3,500, twenty per cent.

- (c) On the excess over \$3,500 and not exceeding \$4,000, thirty per cent.
- (d) On the excess over \$4,000 and not exceeding \$4,500, forty per cent.
- (e) On the excess over \$4,500, fifty per cent.

(3) Of the net income of each year over \$1,500 every Registrar, other than the Registrars for East and West Toronto, shall, subject to section 129 of this Act and to section 162 of *The Land Titles Act*, further pay to the said treasurer for the use of the municipality, the following percentages, namely:—

Percentage of
net income
payable to
municipality.
Rev. Stat.
c. 138.

- (a) On the excess over \$1,500, not exceeding \$2,000, ten per cent. thereof;
- (b) On the excess over \$2,000, not exceeding \$2,500, twenty per cent. thereof;
- (c) On the excess over \$2,500, not exceeding \$3,000, thirty per cent. thereof;
- (d) On the excess over \$3,000, fifty per cent. thereof.

56 V. c. 21, s. 119; 57 V. c. 9, s. 1 (6, 7); 59 V. c. 29, ss. 11, 13.

127.—(1) The Registrars of East and West Toronto, subject to the provisions of section 162 of *The Land Titles Act*, shall each pay to the Treasurer of the City of Toronto of his net income of each year over the sum of \$1,500, the following percentages:—

Percentage
payable out of
net income of
Toronto
Registrars.
Rev. Stat.
c. 138.

- (a) On the excess over \$1,500, not exceeding \$2,000, ten per cent. thereof;
- (b) On the excess over \$2,000, not exceeding \$2,500, twenty per cent. thereof;
- (c) On the excess over \$2,500, not exceeding \$3,000, thirty per cent. thereof;
- (d) On the excess over \$3,000, not exceeding \$6,000, fifty per cent. thereof;
- (e) On the excess over \$6,000, ninety per cent. thereof.

(2) The expenses connected with the work of or in conducting the business of the offices of the Registrars of East and West Toronto, shall not be increased beyond those paid in the year 1895, without the consent of the Inspector in writing first had and obtained. 59 V. c. 29, s. 12.

128. For the purposes of this Act, "net income" shall mean the excess of all fees and emoluments, including receipts in the current year, whether on account of the earnings or

"Net income," meaning of.

salary of such year or of any former year or years after the first day of January, 1893, by the Registrar, after deducting the disbursements incident to the business of his office and after payment to the municipality of the proportion of fees provided by subsection 2 of section 126 in cases coming within that subsection. 56 V. c. 21, s. 122.

Payment of
surplus fees.

Return.

129.—(1) On the fifteenth day of January in each year every Registrar shall transmit to the treasurer of the county or city for which, or for part of which, he is Registrar, a duplicate of the return required by this Act, and shall also pay to such treasurer for the uses of the municipality such proportion of the fees and emoluments received by him during the preceding year, as under this Act he is not entitled to retain to his own use.

(2) Where a Registry Division includes a county or part of a county, and a city or town separated from the county for municipal purposes, the amount aforesaid shall be paid to the treasurer of the county and to the treasurer of the city or town for the use of the municipality in the same proportions in which the gross fees and emoluments are derived from extracts, searches, registrations, and other charges in respect of lands situate in the county, and in respect of lands situate in the city or town. 56 V. c. 21, s. 120.

Adjustment
of percentage
payable
to municipal-
ity where
Registrar fills
the office for
part of year
only.

130.—(1) Every Registrar, or Deputy Registrar, acting as Registrar, who fills the office of Registrar and receives the fees and emoluments thereof for a part of any year shall, or in case of his death his executors or administrators shall, in respect of the fees and emoluments received by him during such part of a year pay a proportion thereof to the municipal treasurer for the uses of the municipality under sections 126, 127 and 129 hereof, such proportion of fees to correspond to the portion of the year during which he so filled the office and such proportion to be computed for such part of the year at the same rate as such Registrar or Deputy Registrar would have had to pay had he filled the office for the whole year and had he during that year received fees and emoluments and made disbursements incident to the business of his office for the whole of such year at the same rate as he received and made for the part of the year during which he filled the office.

(2) Every Registrar or Deputy Registrar in this section referred to shall, within fifteen days after the expiry of the part of the year for which he filled the office, and the executors or administrators of every deceased Registrar who filled the office for a part of any year and died in office, shall, within thirty days after the death of such Registrar or Deputy Registrar, make, up to and including the days of such expiry, a return under oath to the Lieutenant-Governor, and such return, in addition to any other information which may be required in connection therewith, shall show for the

said part of the year all the particulars required by subsection 2 of section 124 of this Act, and shall also, within the said period of fifteen days or of thirty days, as the case may be, transmit to the treasurer of the county or city for which, or for part of which, he so filled the office of Registrar, or Deputy Registrar, a duplicate of such return, and shall also pay to such treasurer for the uses of the municipality such proportion of the fees and emoluments received by him or by the deceased Registrar or Deputy Registrar, as the case may be, during the part of the year herein referred to as he is hereunder liable to pay to such municipality, and subsection 2 of section 129 of this Act shall apply to the proportion of fees in this section mentioned. 59 V. c. 29, s. 17.

131. In the fees and emoluments mentioned in sections 126, 127, 128, 129 and 130 of this Act, there shall not be included any sums receivable from the municipality for the preparation of abstract indexes, or for work done under section 32 or section 35 or subsection 5 of section 106 of this Act, nor shall anything in this Act contained be construed to apply to the fees or emoluments of any Registrar received on account of services as Returning Officer under the election Acts of the Province of Ontario or of Canada. 56 V. c. 21, s. 99 (5) part; ss. 124, 127.

Certain fees not to be included in payments to municipalities.

132. The council of every county, city or separated town may by by-law authorize the warden, mayor or treasurer to inspect the books of office kept in any registry division in the county or city, for the purpose of testing the accuracy of the returns or computations of fees received by the registrar to a share or percentage of which the county, city or town may be or may become entitled, and the registrar shall at all convenient times allow the said books to be inspected for such purpose free of charge. 60 V. c. 14, s. 17.

Inspection of registry books by municipal officers.

133. The disbursements of the Registrars shall be subject to the revision of the Inspector, and for the purposes of such revision the Inspector shall have power to take evidence and examine witnesses under oath. 56 V. c. 21, s. 126.

Disbursements subject to revision of Inspector.

134. The Lieutenant-Governor in Council may make rules and regulations for the management of the office of Registrar, and may, by such rules, confer on the Inspector such powers as may be deemed necessary for carrying out the provisions of this Act, and all other Acts relating to the duties of Registrars. All such rules and regulations shall be laid before the Legislative Assembly within the first ten days of the session after the making thereof. 56 V. c. 21, s. 125.

Lieutenant-Governor may make rules and regulations.

INSPECTOR OF REGISTRY OFFICES.

135. The Lieutenant-Governor may, from time to time, appoint an Inspector of Registry Offices, whose duty shall be,

Appointment of Inspector, and his duties

- Inspection of Building.** 1. To make a personal inspection of the building in which each office is kept, and of the books, deeds, memorials and other instruments in each Registry Office ;
- Books, etc.** 2. To see that the proper books are provided, that they are in good order and condition, that the proper entries and registrations are made therein in a proper manner and in a due and proper form and order, that the indexes are properly kept, and that all the memorials and other instruments are duly endorsed and certified, and preserved ;
- Office hours.** 3. To ascertain that the office is kept duly open at and for the proper times, and that it is at all times duly attended to by the Registrar or his Deputy ;
- Seals of office.** 4. To settle on some uniform device for the official seals, and to see that the Registrars supply themselves therewith ;
- New indexes.** 5. To inspect all new abstract and alphabetical indexes, and to settle and certify the sums, if any, chargeable therefor ;
- Plans.** 6. To ascertain whether the proper plans required by this Act have been filed in the several Registry Offices, and where necessary, to enforce the provisions of the law in that respect, and he may instruct the County Crown Attorney to take the necessary proceedings for that purpose ;
- Reporting vacancies.** 7. To report upon any vacancies by death or otherwise, in the offices of Registrar and Deputy Registrar ;
- Instruction of Registrar and his duties.** 8. To inform the Registrar how and in what manner he shall do any particular act or amend or correct whatever he may find amiss ; and in case he finds the work improperly performed by any Registrar, he shall have power to order a new book or books to be prepared and completed by the Registrar at his own expense ;
- Sufficiency or insufficiency of sureties.** 9. To ascertain the sufficiency or insufficiency of the sureties for the Registrar, and whether they are living or dead ; and
- Reporting to Lieutenant-Governor.** 10. To report upon all such matters, as expeditiously as may be, to the Lieutenant-Governor for his information and decision. 56 V. c. 21, s. 128.

Registrars to furnish information to inspector. **136.** The Registrars shall transmit to the Inspector of Registry Offices such particulars with reference to the business of their offices as the said Inspector may require. 56 V. c. 21, s. 129.

Duty of Inspector on finding work in arrear. **137.** In the event of the work of any Registry Office being in arrear, and it appearing to the Inspector that no sufficient reason is given therefor, the Inspector shall employ such assistance as he deems necessary to perform the work so in arrear, and the cost of such assistance shall be payable by the Registrar to the parties entitled, on the certificate of the Inspector. 56 V. c. 21, s. 130.

138. A sum not exceeding \$2,000 per annum, and travelling and other expenses, necessarily incurred, shall be allowed to the Inspector of Registry Offices. 56 V. c. 21, s. 131; 59 V. c. 29, s. 10.

SCHEDULE A.

(Section 13.)

FORM OF COVENANT OF REGISTRAR.

Know all men by these presents, that we, *A. B.*, Registrar of Esquire, and *C. D.*, of Esquire, and *E. F.*, of Esquire, do hereby jointly and severally for our and each of our heirs, executors and administrators, covenant and promise, that the said *A. B.*, as Registrar of shall well, truly and faithfully perform the duties and obligations of his office as such Registrar, and that neither he nor his Deputy shall negligently or wilfully misconduct himself in his said office to the damage of any person or persons whomsoever; nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than the following, that is to say; against the said *A. B.*, in the whole, \$ [the amount fixed by Order in Council]; against the said *C. D.* and *E. F.*, \$ respectively [the amount fixed by Order in Council for each].

In Witness Whereof we have hereunto set our hands and seals this day of , A. D. 18 .

Signed, sealed and delivered in the presence of }

56 V. c. 21, Sched. A

SCHEDULE B.

(Section 13.)

FORM OF AFFIDAVIT OF JUSTIFICATION.

County of } I, *A. B.*, of one of the sureties
To wit : } in the annexed covenant named, make oath and say as follows :

I am seised and possessed to my own use of real (or real and personal) estate in Ontario of the actual value of \$ over and above all charges upon, or incumbrances affecting the same.

2. (Where the party has real estate.) The said real estate consists of (describing the property.)

3. I am worth (the amount for which the party has become liable by the covenant) \$ over and above my just debts.

4. My post office address is as follows : (insert name of post office;)

Sworn before me at , in the
County of , this
day of , A. D. 18 . }

56 V. c. 21, Sched. B.

SCHEDULE C.

(Section 20.)

FORM OF REGISTRAR'S OATH OF OFFICE.

ONTARIO.

County of } I (*name and describe deponent,*) having been appointed
 To wit : } by the Lieutenant-Governor to the office of Registrar, in and
 for the (*name of Registry Division, etc.,*) do swear that I
 will well, truly and faithfully perform and execute all duties
 required of me, under the laws of this Province, pertaining to the said
 office, so long as I continue therein, and that I have not given directly or
 indirectly, nor authorized any person to give, any money gratuity or
 reward whatsoever for procuring the said office for me.

Sworn before us at
 the day of , A. D. 18 .

A. B., J. P., }
 C. D., J. P., } In and for the said County,

56 V. c. 21, Sched. C.

SCHEDULE D.

(Section 31.)

FORM OF CERTIFICATE RESPECTING REGISTRY BOOKS.

This register contains pages exclusive of index, and
 is to be used in and for the City (*or Town, Incorporated Village or Town-*
ship) of , in the County of , for the
 enregistration of deeds, duplicates, and other instruments under the pro-
 visions of *The Registry Act*, and is provided in pursuance of the
 requirements of the said Act.

Dated this day of , A. D. 18 ,
 A. B., Judge of the County Court of -
 or
 A. B. Warden of the County of

56 V. c. 21, Sched. D

SCHEDULE E.

(Section 36.)

FORM OF ABSTRACT INDEX.

Township of Yarmouth, Lot No. , in the 1st Concession.

1	2	3	4	5	6	7	8	9
No. of Instru- ment.	Instru- ment.	Its Date.	Date of Registry.	Grantor.	Grantee.	Quantity of Land.	Consideration in conveyance or amount of mort- gage money.	Remarks.
	Patent.	21st February, 1820....		Crown.....	John Jones ...	All of said Lot.	\$300	
54.....	B. & S.	10th January, 1835...	11th January, 1835...	David Brown and wife.	George Smith....	N. ½	\$400	
73.....	B. & S.	30th May, 1830.	15th May, 1838.....	John Jones and wife.	David Brown....	N. ½	\$500	
460.....	B. & S.	23rd June, 1840.....	23rd June, 1840.....	George Smith.....	Charles Gates....	N. ½	\$782	
461.....	M.	Do do	Do do	Charles Gates and wife.	George Smith....	N. ½	\$500	
490.....	B. & S.	20th October, 1841....	20th October, 1841....	John Jones and wife.	Charles Gates....	S. ½	\$200	D of 461.
1003.....	D. M.	23rd June, 1842	1st July, 1842	George Smith	Charles Gates....	N. ½		
2660.....	B. & S.	25th April, 1855	1st of May, 1856.....	Charles Gates and wife.	Alexander Erie....	All.	\$800	
2875.....	B. & S.	1st May, 1860.....	1st May, 1860.....	Alexander Erie	James Erie	E. ½ of the N. ½ or N. E. ¼	\$1 and nat. love and affection.	

56 V. c. 21, Sched. E.

NOTE.—The names of all the grantors and grantees should appear in the abstract index.

SCHEDULE F.

(Section 37.)

FORM OF ALPHABETICAL INDEX.

No. of Instrument.	GRANTOR.	GRANTEE.	No. of Instrument.	GRANTEE.	GRANTOR.
1011	A. Abbott, George	Black, John	1029	A. Appleton, James	Buck, Peter.
1015	Allen, William	Cook, Edward	1039	Angus, Robert	Cooms, Joseph.
1017	Anderson, James	Smith, Thomas	1058	Anson, William	Whalke, Jane.
1004	B. Bernard, John	Green, Edward	1011	B. Black, John	Abbott, George.
1020	Burns, Robert	Cassels, George	1070	Benson, Jessie	Crooks, Nelson.
1050	Buck, Peter	Appleton, James	1098	Burrows, Joseph	Hinda, Henry.
1030	C. Cooms, Joseph	Angus, Robert	1015	C. Cook, Edward	Allen, William.
1046	Coffee, Richard	Ingram, Benjamin	1020	Cassels, George	Burns, Robert.
1070	Crooks, Nelson	Benson, Jessie	1118	Castor, Simeon	Philip, Richard.

56 V. c. 21, Sched. F.

SCHEDULE G.

(Section 40.)

FORM OF AFFIDAVIT OF EXECUTION.

County of _____ } I, _____, of _____, of
 To Wit : } the _____ of _____ in the
 and say : } County of _____, make oath

1. That I was personally present and did see the annexed (or within) instrument (and a duplicate, if any, according to the fact) duly signed, sealed and executed by _____ and the parties thereto.

2. That the said instrument (and duplicate, if any, according to the fact) were executed at the _____ of _____

3. That I know the said parties (or one or more of them, according to the fact).

4. That I am a subscribing witness to the said instrument (and duplicate, according to the fact.)

56 V. c. 21, Sched. G.

SCHEDULE H.

(Section 43.)

AFFIDAVIT OF EXECUTION WHERE THE INSTRUMENT IS A SECURITY BUT DOES NOT CONVEY THE LAND.

County of _____ } I, A. B., of the _____ in the County
 To Wit : } of _____ (addition), make oath and say :

1. That I was personally present and did see the annexed (or within) instrument (and a duplicate, if any, according to the fact), duly signed, sealed and executed by _____ and the parties thereto.

2. That the said instrument was read over in my presence and explained to the said _____, and that he appeared perfectly to understand the same, and was informed that it might be registered as an incumbrance on his lands.

3. That the said instrument (and duplicate, if any, according to the fact) was (or were) executed at the _____ of _____

4. That I know the said parties (or one or more of them, according to the fact).

5. That I am a subscribing witness to the said instrument (and duplicate, according to the fact).

56 V. c. 21, Sched. H.

SCHEDULE I.

(Section 50.)

CERTIFICATE OF COUNTY JUDGE IN LIEU OF AFFIDAVIT OF EXECUTION.

ONTARIO.

County of _____ } I,
 To Wit : } Judge of the County Court of the County of _____, certify that, from the proof adduced by
 (name the person producing the proof, and state the
 evidence given), I am satisfied of the due execution of the within instru-
 ment (or of the instrument whereof the within is a copy, memorial or
 duplicate, as the case may be).

As witness my hand at _____ the
 day of _____ A.D. 18 _____
 _____ A. B.,
 Judge of the County Court of _____
 56 V. c. 21, Sched. I.

SCHEDULE J.

(Section 63.)

FORM OF CERTIFICATE OF REGISTRATION.

I certify that the within _____ is duly entered and
 registered in the Registry Office for the _____ of the County
 of _____ in Book _____ for the _____ of
 at _____ o'clock of the _____ day of _____
 A.D. 18 _____
 _____ Number

Registrar.
 or Deputy Registrar.

56 V. c. 21, Sched. J.

SCHEDULE K.

(Section 67.)

FORM OF MINUTE OF REGISTRATION.

Entered and registered this _____ day of _____
 A.D. _____ at _____ o'clock.

56 V. c. 21, Sched. K.

SCHEDULE L.

(Section 76.)

FORM OF DISCHARGE OF MORTGAGE.

ION.

ced by
ate the
instru-
rial or

To the Registrar of the County of
I, _____, of _____, do certify that _____ has satisfied all
money due on, or to grow due on (or has satisfied the sum of \$ _____ men-
tioned in), a certain mortgage made by _____ of _____ to
which mortgage bears date the _____ day of _____ A.D. 18 _____, and
was registered in the Registry Office for the County of _____ on
the _____ day of _____, A.D. 18 _____, at _____ minutes past
o'clock, _____ noon, in Liber _____ for _____ as No. _____ (here mention the day
and date of registration of each assignment thereof, and the names of the
parties, or mention that such mortgage has not been assigned, as the fact may
be), and that I am the person entitled by law to receive the money, and
that such mortgage (or such sum of money as aforesaid, or such part of
the lands as is herein particularly described, that is to say : _____)
is therefore discharged.

Witness my hand this _____ day of _____ A.D. 18 _____
A. B.

One Witness. }

Z. I.

56 V. c. 21, Sched. L

SCHEDULE M.

(Section 83.)

FORM OF CERTIFICATE OF DISCHARGE OF MORTGAGE BY SHERIFF, ETC.

red and
County

strar.

d. J.

To the Registrar of the County (Division or City, as the case may be)
of _____
I, A. B., of _____ Sheriff of the County of _____
[or Bailiff of the (number) Division Court of the County (or City, as the
case may be) of _____] do certify that by virtue of a
writ of execution wherein C. D. is plaintiff and E. F. defendant, issued
out of Her Majesty's High Court of Justice (or as the case may be) and to
me directed, I seized a certain mortgage made by one J. H. of (as de-
scribed in said mortgage) bearing date the _____ day of _____
A.D. 18 _____ and registered at _____ of the clock in th- forenoon,
Liber _____, for _____ No. _____ (as the case may be) of the
day of _____ in the same year (as the case may be) to E. F., of
(as described in the mortgage), the defendant in the said writ of
execution named, and such mortgage has not been assigned (or has been
assigned to the defendant and such assignment has been registered as
follows : here set out date and registration of assignment) and I do further
certify that I have levied from the said mortgagor, his executors, adminis-
trators or assigns (as the case may be) the full amount of said mortgage
(or \$ _____ parcel of said mortgage), and that such mortgage is therefore dis-
charged (or that such mortgage is as to \$ _____ parcel of the moneys
thereby payable, discharged.)

As witness my hand and seal of office (or the seal of the said Court)
this _____ day of _____ A.D. 18 _____
Signed, _____ A. B.

Witness,
L. M. }

d. K.

56 V. c. 21, Sched. M.

SCHEDULE N.

(Section 85.)

CERTIFICATE OF DISCHARGE OF INSTRUMENT CREATING A CHARGE.

To the Registrar of the County of

County of } I, of the in the County
 To Wit : { of (addition), do hereby certify
 that of the of in the County of (addi-
 tion), has satisfied all money due or to grow due on (or has satisfied
 the sum of \$ mentioned in) a certain instrument made
 by of to , which instrument bears date the
 day of A.D. 18 , and was registered in the Registry
 Office for the County of day of A.D.
 18 , at minutes past o'clock noon, in Liber for
 , as No. (here mention the day and date of registration of each
 assignment thereof, and the names of the parties, or mention that such
 instrument has not been assigned, as the fact may be), and that I am the
 person entitled by law to receive the money, and that such instrument (or
 such sum of money as aforesaid, or such part of the lands as is herein
 particularly described, that is to say :) is therefore discharged.

Witness my hand this

day of

A.D. 18

One Witness }

A. B.

56 V. c. 21, Sched. N.

SCHEDULE O.

(Section 100.)

FORM OF SURVEYOR'S CERTIFICATE OF PLAN.

I hereby certify that this plan accurately shows the manner in which the
 land included therein has been surveyed and subdivided by me ; and that
 the said plan is prepared in accordance with the provisions of *The Regis-
 try Act*.

Dated

18

A. B.

Provincial Land Surveyor.

56 V. c. 21, Sched. O.

SCHEDULE P.

(Section 108.)

AFFIDAVIT WHERE INSTRUMENT DOES NOT CONFORM TO PLAN.

County of

I (give name, address and occupation.)

To Wit :

make oath and say

1. To the best of my knowledge and belief, the lands described in the
 within (or annexed) instrument and duplicate are designated on Regis-
 tered Plan No. as lots (describe same so as to conform to plan).

2. That a party to said instrument died on or about
the day of A.D. (or as
the case may be).

3. That it would be impossible (or inconvenient) for the reason aforesaid
to obtain a new instrument or a re-execution of the said instrument contain-
ing a description conforming to the said plan.

4. That I have a personal knowledge of the matters herein deposed to.

Sworn, etc.

57 V. c. 35, s. 3, part.

County
certify
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Registry
A.D.
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charged.

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urveyor.

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N.

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on Regis-
o plan).

SCHEDULE Q.

LIST OF REGISTRY DIVISIONS.

(Section 3.)

Part 1.

The undermentioned TERRITORIAL DIVISIONS, as set forth in Chapter 3
of the Revised Statutes of Ontario, 1897 (except as otherwise men-
tioned), constitute separate registry divisions:—

The Counties of—

- | | |
|-----------------------------------------------|---------------------------|
| 1. Brant. | 17. Leeds. |
| 2. Bruce. | 18. Lennox and Addington. |
| 3. Carleton, excepting the City of
Ottawa. | 19. Lincoln. |
| 4. Dufferin. | 20. Norfolk. |
| 5. Dundas. | 21. Ontario. |
| 6. Elgin. | 22. Oxford. |
| 7. Essex. | 23. Peel. |
| 8. Frontenac, excepting the City
Kingston. | 24. Peterborough. |
| 9. Glengarry. | 25. Prescott. |
| 10. Grenville. | 26. Prince Edward. |
| 11. Haldimand. | 27. Renfrew. |
| 12. Halton. | 28. Russell. |
| 13. Hastings. | 29. Simcoe. |
| 14. Huron. | 30. Stormont. |
| 15. Kent. | 31. Victoria. |
| 16. Lambton. | 32. Waterloo. |
| | 33. Welland. |
| | 34. Wentworth. |

The Cities of—

- | | |
|---------------|-------------|
| 35. Kingston. | 37. Ottawa. |
| 36. London. | |

The Provisional County of—

38. Haliburton; and

The Districts of—

- | | |
|-----------------|----------------------|
| 39. Algoma. | 43. Parry Sound. |
| 40. Manitoulin. | 44. Rainy River, and |
| 41. Muskoka. | 45. Thunder Bay. |
| 42. Nipissing. | |

Part 2.

The undermentioned ELECTORAL DISTRICTS, as set forth in Chapter 6 of the Revised Statutes of Ontario, 1897 (except as otherwise mentioned), constitute separate registry divisions :—

- | | |
|-----------------------------------------------------|---------------------------------------------------------------------|
| 46. Durham, East Riding. | 52. Northumberland, West Riding, and the township of West Monaghan. |
| 47. Durham, West Riding. | 53. Perth, North Riding, and the township of Logan. |
| 48. Lanark, North Riding, excepting Carleton Place. | 54. Perth, South Riding, excepting the township of Logan. |
| 49. Lanark, South Riding, and Carleton Place. | 55. York, North Riding. |
| 50. Middlesex, West Riding. | |
| 51. Northumberland, East Riding. | |
56. The East and North Ridings of Middlesex constitute one registry division ; and
57. The East and West Ridings of York constitute one registry division.

Part 3.

The undermentioned registry divisions are constituted as hereinafter set forth :—

58. East Toronto consists of all that part of the City of Toronto lying east of Spadina Avenue and Spadina Road, continued south and north to the boundaries of the city, the land on Spadina Avenue now occupied by Knox College, and the Islands constituting the southerly part of the said city.
59. West Toronto consists of all that part of the said city lying west of Spadina Avenue and Spadina Road, continued as aforesaid to the boundaries of the city.
60. Grey, North Riding, consists of the townships of Collingwood, Derby, Euphrasia, Holland, Keppel, St. Vincent, Sarawak, Sullivan and Sydenham, and the towns of Meaford, Owen Sound and Thornbury.
61. Grey, South Riding, consists of the townships of Artemesia, Bentinck, Egremont, Glenelg, Normanby, Osprey and Proton, the town of Durham, and the incorporated villages of Dundalk and Markdale.
62. Wellington, North Riding, consists of the townships of Arthur, Minto, Maryborough, Peel and West Luther; the towns of Harriston, Mount Forest and Palmerston, and the incorporated villages of Arthur, Clifford and Drayton.
63. Wellington, South and Centre Ridings, consists of the townships of Guelph, Eramosa, Erin, Nichol, Pilkington, West Garafraxa and Puslinch; the city of Guelph, and the incorporated villages of Elora, Fergus and Erin.

NOTE.—The townships hereinbefore mentioned include all towns and incorporated villages situated within the limits thereof respectively.

NOTES.

Registration compulsory. Until 13 & 14 Vict. c. 63 (1851) the Registry Acts had no operation until the grant from the Crown had issued, and some memorial of an instrument had been registered. Registration was, therefore, permissive, and not imperative; *Jones v. Cowden* (1874) 34 U.C.R. 345. Since that time the law has been that, after the grant from the Crown, every unregistered deed is fraudulent and void as against a subsequent purchaser or mortgagee for valuable consideration without actual notice; see s. 87. Practically, therefore, registration is compulsory except as against execution creditors; *Russell v. Russell* (1880) 28 Gr. 419; *Jellett v. Wilkie* (1896) 26 S. C. R. 282. Registration is essential to complete a title, so that an abstract not showing a deed to be registered is imperfect and does not show a good title; *Kitchen v. Murray* (1865) 16 C. P. 69; *Brady v. Walls* (1871) 17 Gr. 699; *Laird v. Paton* (1884) 70 R. 141.

Effect of Registry Act. The effect of the Act was stated by Hagarty, C. J., in *Millar v. Smith* (1873) 23 C.P. 47, as follows:

- 1st. Priority of registration shall prevail.
- 2nd. But twelve months shall be allowed for registration of wills.
- 3rd. Registration shall in Equity be notice.
- 4th. Priority of registration shall in all cases prevail, except as against actual notice.
- 5th. Equitable liens and charges shall not prevail in any Court against a registered instrument.

The words "in Equity" which occurred in s. 66 of the Act in force at the time of this decision (31 V. c. 20) are omitted in the corresponding section (92) of the present Act.

Registration as notice. Registration is notice to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration; s. 92. If any registered document is executed so as to be binding upon the party executing it, a subsequent purchaser from such person cannot set up a mere informality in the mode of proof for registration as nullifying the statutory effect which is given to the fact of registration, unless, perhaps, the objection taken constitutes an absolute defect in the proceeding, as, for example, the absence of any affidavit of execution; *Rooker v. Hoofstetter* (1896) 26 S. C. R. 41, 46; but where an instrument registered had another document attached to it, and without any proof of execution of such attached document, the Registrar received and registered it with the other, it was held that such registration constituted good notice; *Armstrong v. Lye* (1896) 27 O. R. 511, 24 A. R. 543. Formerly defective registration was not notice; *Boucher v. Smith* (1862) 9 Gr. 347; *Read v. Whitehead* (1864) 10 Gr. 446, 2 E. & A. 580.

Where several parcels of land are comprised in one mortgage the purchaser of any parcel therein must take notice of any intervening registered mortgage or conveyance of other parcels therein which may have the effect of throwing the whole burden of the first encumbrance on the parcel which he is acquiring; *Clark v. Bogart* (1880) 27 Gr. 450. A conveyance, when registered, is notice of every thing which, according to law, passes under the description contained in it or as incident thereto, e.g. an easement of drainage over the grantor's other property; *Israel v. Leith* (1890) 20 O. R. 361. And it is also notice of the effect of the conveyance as explained by subsequent registered instruments; *McKay v. Bruce* (1891) 20 O. R. 709, 718.

Although registration is notice it does not preclude the enquiry whether there was knowledge in fact and relief may on equitable grounds be, in a proper case, given to a party who failed to obtain knowledge by omitting to search; *Abell v. Morrison* (1890) 19 O. R. 669, and see *McLeod v. Wadland* (1894) 25 O. R. 118; but in *Gray v. Coughlin* (1891) 15 S. C. R. at p. 570, Strong J. said: "Registration is conclusive and not merely presumptive notice to all subsequent purchasers and incumbrancers."

The Registry Act is binding on railway companies having powers of expropriation; *Harty v. Appleby* (1872) 19 Gr. 205; *R. v. Smith* (1878) 43 U. C. R. 309.

What May Be Registered. Every document whereby lands or real estate in Ontario may be transferred, disposed of, charged, incumbered or affected in anywise may be registered; *S. 2 (1)*; *McMaster v. Phipps* (1855) 5 Gr. 253. A document stating "I claim the lands and premises known and described as follows, etc.," is not an instrument capable of registration; *Ontario Industrial Loan Co. v. Lindsay* (1883) 3 O. R. 75. A memorandum agreeing to charge property for a debt due, and to execute a mortgage for that purpose may be registered; *Hoofstetter v. Rooker* (1895) 22 A. R. 175, 26 S. C. R. 41. A conveyance of growing timber may be registered; *Ellis v. Grubb* (1835) 3 O. S. 611; *Ferguson v. Hill* (1854) 11 U. C. R. 530; *Short v. Ruttan* (1854) 12 U. C. R. 79; *McLean v. Burton* (1876) 24 Gr. 134. An alimony judgment is not an ordinary debt, but is a charge on the land of the defendant when registered; *Abraham v. Abraham* (1890) 19 O. R. 261, 15 A. R. 436.

Reference to Plans. A certificate *lis pendens* must refer to a sub-division made by a registered plan to entitle it to registration; *Re Thompson and Registrar of Wellington* (1866) 25 U. C. R. 237; so must a by-law opening a street; *Re Henderson and Toronto* (1898) 29 O. R. 609; see also *Israel v. Leith* (1890) 20 O. R. 361. But a deed which contains a description not sufficient for registration will nevertheless pass a title as against persons other than subsequent registered owners for value without notice; *Rathbun v. Culbertson* (1875) 22 Gr. 465. Whether a conveyance of all the estate, real and personal of the grantor could be registered was a moot point; *Russell v. Russell* (1881) 28 Gr. 419; *Robson v. Carpenter* (1865) 11 Gr. 293. It is now necessary that a local description verified by statutory declaration should be furnished in all cases when the General Register is to be used; *s. 29 (3)*; 62 V. c. 16 s. 1.

Unpatented Lands. Instruments executed before the grant from the Crown are not affected by the Registry Act; *Casey v. Jordan* (1856) 5 Gr. 467, but such an instrument may be registered; *R. S. O. c. 31 s. 28*; *Holmes v. Moore* (1866) 12 Gr. 206, and will then be notice; *Vance v. Cummings* (1867) 13 Gr. 25. Actual notice of an unregistered assignment of unpatented lands has the like effect as actual notice of an unregistered conveyance; *Goff v. Lister* (1868) 13 Gr. 408; 14 Gr. 451. A person who without notice registers an instrument in the Registry Office of a mortgage of unpatented lands, and the mortgage not being registered in the Indian Department, is not bound by the advances the money and obtains a patent from the Crown, and will to the extent of the money advanced obtain a mortgage; *Re Reed v. Wilson* (1893) 23 O. R. 552.

What Constitutes Registration. In the construction of the various registry acts, difficulties have arisen in ascertaining exactly what constitutes registration. Is it the delivery of the instrument to the registrar or the entry by the Registrar in his books? The question is important because if notice of a prior instrument is brought home to a purchaser at any time before registration of his conveyance, it is effectual. Under the act of 1795 (35 Geo. III) where a deed was endorsed by the registrar with a certificate of registration, but no entry was found in his books other than a marginal note in one corner giving the number of the conveyance, and the day and hour of its registration, it was held that there was no registration, and that the Registrar's certificate was not conclusive; *Doe d. McLean v. Manahan* (1845) 1 U. C. R. 491. *S. 96* an instrument is deemed to be registered on delivery thereof to the Registrar, either personally or by letter, and received at his office during office hours by the Registrar, or some officer or clerk in his office on his behalf, and on payment or tender of the proper fees.

Leaseholds. Under *s. 39*, the act does not extend to any lease for a term not exceeding seven years, when the actual possession goes along with the lease, but it does extend to every lease for a longer term than seven years. The possession required is actual possession under a lease for a term subsisting at the date of the execution of a subsequent registered conveyance. If the possession is under a subsisting lease it will not protect the lessee's right under a further unregistered lease of the same premises for a term to commence in the future; *Davidson v. McKay*, (1867) 26 U. C. R. 306. But a covenant for renewal contained in a lease, where the present and renewal term do not together exceed seven years, creates a further equitable term for the renewal period, and the further term cannot be regarded as a lease to commence *in futuro*, but rather as an extension of the first term and the lease is effectual

without registration for both terms; *Latch v. Bright* (1869) 16 Gr. 653. The unnecessary registration of a lease does not make registration of an assignment thereof necessary, provided possession goes therewith; *Kingston Bldg. Socy. v. Rainsford* (1853) 10 U. C. R. 236.

Equitable Interests. Equitable rights such as an equitable mortgage or the right to consolidate mortgages, or to specific performance of parol agreements, partly performed, or to set aside a conveyance or mortgage for fraud, or as a preference, or for undue influence, or to enforce a vendor's lien or a resulting trust, or an equity to reform a registered instrument, being incapable of registration, were until 1865 not subject to the Registry laws; *McMaster v. Phipps* (1855) 5 Gr. 253; *Harrison v. Armour* (1865) 11 Gr. 303; *Toronto v. Jarvis* (1895) 25 S. C. R. 237, 242. Such instruments as are capable of registration must, of course, be registered, or they will lose their priority by virtue of s. 97; e.g., mortgages of an equity of redemption; *Cooley v. Smith* (1877) 40 U. C. R. 543; or a grant of an easement; *Ross v. Hunter* (1881) 7 S. C. R. 289. S. 98 now makes invalid all equitable interests as against every registered instrument executed by the party conferring it or his heirs, or even by his assigns; *Toronto v. Jarvis* (1895), 25 S. C. R. 237, unless there be actual notice of such equitable interest prior to registration of such instrument; *Rose v. Peterkin*, (1885) 13 S. C. R. 677; *Peterkin v. McFarlane* (1884), 9 A. R. 429; *Forrester v. Campbell* (1870) 17 Gr. 379; *Wigle v. Settrington* (1872) 19 Gr. 512. Knowledge that the party having the equitable interest is in possession is not actual notice; *Bell v. Walker* (1873) 20 Gr. 558; *Grey v. Ball* (1876) 23 Gr. 390; *Cooley v. Smith* (1877) 40 U. C. R. 543; *Building and Loan Association v. Poaps* (1896) 27 O. R. 470.

The right of consolidating separate mortgage debts on separate properties is an equitable one, and will not be allowed in favor of the mortgagee against a *puisse* incumbrancer of one of the mortgaged properties without notice; *Browe v. Canada Permanent Building Assn.* (1877) 24 Gr. 509; *Johnston v. Reid* (1881) 29 Gr. 293; *Miller v. Brown* (1883) 3 O. R. 210.

The right of a person for whom land is purchased in the name of another to have the land conveyed to him is an equitable interest within s. 98; *Canada Permanent Loan and Savings Co. v. McKay* (1881) 32 C. P. 51; and so is the right to reform a mortgage; *Bridges v. Real Estate Loan and Debenture Co.* (1885) 8 O. R. 493; and so is the right of a surety whose lands are comprised in a mortgage to throw the whole burden of the mortgage on the lands of the principal debtor; *Core v. Ontario Loan and Debenture Co.* (1885) 9 O. R. 236. A parol trust of land cannot be enforced as against a registered mortgage by the trustee; *Bank of Montreal v. Stewart* (1887) 14 O. R. 482. A municipality or person who with the oral consent of the owner builds a sewer through land, acquires an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser without notice is not affected; *Jarvis v. Toronto* (1894) 21 A. R. 395, 25 S. C. R. 237; *Tolton v. Canadian Pacific Ry. Co.* (1892) 22 O. R. 204.

Tacking. A mortgagee of the legal estate in land acquiring a subsequent equitable interest was entitled to tack the subsequent equitable interest to his legal mortgage, so as to exclude the intermediate equitable charge, if he had not notice thereof; *Lloyd v. Attwood* (1860) 3 De G. & J. 614. The principle acted upon in applying the doctrine of tacking, was that where the equities were equal, the law should prevail. The Registry Act is notice only to subsequent acquirers; *Gilleland v. Wadsworth* (1877) 1 A. R. 82; *Pierce v. Canada Permanent L. & S. Co.* (1894) 25 O. R. 671, 23 A. R. 516. But a first mortgagee who advances a further sum than that secured or contemplated by his mortgage is by virtue of s. 98 a subsequent mortgagee as to any intervening registered mortgage made by his mortgagor, whether he has actual notice thereof or not. Tacking is not allowed to prevail against the provisions of the Act. It is not in every case that it is abolished; *Dominion Savings and Investment Socy. v. Kittridge* (1876) 23 Gr. 631. A first mortgagee is prevented from tacking a third mortgage to his first mortgage as against a second registered mortgage. To avoid circuitry of action a mortgagor's heirs or devisees are never permitted to redeem a mortgage without also paying a bond or judgment debt owing by the mortgagor; *McLaren v. Fraser* (1870) 17 Gr. 533. But a personal representative of an insolvent estate or an assignee for the benefit of creditors would be allowed to redeem a mortgage without paying an unsecured debt due by the estate to the mortgagee; *Young v. Spiers* (1888) 16 O. R. 672. Consolidation of mortgages is not tacking; *Dominion Savings and Investment Socy. v. Kittridge* (1876) 23 Gr. 631.

By-laws. A By-law of a municipality opening a road on private property which is not registered, because it does not conform to s. 100 (3), does not become effectual in law; s. 86, and therefore, a by-law of the municipality providing for the cost of such road is invalid; *Re Henderson and Toronto* (1898) 29 O. R. 669.

Plans. A plan of subdivision should be filed by the owner; *Nevitt v. McMurray* (1886) 14 A.R. 126; but a person who intends to become the owner may file a plan, and it is binding on him if he adopts it after acquiring title; *Re Chisholm and Oakville* (1885) 12 A.R. 225. The Registrar must refuse to file instruments dealing with lots comprised in a plan after its registration, unless the instruments conform and refer to the plan; s. 100 (3); *Israel v. Leith* (1890) 20 O.R. 361. The only exceptions are (a) where the party executing the instrument has died prior to registration; s. 108; (2) when in the opinion of the Registrar, it would be impossible or inconvenient to obtain a new instrument; s. 108; (3) a final order of foreclosure or of a conveyance under the power of sale contained in a mortgage made before the plans; s. 100 (3). In cases coming within the two first exceptions the affidavit, Form P, must be registered. Under the last exception, the mortgagee or a purchaser from him, if the mortgagee did not consent to the plan, would probably be at liberty to close up the streets and annihilate the subdivision; *Morse v. Lamb* (1893) 23 O.R. 168; *Gooderham v. Toronto* (1895) 25 S.C.R. 252, but he may expressly or impliedly assent to the plan; *Wyoming v. Bell* (1877) 24 Gr. 564. An instrument describing certain lots correctly according to a plan, but comprising other property not so described may be registered against the correctly described parcel; *Re Thompson and Wellington* (1866) 25 U.C.R. 237. The laying out upon a registered plan of a reserve for school purposes, and the sale of lots according to the plan, is a sufficient dedication to entitle a Public School Board to the property; *Wyoming v. Bell* (1877) 24 Gr. 564. But laying out a parade, fronting upon a lake, will not entitle a purchaser of lots according to the plan, which lots were several hundred yards away, and not directly affected by the closing of the parade, to set aside an order of a judge closing the parade in the absence of some representation, at the time of purchase, that the parade would be kept open; *Re McMurray and Jenkins* (1895) 23 A.R. 398. And it was said by Maclellan J. A. that no one can object to the alteration of a plan who has not some legal or equitable interest in that part of the plan proposed to be altered; *ib. at p. 407*.

A conveyance of a township lot excepting certain numbered lots shewn on an unregistered plan may be registered without registration of the plan, and will comprise all the property save the excepted lots, and a purchaser of a lot not excepted will not obtain title thereto although owing to an amendment made to the plan when registered the lot bears a number similar to that of one of the excepted lots; *Muttlebury v. King* (1879) 44 U.C.R. 355; the first grantee is under no obligation to register the plan so as to define the exceptions upon the registry; *ib.* If lots on a plan are consecutively numbered, the fact that one is incorrectly described as being in a certain block or on a certain street will not vitiate a conveyance, the addition of anything to the number being mere surplusage; *Aston v. Innis* (1878) 26 Gr. 42. Although an uncertified plan cannot properly be registered, reference may be made thereto for the description or designation of a lot in the same way as a reference to any other document; *Ferguson v. Winsor* (1885) 10 O.R. 13. See s.c. 11 O.R. 88.

The registration of a plan of property in cities, towns, villages or townships now amounts to a dedication of all roads and streets upon which lots are sold; *Roche v. Ryan* (1892) 22 O.R. 107; R.S.O. (1897) c. 181 s. 39. The cases of *Re Waldie and Burlington* (1886) 13 A.R. 104, and *Sklitzsky v. Cranston* (1892) 22 O.R. 590, are superseded by the amending legislation. See a history of the legislation to 1887; *Gooderham v. Toronto* (1895) 25 S.C.R. 246. Until a sale is made the plan is not binding; s. 110; and even after sales are made it is, except as to public highways, only binding *sub modo*, that is to say, to the extent that a court or a Judge may think proper to permit a proposed amendment; *Re Waldie and Burlington* (1886) 13 A.R. 104, 111. Once a road laid out by an individual has been assumed as a public highway by a corporation, thereafter it can be closed or altered only by by-law and not by the order of a Judge; *Roche v. Ryan* (1892) 22 O.R. at p. 110, and a subsequent plan cannot restrict or qualify the public rights; *Re Peck and Galt* (1881) 46 U.C.R. 211. Lanes shown on a plan are not dedicated to the public. Purchasers of lands comprised in a plan have the right to insist upon a lane shown thereon being kept open for their use, but it would seem that by agreement among them-

selves, they can abstain from opening it altogether or enforce its being maintained as a private lane; *Re Morton and St. Thomas* (1881) 6 A.R. 323, and if one person acquires the lane and all the lots he may close the lane; *ib.*

A Judge of a County Court to whom application is made for the amendment of a plan, has precisely the same jurisdiction as a Judge of the High Court; *Re Chisholm and Oakville* (1885) 12 A.R. 225. Should a municipality file a plan made by a private owner it acts as a representative of the owner, and a purchaser from the owner is an assign of the person filing the plan within s. 110 so as to give him the right to apply for an amendment thereof; *Re Waldie and Burlington* (1886) 13 A.R. 104, 110.

Discharges of Mortgage. A statutory discharge of mortgage is a peculiar instrument. Until registration it is nothing more than a receipt; *Trust and Loan Co. v. Gallagher* (1879) 8 P.R. 100; *Re Music Hall Block* (1884) 8 O.R. 228. But upon registration it operates upon the legal estate, although it may be executed by a person, e. g., a sheriff in whom the legal estate never vested; *Dilke v. Douglas* (1880) 5 A.R. 63. The effect of a discharge is to replace the mortgagee's estate in the person best entitled to it, without affecting the real rights of any person; *Brown v. McLean* (1889) 18 O.R. 533; but see *Fisher v. Spohn* (1884) 4 C.L.T. 446. Such errors as the following are immaterial: An omission of the payer's name; *Carrick v. Smith* (1874) 35 U.C.R. 348; or the alteration of an incorrect date; *Sayles v. Brown* (1880) 28 Gr. 10; or the omission of particulars of the date of and parties to an assignment of the mortgage; *Re Mara* (1888) 16 O.R. 391; or the execution by "Eliza" Switzer of a discharge of a mortgage made to "Elizabeth" Switzer; *Re Clarke and Chamberlain* (1889) 18 O.R. 270. Two mortgages should not be attempted to be released by one statutory discharge; *Re Smith and Shenston* (1871) 31 U.C.R. 305. Where a mortgage is paid off by a new mortgagee, and a discharge of the old mortgage registered in ignorance of an intervening encumbrance, such as an execution or a Mechanics Lien, the new mortgagee may be subrogated to the rights of the mortgagee who has been paid off; *Brown v. McLean* (1889) 18 O.R. 533; *Abell v. Morrison* (1890) 19 O.R. 669; but this right may be lost by laches; *McLeod v. Wadland* (1894) 25 O.R. 118.

Wills. Wills must be registered within 12 months from the death of the testator, unless the devisee is disabled by the contesting of the will or "other inevitable difficulty," otherwise a conveyance from the heirs to a purchaser or mortgagee for value will be valid; s. 89; *Bondy v. Fox* (1869) 20 U. C. R. 64; *Stephen v. Simpson* (1866) 12 Gr. 493, 15 Gr. 594; *Rykert v. Miller* (1867) 14 Gr. 25; but a conveyance for a nominal consideration will not cut out the will, *Wilkinson v. Conklin* (1860) 10 C.P. 211. Infancy is no excuse for not registering a will; *McLeod v. Truax* (1837) 5 O.S. 455; *Mandeville v. Nicholl* (1859) 16; U.C.R. 609 but it may be so in conjunction with other facts; *O'Neill v. Owen* (1889) 17 O.R. 525.

Subsequent Advances on Mortgages. A mortgage is good for the amount expressed to be secured thereby, although the whole or part of the mortgage money is advanced after the registration of the mortgage. But advances made after notice of the execution and registration of a subsequent mortgage is acquired will be postponed thereto; s. 99. This section in effect states the ultimate decision in *Pierce v. Canada Permanent Loan Co.* (1894) 25 O.R. 671, 23 A.R. 516; 24 O.R. 426.

Subsequent Acquirers Only Protected. A party acquiring an interest in lands is assumed to search the registry and is affected with notice of what such a search would disclose; but this does not apply to one who is not acquiring, but parting with an interest in lands; *Trust and Loan Co. v. Shaw* (1869) 16 Gr. 448; *Kingston Building Society v. Rainsford* (1853) 10 U.C.R. 236. A mortgagor is not affected with notice of an assignment of the mortgage merely by registration thereof, but a purchaser from him after the registration of the assignment is assumed to have such notice; *Gilleland v. Wadsworth* (1877) 1 A.R. 82. The notice moreover is assumed only in favor of prior registered conveyances from the same grantor; a grantor who covenants against encumbrances is liable to his covenantee on such covenant, though the encumbrances are registered; *Platt v. Grand Trunk Ry. Co.* (1886) 12 O.R. 134. A vendor of land whose purchase money is unpaid, is entitled to his vendor's lien as against a party claiming under his grantee by virtue of an instrument executed before the delivery of the conveyance to his grantee, though such instrument may be registered before a mortgage for unpaid purchase money given by the grantee to him. In such a case the conveyance to the purchaser would feed the estoppel created by his earlier conveyance to the extent only of the interest

taken by the purchaser, and that interest would be subject to the vendors right to a legal mortgage, and he will therefore be entitled to priority; *Nevitt v. McMurray* (1886) 14 A. R. 126; *McMillan v. Munro* (1898) 25 A. R. 288. S. 87 of the Act contemplates a transaction of sale or mortgage actually and entirely subsequent to the execution of the instrument affecting the land mentioned in the first part of the section, which instrument may be postponed by the earlier registration of the former, and not a prior dealing with the land by a person who has no interest in, or title to it, but which by the operation of the law of estoppel may assume vitality through the deed of the owner, made in entire ignorance of its existence, and against which nothing in The Registry Act calls upon him to be on his guard; per *Osler, J. A.*, 25 A. R. at p. 294.

Priority of Registration. Priority of registration prevails, although the registered instrument is not in fact handed over to the grantee until after registration of a subsequent instrument; *Muir v. Dunnet* (1864) 11 Gr. 85.

Actual Notice. The actual notice required by the Registry Act is such notice as will make the conduct of the purchaser in taking and registering his conveyance fraudulent; *New Brunswick Railway Co. v. Kelly* (1896) 26 S.C.R. 341. The notice may be either written or verbal. The purchaser is not bound to attend to vague rumors, or to statements by mere strangers. The notice in order to be binding must proceed from some person interested in the property; *Barnhart v. Greenshields* (1853) 9 Moo. P. C. 36; *Natal Land Co. v. Good* (1868) L.R. 2 P. C. 121, 129. The notice must be given or received during the course of or close upon the transaction and not at a time long antecedent thereto; *Hamilton v. Royse* (1804) 2 Sch. & L. 327. But it would seem that if the purchaser has obtained knowledge of the kind which would operate on the mind of a reasonable man it will be sufficient; see *Lloyd v. Banks*, (1878) L. R. 3 Ch. 488. Where a purchaser had notice that an agreement had been made at the time an absolute conveyance was executed, that the grantor should have her whole life to redeem, he was held to have actual notice that the conveyance was merely a mortgage; *Peterkin v. McFarlane* (1884) 9 A. R. 429; *Rose v. Peterkin* (1885) 13 S.C.R. 677. Possession by the party claiming adversely to the registered title is not such notice as will affect the right of a party claiming under a registered conveyance; *Waters v. Shade* (1851) 2 Gr. 457; *Sherboneau v. Jeffs* (1869) 15 Gr. 574; *Harty v. Appleby* (1872) 19 Gr. 205; *Grey v. Ball* (1876) 23 Gr. 390; *Roe v. Braden* (1877) 24 Gr. 589; *New Brunswick Ry. Co. v. Kelly* (1896) 26 S.C.R. 341. The evidence of notice must be quite satisfactory and distinct; *Hollywood v. Waters* (1857) 6 Gr. 329. But where a person fraudulently took and registered a conveyance knowing or believing that his grantor had parted with his interest, his title was not allowed to prevail, though he did not know and had no correct information who the true owner was; *McLennan v. McDonald* (1871) 18 Gr. 502; and the result was the same where the purchaser knew of an unregistered deed of part of the land though he did not know what part had been conveyed; *Severn v. McLellan* (1872) 19 Gr. 220.

The first registered conveyance to have priority over an unregistered instrument must be for valuable consideration; *Leech v. Leech* (1865) 24 U. C. R. 321; and the mere production of the deed through purporting to be for value will be insufficient proof of the fact; *Barber v. McKay* (1890) 19 O. R. 46. An antecedent debt will be a sufficient valuable consideration; *Fraser v. Sutherland* (1851) 2 Gr. 442; but an assignee in insolvency will not acquire priority; *Collver v. Shaw* (1873) 19 Gr. 599. A person who for value acquires title from a purchaser or mortgagee who has gained priority under the Registry Laws over a former unregistered deed or mortgage, is entitled to the benefit of the priority so acquired, even though he himself may have had notice; *Gray v. Coughlin* (1891) 18 S. C. R. 553, 568. Knowledge by a surety of a prior unregistered mortgage will not affect his right of subrogation to the title of the first registered mortgagee to whom he is surety; *ib.*

Time of Receiving Notice. Notice is effectual if brought home to the purchaser at any time before the registration of his conveyance. *Armour on Titles*, 2nd Ed. 62. In *Millar v. Smith* (1873) 23 C. P. 47, it was said that the intention was evidently to protect an innocent purchaser who had not actual notice when he effected his purchase; but the section (s. 97) is worded so as to refer the notice to the time of registration instead of the time of purchasing or paying his money. And in *Gray v. Coughlin* (1891) 18 S. C. R. 553, 571, *Strong J.* said "notice of a prior unregistered deed or equity, after the execution of a conveyance or mortgage, but before registration, is sufficient to postpone the party claiming under it."

Abstract. A Registrar's abstract is not admissible as evidence of title; *Gamble v. McKay* (1858) 7 C. P. 319.

Liability of Registrar. A Registrar is liable for acts or omissions causing damage although arising wholly from negligence or mistake; e.g. for improperly, but in good faith registering an instrument not registrable; *Ontario Industrial Loan Co. v. Lindsey*, (1883) 66; or for omitting a mortgage from an abstract of title; *Harrison v. Brega* (1861) 20 U. C. R. 324; or for omitting an instrument from the abstract index; *Green v. Ponton* (1884) 8 O. R. 471. But there must be privity between the Registrar and the person damaged; *ib.* The duty of keeping his books correctly is, while in one sense a public duty, for the benefit of those who make searches and pay fees for so doing; and liability for breach of such duty must be confined to those directly injured; per *Cameron C. J. Green v. Ponton* (1884) 8 O. R. 474. Whether he would be liable to a third person dealing with the person to whom a certificate was granted upon the faith of it, is undecided; *ib.*

Payments of the purchase money to the vendor after notice of the Registrar's omission of a mortgage will not be allowed as damages against the Registrar; *Brega v. Dickey* (1860) 16 Gr. 494. Should the Registrar take an assignment of the omitted mortgage he may be entitled to foreclose the same; *ib.* In an action against a Registrar for not paying over to a Municipality its share of fees, notice of action is not necessary; *Bruce v. McLay* (1883) 3 O. R. 23. Nor is a Registrar entitled to notice of action where he is sued for neglecting and refusing to furnish a statement in detail of fees as required by s. 121; *Ross v. McLay* (1876) 40 U. C. R. 83.

Liability of Sureties. Sureties on a Bond in the form of Schedule A. given in pursuance of s. 13 are not liable to the Municipality for the share of fees payable thereto under ss. 126-133; *Middlesex v. Smallman* (1890) 19 O. R. 349, 20 O. R. 487. The Municipality in order to be secured must obtain a special security in pursuance of s. 17.

Fees. The Registrar on exhibiting a plan to an assessor, who desires, for assessment purposes, to check the dimensions of the various lots shewn thereon, is not entitled to charge as for a search on each lot; *Lindsey v. Toronto* (1875) 25 C. P. 335. A person is not entitled to see an original registered instrument upon giving the Registrar the names of the parties and the number of the Lot upon payment of 10 cents, without also giving the registered number of the instrument; *Macnamara v. McLay* (1883) 8 A. R. 319. A person who examines the abstract index, and asks to see four of the registrations can only be charged 25 cents, though the index contains 31 registrations on the lot; *Ross v. McLay* (1876) 26 C. P. 190; *Macnamara v. McLay* (1883) 8 A. R. 319. A Registrar may in preparing an abstract, rely on the abstract index, and give a mere copy thereof, but he is entitled to charge the same fees as if he searched each instrument thereon; but if a copy only of the abstract index is asked for, no more than 10 cents a folio can be charged; *Macnamara v. McLay* (1883) 8 A. R. 319. A registrar when required to furnish a copy of any document, can make no charge for a search for the original; per *Spragge, C. J. O.*; *ib.* Where lands comprised in a mortgage have subsequently been sub-divided by a registered plan, the mortgagee is entitled to make searches on each of the lots shown on the plan on payment of a fee of 10 cents for each lot, not exceeding \$2 in all, on producing a statutory declaration that such searches are made for the purpose of ascertaining subsequent grantees or incumbrances in sale, foreclosure or other proceedings under such mortgage; s. 119 (2); the decision of *Morse v. Lamb* (1893) 23 O. R. 167, 608, where \$110 was allowed in a similar case is by virtue of the amendment made in section 118 (2) not now law.

Registered duplicate as evidence. The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, under s. 63, *prima facie* evidence of the due execution thereof; *Canada Permanent L. & S. Co. v. Page* (1879) 30 C. P. 1, notwithstanding that material alterations appear on the face of the instrument; *Greystock v. Barnhart* (1899) 19 C. L. T. 381.

CHAPTER 163.

An Act respecting the property of Married Women.

SHORT TITLE, s. 1.	ANTE-NUPTIAL DEBTS AND LIABILITIES, s. 16.
INTERPRETATION, s. 2.	LIABILITY OF HUSBAND FOR WIFE'S DEBTS, ETC., ss. 17, 18.
RIGHT TO HOLD PROPERTY AND TO CONTRACT, ss. 3-7.	QUESTIONS BETWEEN HUSBAND AND WIFE AS TO PROPERTY TO BE DECIDED IN A SUMMARY WAY, s. 19.
EXECUTION OF GENERAL POWER, s. 8.	MARRIED WOMAN AS AN EXECUTRIX OR TRUSTEE, s. 20.
POWER FOR COURT TO BIND INTEREST OF MARRIED WOMAN, s. 9.	SAVING AS TO SETTLEMENTS, s. 21.
DEPOSITS, STOCKS, ETC., STANDING IN NAME OF MARRIED WOMAN TO BE DEEMED HER PERSONAL PROPERTY, ss. 10, 11.	WHEN MARRIED WOMAN MAY OBTAIN ORDER OF PROTECTION FOR EARNINGS OF HER MINOR CHILDREN, s. 22.
INVESTMENTS IN JOINT NAMES OF MARRIED WOMEN AND OTHERS, ss. 12, 13.	LEGAL REPRESENTATIVE OF MARRIED WOMAN, s. 23.
FRAUDULENT INVESTMENTS WITH MONEY OF HUSBAND, s. 14.	RIGHTS PRIOR TO 47 V. c. 19, NOT AFFECTED, s. 24.
REMEDIES OF MARRIED WOMAN FOR PROTECTION OF SEPARATE PROPERTY, s. 15.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Married Women's Property Act.*" R. S. O. 1887, c. 132, s. 1.

Interpretation
"Contract."

2. In this Act the word "contract" shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by a married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration, and the word "property" shall include a thing in action. R. S. O. 1887, c. 132, s. 2.

Liabilities.

"Property."

Married woman to be capable of holding property as a *feme sole*.

3.—(1) A married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

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(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. R. S. O. 1887, c. 132, s. 3 (1, 2).

Power to
contract.

(3) Every contract entered into by a married woman prior to the 13th day of April, 1897, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn.

Contracts
prior to 13th
April, 1897.

(4) Every contract entered into by a married woman prior to the said 13th day of April, 1897, with respect to and to bind her separate property, shall bind, not only the separate property which she was possessed of or entitled to at the date of the contract, but also all separate property which she has since acquired or may hereafter acquire. R. S. O. 1887, c. 132, s. 3 (3, 4); 60 V. c. 22, s. 3.

4.—(1). Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent:

Contracts of
married
women from
13th April,
1897, to bind
all their separ-
ate estate.

(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had any separate property at the time when such contract was entered into, or subsequently;

(b) Shall bind all separate property which she may at the time or thereafter possess or be entitled to; and

(c) Shall also be enforceable by process of law against all property which she may thereafter while discoverd possess or be entitled to.

(2) Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating. 60 V. c. 22, s. 1.

Except where
restraint on
anticipation
exists.
56-57 V.(Imp.)
c. 63, s. 1.

5.—(1) Every woman married on or before the 4th day of May, 1859, without any marriage contract or settlement, shall and may, from and after the said day, notwithstanding her coverture, have, hold and enjoy all her real estate not on or before the said 4th day of May taken possession of by her

A woman
married on
or before 4th
May, 1859,
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perty not then
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husband, by himself or his tenants, and all her personal property not on or before said day reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

A woman married between 4th May, 1859, and 2nd March 1872, may hold her real property free from the debts or control of her husband.

(2) Every woman married between the 5th day of May, 1859, and the 2nd day of March, 1872 (both inclusive), without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real property, whether belonging to her before marriage or acquired by her by inheritance, devise or gift, or as heir-at-law to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried; but this section shall not extend to any property received by a married woman from her husband during coverture.

Proviso.

A woman married after 2nd March, 1872, may hold her real property free from any estate or claim of her husband during her life.

(3) The real estate of any woman married after the 2nd day of March, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall, without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate therein of her husband during her lifetime, and from his debts and obligations, and from any claim or estate by him, as tenant by the curtesy; and her receipts alone shall be a discharge for any rents, issues and profits of the same; but nothing herein contained shall prejudice the right of the husband as tenant by the curtesy in any real estate of the wife which she has not disposed of *inter vivos*, or by will.

A woman married since 4th May, 1859, may hold her personal property free from the debts or control of her husband.

(4) Every woman married since the 4th day of May, 1859, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her personal property, whether belonging to her before marriage or acquired by her by inheritance, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried; but this sub-section shall not extend to any property received by a married woman from her husband during coverture. R. S. O. 1887, c. 132, s. 4.

Proviso.

Earnings of married women.

6.—(1) Every married woman, whether married before or after the passing of this Act, shall be entitled to have and hold as her separate property, and to dispose of as her separate property, the wages, earnings, money and property, gained or acquired by her in any employment, trade or occupation in

which she is engaged or which she carries on, and in which her husband has no proprietary interest, or gained or acquired by the exercise of any literary, artistic or scientific skill.

(2) Every woman married on or after the first day of July, 1884, shall also be entitled to have and hold and to dispose of as her separate property all other real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage. R. S. O. 1887, c. 132, s. 5.

Property of a woman married on or after 1st July, 1884, to be held as separate property.

7. Every woman married before the first day of July, 1884, shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue on or after the said first day of July, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. R. S. O. 1887, c. 132, s. 7.

Property acquired after 1st July, 1884, by a woman married before that date to be held by her as separate property.

8. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. R. S. O. 1887, c. 132, s. 6.

Execution of general power.

9. Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. R. S. O. 1887, c. 132, s. 8.

Power of court to bind interest of married women. Imp. Act 44-45 V. c. 41, s. 39.

10. All deposits, all sums forming part of public stocks or funds, which on the first day of July, 1884, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of, or in any industrial, provident, friendly, benefit, building, or loan society, which, on the first day of July, 1884, were standing in her name, shall be deemed, unless and until the contrary be shewn, to be the separate property of such married woman; and the fact that any such deposit, sum forming part of public stocks, funds, or of any share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify all public officers, and all directors, managers, and trustees of every such corporation, company, public body, or society as aforesaid, in respect thereof. R. S. O. 1887, c. 132, s. 9.

As to stock, etc., to which a married woman is entitled.

As to stock,
etc., trans-
ferred, etc.,
to a mar-
ried woman.

Proviso.

11. All such particulars mentioned in the preceding section which after the first day of July, 1884, were placed, or transferred in or into, or made to stand, in the sole name of any married woman shall be deemed, unless and until the contrary be shewn, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded or not; Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident contrary to the provisions of any statute, charter, by-law, articles of association, or deed of settlement regulating such corporation or company. R. S. O. 1887, c. 132, s. 10.

Investments
in joint names
of married
women and
others.

12. All the provisions hereinbefore contained as to such particulars mentioned in section 10, which on the first day of July, 1884, were standing in the sole name of a married woman, or which after that time shall be placed or transferred to or into or made to stand in the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, on the 25th day of March, 1884, were standing in, or which shall be placed, or transferred to or into, or made to stand in, the name of any married woman jointly with any person or persons other than her husband. R. S. O. 1887, c. 132, s. 11.

As to stock,
etc., standing
in the joint
names of a
married
woman and
others.

13. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such particulars named in section 10, which shall be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband. R. S. O. 1887, c. 132, s. 12.

Fraudulent
investments
with money
of husband.

14. If any investment in any of the particulars set forth in section 10 shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section 19 of this Act, order such investment, and the dividends thereof, or any part thereof, to be respectively transferred and paid to the husband; and nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, in fraud of his creditors, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any property

or moneys so deposited or invested may be followed as if this Act had not been passed. R. S. O. 1887, c. 132, s. 13.

15. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband and wife shall be competent to give evidence against each other. R. S. O. 1887, c. 132, s. 14.

Remedies of married woman for protection and security of separate property.
Torts as between husband and wife.

16. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract or wrong, as aforesaid. R. S. O. 1887, c. 132, s. 15.

Wife's ante-nuptial debts and liabilities.

Proviso.

17. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, and for wrongs committed by her after marriage, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any legal proceeding, in respect of any such debts, contracts or wrongs, for or in respect of which his wife is liable; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt or liability shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the first day of July, 1884, for or in respect of any such debt or other liability of his wife as aforesaid. R. S. O. 1887, c. 132, s. 16.

Husband to be liable for his wife's debts and other liabilities to a certain extent.

Proviso.

Suits for
wife's liability.

18. A husband and wife may be jointly sued in respect of any such debt or other liability (whether for contract or for any wrong) contracted or incurred by the wife as aforesaid if the plaintiff in the action shall seek to establish his claim either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so required by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only. R. S. O. 1887, c. 132, s. 17.

Questions
between hus-
band and wife
as to property
may be decid-
ed in a sum-
mary way.

19.—(1) In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body, or society in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise, in a summary way, to a Judge of the High Court, or (at the option of the applicant, irrespectively of the value of the property in dispute) to the Judge of the County Court of the county in which either party resides, and the Judge may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit; or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.

(2) Any order of a Judge of the High Court, made under the provisions of this section, shall be subject to appeal in the same way as an order made by the same Judge in an action in the said Court.

(3) Any order of a County Court, under the provisions of this section, shall be subject to appeal in the same way as any other order made by the same Court.

(4) All proceedings in a County Court, under this section, in which, by reason of the character or value of the property in dispute, such Court would not have had jurisdiction if this Act had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court, by *certiorari*, or otherwise, as may be prescribed by the Rules of Court; but any order made or act done in the course of the proceedings, prior to the removal,

shall be valid, unless order is made to the contrary by the High Court.

(5) The Judge of the High Court, or County Court, if either party so request, may hear any such application in his private room.

(6) Any such corporation, company, public body, or society, as aforesaid, shall, in the matter of any such application, for the purposes of costs or otherwise, be treated as a stakeholder only. R. S. O. 1887, c. 132, s. 18.

20. A married woman, who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly as aforesaid, of property subject to any trust, may sue or be sued, and may transfer or join in transferring, in that character, any such particulars as are mentioned in section 10, without her husband, as if she were a *feme sole*. R. S. O. 1887, c. 132, s. 19.

Married woman as an executrix or trustee.

21. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors. R. S. O. 1887, c. 132, s. 20.

Saving of existing settlements, and the power to make future settlements.

22.—(1) Any married woman having a decree for alimony against her husband, or any married woman who lives apart from her husband, having been obliged to leave him from cruelty, or other cause which by law justifies her leaving him and renders him liable for her support, or any married woman whose husband is a lunatic either with or without lucid intervals, or any married woman whose husband is undergoing sentence of imprisonment in the Provincial Penitentiary or in any gaol for a criminal offence, or any married woman whose husband from habitual drunkenness, profligacy, or other cause, neglects or refuses to provide for her support and that of his family, or any married woman whose husband has never been in this Province, or any married woman who is deserted or abandoned by her husband, may obtain an order of protection, entitling her, notwithstanding her coverture, to have and to enjoy all the

In what cases a married woman may obtain an order of protection for the earnings of her minor children.

Purport and effect of such order.

earnings of her minor children, and any acquisitions therefrom, free from the debts and obligations of her husband and from his control or disposition, and without his consent, in as full and ample a manner as if she continued sole and unmarried.

How and by whom an order discharging protection may be obtained.

(2) The married woman may at any time apply, or the husband or any of the husband's creditors may at any time, on notice to the married woman, apply for the discharge of the order of protection; and if an order for such discharge is made the same may be registered or filed like the original order.

Either order may be in duplicate. By whom to be made in cities and towns. Registration.

(3) Either order may issue in duplicate, and where the married woman resides in a city or town in which there is a Police Magistrate, the order for protection or any order discharging the same shall be made by the Police Magistrate, and shall be registered in the registry office of the registry division in which the city or town is situate.

By whom order made elsewhere than in city or town.

(4) Where the married woman does not reside in a city or town in which there is a Police Magistrate, the order shall be made by the Judge or one of the Judges, or the acting or Deputy Judge of the Division Courts or a Division Court of the county in which the married woman resides; and instead of being registered, shall be filed for public inspection with the Clerk of the Division Court of the division within which the married woman resides.

Hearing may be public or private.

(5) The hearing of an application for an order of protection, or for an order discharging the same may be public or private, at the discretion of the Judge or Police Magistrate.

Order not to have effect until registered or filed. Evidence of order, etc.

(6) The order for protection shall have no effect until it is registered or filed, and the registrar or clerk shall immediately on receiving the order endorse thereon the day of registering or filing the same; and a certificate of the registering or filing and date, signed by the registrar or clerk for the time being, shall be *prima facie* evidence of such registering or filing and date; and a copy of the order which is registered or filed certified under the hand of the Registrar or Clerk to be a true copy thereof, shall be sufficient *prima facie* evidence of the order without proof of the signature of the Registrar or Clerk, and without further proof of the order itself, or of the making or validity thereof.

From what time the order discharging protection shall take effect.

(7) The order for discharging an order of protection shall not in any case be retroactive, but shall take effect from the time it is made, and the order for protection shall protect the earnings of the minor children of the married woman until an order is made discharging such order of protection, and the married woman shall continue to hold and enjoy to her separate use whatever, during the interval between the registering or filing of the order of protection and the making of the order discharging the same, she may have acquired by the earnings of her minor children. R. S. O. 1887, c. 132, s. 21.

23. For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have or be if she were living. R. S. O. 1887, c. 132, s. 22.

24. This Act shall not be construed to deprive a woman married prior to the commencement of *The Married Women's Property Act, 1884*, of any right or privilege which she had at the time of the commencement of that Act, or would afterwards have had if that Act had not been passed. R. S. O. 1887, c. 132, s. 24.

NOTES.

History. At common law, a husband became entitled to receive the rents and profits of his wife's real estate during their joint lives, and to a possible estate by the curtesy, and he became absolutely entitled to all her personal property in possession, and to all her choses in action, if he reduced them to possession during his life. He was also entitled to her chattels real and had full power to sell and convey them. If the wife predeceased the husband, he was entitled, as her administrator, to reduce into possession any choses in action not theretofore recovered, and, without administration, to alien any of her chattels real for his own benefit; *Re Bellamy, Elder v. Pearson* (1883) 25 Ch. D. 620. But any choses in action not reduced by the husband into possession, belonged to the wife surviving him; see notes to *Hornsby v. Lee* (1816) 2 Madd. 16, 2 W. & T. L. C. 907. But equity at a comparatively early date, probably about 1660, recognized the separate existence of a married woman as regards property given to or settled upon her for her separate use. In *Hulme v. Tenant* (1778) 1 Bro. C. C. 16, 2 W. & T. L. C. 536, Lord Thurlow thought that the interposition of trustees was necessary, for otherwise there could be no separate property; but it has long since been established that the intention of the testator or settlor will be effectuated though no trustees are appointed, and that the wife's interest will be protected by the conversion of the husband into a trustee for her; *Bennet v. Davis* (1725) 2 P. Wms. 316; *Newlands v. Paynter* (1839) 10 Sim. 377, 4 Myl. & Cr. 408; 2 W. & T. L. C. 545; and this is so even when the marriage took place in a foreign country; *Ex parte Sibeth, Re Sibeth* (1885) 14 Q. B. D. 417. With the creation of the separate use, there also arose the capacity to contract. For some time it was questionable how far the general personal engagements of a married woman should be executed out of her separate property, but as early as *Hulme v. Tenant* (1778) 1 Bro. C. C. 16, 2 W. & T. L. C. 536, the result of the cases was stated to be, that the trustee was obliged to apply personal estate, and rents and profits when they arose, to the satisfaction of such general engagements. Over property settled to the separate use of a married woman, she had a disposing power unless restrained from anticipation; *Taylor v. Meads* (1865) 4 De G. J. & S. 597. This restraint on anticipation was for the purpose of securing the married woman against the influence and control of her husband, by providing that the wife should not have power to anticipate or alienate her separate property. Such a fetter upon alienation was altogether repugnant to the principles of the common law, the general rule being that the power of alienation is a necessary and inseparable incident to ownership of property; *Moore v. Jackson* (1893) 22 S. C. R. 210, 217. It is however valid when annexed to a separate use; *Baggett v. Meux* (1844) 1 Coll. 138, 1 Ph. 627; *Re Sykes* (1861) 2 J. & H. 415. By various statutes commencing with 22 Vict. c. 34 (C. S. U. C. c. 73) the doctrine of separate use has been extended, and property which is not by any deed or will settled to the separate use of a married woman, is, by force of the enactments, now consolidated in R. S. O. c. 163, legislatively settled upon her to such use. It is no longer necessary, as was formerly the case, either to find a trustee to act for her, or if there be no trustee, to declare the husband to be trustee for her; *Re Harkness and Allsopp* (1896) 2 Ch. 358, 362. If personal chattels are conveyed to a trustee for the separate use of a married woman, and possession thereof is delivered to her, she becomes clothed with the legal title; per *Patterson, J.A., Connell v. Hickok* (1888) 15 A. R. 518, 527.

Epochs in Legislation. To ascertain precisely the rights of a married woman to property not settled to her separate use, but to what may be called statutory separate property, and to determine the extent of a married woman's liability, it is necessary to enquire the date of the marriage and the date of the acquisition of the property. There are five epochs in the Ontario legislation affecting her rights and liabilities:

- (1) Before 4th May, 1859.
- (2) Between 5th May, 1859, and 2nd March, 1872.
- (3) Between 3rd March, 1872, and 31st December, 1877.
- (4) Between 1st January, 1878, and 1st July, 1884.
- (5) After 13th April, 1897.

What is Separate Estate? Separate estate is real or personal property, including choses in action and chattels real, held by a married woman, or by trustees, for her separate use, free from all marital rights of the husband, and over which he has no control or right of interference or disposition.

The doctrines of courts of equity as regards estates settled to the separate use of married women, either through the intervention of an express trustee, or without a trustee have no bearing upon statutory separate property. So far from elucidating the acts of the legislature, they rather tend to embarrass us in performing that task, inasmuch as they present false and misleading analogies; per Strong, *C. J.*, *Moore v. Jackson* (1893) 22 S. C. R., 217.

The separate use is an incident of and lasts only during coverture; *Re Lambert's Estate*, *Stanton v. Lambert* (1888) 39 Ch. D., 626; *Standard Bank v. Boulton* (1878) 3 A. R. 93. While discover, the property is not separate estate; *Myles v. Burton* (1884) 14 L. R. Ir. 258; but on re-marriage it becomes separate estate again; *Tullet v. Armstrong* (1838) 1 Beav. 1.

Express Settlement for Separate Use. Real estate conveyed or devised to a married woman or to trustees for her separate use in fee; *Taylor v. Meads* (1865) 4 DeG. J. & S. 597; or in tail; *Cooper v. Macdonald* (1877) 7 Ch. D. 288; is separate estate subject to the equitable doctrines upon that subject. So is property held by a married woman when there was an agreement with her husband before marriage that all property acquired by her should be separate estate; *Sanders v. Malsburg* (1882) 1 O. R. 178; so is real estate conveyed to a married woman for her sole use and benefit; *Dame v. Slater* (1891) 21 O. R. 375, or in lieu of alimony; *Adams v. Loomis* (1875) 22 Gr. 99, 24 Gr. 242, *Re Konkle* (1886) 14 O. R. 183. Property conveyed by a husband to his wife for her sole use; *Massey v. Rowen* (1869) L. R. 4 H. L. 288, 297; *Totten v. Bowen* (1882) 8 A. R. 602; *Kent v. Kent* (1892) 19 A. R. 352, or for "her own proper use and benefit"; *Surman v. Wharton* (1891) 1 Q. B. 491; is separate estate. Property over which a married woman has a general power of appointment by deed, writing or will, whether exercised or not; *Johnson v. Gallagher* (1861) 3 DeG. F. & J. 494; *London Chartered Bank of Australia v. Lamprerie* (1873) L. R. 4 P. C. 572, 595, is also separate estate and liable for a married woman's debts after her death except against persons entitled in default of appointment, unless they are heirs, executors or administrators; but it cannot be touched during her lifetime; *Ex parte Gilchrist*, *Re Armstrong* (1888) 17 Q. B. D. 521; *Gordon v. Warren* (1897) 24 A. R. 44. The wife's representatives are now expressly made subject to the same liabilities as she would have been if living; s. 23. By s. 8 of the Act the execution of a general power by will has the effect of making the proper appointed liable for debts and other liabilities. Savings from property purchased with the product of separate estate partake of the same character as the property from which they were derived; *Horne v. Kerr* (1880) 6 A. R. 30; *Pike v. Fitzgibbon* (1880) 6 L. R. Ir. 486; *Trotter v. Chambers* (1883) 2 O. R. 515; *Duncan v. Cashin* (1875) L. R. 10 C. P. 554. If a husband allows his wife to make a profit out of some department of the household, any savings are her separate property; *Slanning v. Style* (1734) 4 P. Wms. 337; *Lumley v. Timms* (1873) 28 L. T. 608; *Mews v. Mews* (1852) 15 Beav. 529, but see *Barrack v. McCulloch* (1856) 3 K. & J. 110. Jewellery given by the husband to the wife may be her separate property; *Re Schofield and wife* (1891) 7 T. L. R. 69; 64 L. T. 838.

Statutory Separate Property. By C. S. U. C. c. 73 the provisions now embodied in s. 5 (1) (2) (4) were enacted. The canon of construction early laid down with regard to those provisions was stated by Draper, C. J. in *Kriemar v. Glass* (1867) 10 C. P. 475 in these words: "Every provision for these purposes is a departure from the common law, and so far as is necessary to give these provisions full effect, we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give." This principle was adopted and acted upon in *Royal Canadian Bank v. Mitchell* (1868) 14 Gr. 412; *Wright v. Garden* (1869) 28 U. C. R. 609; *Balsam v. Robinson* (1869) 19 C. P. 263; *Mitchell v. Weir* (1872) 19 Gr. 568; *Lawson v. Laidlaw* (1878) 3 A. R. 77, and has been recently affirmed by the Supreme Court in *Moore v. Jackson* (1893) 22 S. C. R. 210. It was settled by the earlier cases just cited that the separate estate created by the Statute was not analogous to the equitable settled property of a married woman settled to her separate use either in respect of the power of disposition or in respect of its liability for the debts of the owner; see *Moore v. Jackson* (1893) 22 S.

C. R. at p 214. Such separate property was not liable for the debts of a married woman; *Royal Canadian Bank v. Mitchell* (1868) 14 Gr. 412; *Wright v. Garden* (1869) 28 U. C. R. 609; nor did the wife have the absolute control and disposition thereof without the husband's consent; *Emrick v. Sullivan* (1865) 25 U. C. R. 105; *Balsam v. Robinson* (1869) 19 C. P. 263; but see as to personal property; *Lawson v. Laidlaw* (1878) 3 A. R. 77, 91; nor could it be disposed of by will otherwise than as provided by the statute, i. e., among the parties now mentioned in R. S. O. (1807) c. 128, s. 6, see *ante* pp. 635, 645. It could however be seized and sold on an execution against her husband for her torts; *C. S. U. C. c. 73, s. 3*. The husband was not deprived of his tenancy by the curtesy in the wife's lands; *ib. s. 4*, but such estate was not subject to the husband's debts during the wife's life; *ib. s. 13*; nor to his interference; *Cameron v. Walker* (1890) 19 O. R. 212. The separate property was liable for the wife's debts before marriage; *ib. s. 14*; and a husband marrying after 4th May 1859, was not liable for the wife's ante-nuptial debts to a greater extent than the value of his interest in her separate property; *ib. s. 15*. Personal earnings of the wife during coverture were not separate property unless she obtained an order for protection thereof; *ib. ss. 5-12*. Real property, not comprised in a settlement for her separate use, acquired before 1st July, 1884, by a woman married before 3rd March, 1872, is still subject to the tenancy of the curtesy of the husband so that she cannot, without an order under R. S. O. c. 165, convey a title thereto free from that estate of the husband; *Wylie v. Framp-ton* (1889) 17 O. R. 515, but if acquired between 3rd March, 1872, and 31st December, 1877, she may perhaps dispose thereof free from that estate. Such property was nevertheless separate property under the Statute and as such was liable for her debts and engagements; *Moore v. Jackson* (1893) 22 S. C. R. 210. The case of *Douglas v. Hutchinson* (1885) 12 A. R. 110 in so far as it held that property of the wife in order to be liable for debts as separate estate must be such as may be disposed of by the wife without the concurrence of the husband must be treated as overruled; see 22 S. C. R. 236.

Important changes in the law respecting statutory separate estate were effected by the act of 1872 (35 V. c. 16). The principal changes were:—

(a) Real estate held by her was to be for her separate use, free from any estate of the husband during his lifetime and from his debts and obligations and from any claim or estate by him as tenant by the curtesy; s. 1; *Boustead v. Whitmore* (1875) 22 Gr. 222; *Furness v. Mitchell* (1879) 3 A. R. 510; *Bryson v. Ontario and Quebec Ry. Co.* (1885) 8 O. R. 380. This section is now embodied in s. 5 (3).

(b) Personal earnings of the wife were made separate estate without any order of protection; s. 7.

(c) The husband was relieved from liability for his wife's ante-nuptial debts and for debts of her separate business and upon her contracts; s. 8.

(d) It was provided that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried; s. 9.

The section conferring the separate use absolutely upon the wife was not originally confined to cases where the marriage took place after the passing of the act, but in *Dingman v. Austin* (1873) 33 U. C. R. 190 and *McCready v. Higgins* (1874) 24 C. P. 233 it was said that the section was not retrospective. The view which ultimately prevailed, however, was that the Act did not take away the rights of a husband acquired before the act, but that as to all lands acquired after the act, the separate use attached free from any estate or tenancy by the curtesy of the husband; *Adams v. Loomis* (1876) 24 Gr. 242; *Furness v. Mitchell* (1879) 3 A. R. 510, but it was settled in the latter case that the act had not deprived the husband of his tenancy by the curtesy in lands not disposed of by the wife *inter vivos* or by will, a view which, prior to the decision, had been affirmed by the legislature; 40 V. c. 7, Sched. A (156) and see *Hope v. Hope* (1892) 2 Ch. 336. Upon the revision of the Statutes in 1877 the section in question of the act of 1872 was expressly confined to cases where the marriage took place after the passing of the act; R. S. O. (1877) c. 125 s. 4 and as to lands acquired between 31st December, 1877, and 1st July, 1884, the husbands of women married before 3rd March, 1872, cannot be deprived by the conveyance or will of their wives of their tenancy by the curtesy.

In 1884 the English Married Women's Property Act 1882 (45 & 46 V. c. 75), which forms the basis of the present act, was in the main adopted. The pro-

visions now in force so far as they affect the question as to what is separate estate may be thus summarized:—

(a) A married woman is capable of acquiring, holding and disposing by will or otherwise of the legal estate in real and personal property.

(b) Personal earnings are separate estate.

(c) All property of a woman married on or after 1st July, 1884, is separate estate.

(d) All property of a married woman married before 1st July, 1884, is separate estate, if her title, whether vested or contingent, and whether in possession, reversion or remainder, accrued after that date.

(e) The act permits the Court, with her consent, to bind separate property which she is restrained from anticipating.

Alimony. Alimony is not separate estate; *Anderson v. Lady Hay* (1891) 7 T.L.R. 113.

Effect of Act of 1884. All property acquired after 1884 by a married woman whenever married, is separate estate. Except as to married women married after 2nd March, 1872, the title must first accrue on or after 1st July, 1884. Therefore, property to which such a married woman was contingently entitled before that date is not separate estate; *Re Adame's Trusts* (1885) 54 L.J. Ch. 878; *Re Trench's Trusts* (1885) L.R. 15 Ir. 406; nor is property in which she had a vested remainder; *Re Tucker. Emanuel v. Parfit* (1885) 54 L.J. Ch. 874; *Reid v. Reid* (1886) 31 Ch. D. 402; *Re Hobson, Webster v. Richards* (1886) 55 L.J. Ch. 300. But a mere *spes successionis* is not title, and therefore, where a married woman became entitled after 1884, to a share in property as one of a class of possible next to kin under a settlement made before the act, her share was held to be separate estate; *Re Parsons, Stockley v. Parsons* (1890) 45 Ch. D. 51, in which case *Re Beaupre's Trusts* (1888) 21 L.R. Ir. 397, which had decided the contrary, was dissented from.

The act of 1884 (s. 22), see now R.S.O. c. 165 s. 3 *infra*, dispensed with the necessity of the concurrence of the husband in the wife's conveyance of her property, and it was held in *re Gracey and Toronto Real Estate Co.* (1888) 16 O.R. 226, that she could make a valid conveyance of a vested remainder, although she was married before 1872, and her title accrued before 1884, and her husband would therefore have been entitled to an estate by the curtesy, if there had been a seisin in possession.

Personal Earnings. The Ontario Act differs from the English Act, and from the legislation prior to 1887 as to personal earnings. The English Act makes personal earnings, separate estate, if gained or acquired by the married woman in any employment, trade or occupation in which she is engaged, "or which she carries on separately from her husband," or by the exercise of any literary, artistic or scientific skill; 45 & 46 Vict. c. 75, ss. 2, 5. The test under that Act is whether she is trading independently of her husband, and without being accountable to him for the profits; *Re Edwards, Ex parte Harvey* (1895) 43 W. R. 509. These sections were re-enacted in Ontario in the Act of 1884, but in 1887 (50 Vict. c. 7, s. 22) the words "and in which her husband has no proprietary interest" were substituted for the words "or which she carries on separately from her husband." This is now the law; see s. 6 (1). The cases decided under the former Act on the subject of separate trading have little or no bearing on the law as it now exists; per Osler, J. A., *Cooney v. Sheppard* (1895) 23 A.R. 4. The section puts it beyond question that the earnings are separate estate; *Robertson v. Laroque* (1889), 18 O. R. 469. A woman who owns a farm may, if she pleases, maintain her husband upon it in idleness, or he may devote his whole time and services in managing and working it without any pecuniary return whatever, and the profits will be the wife's separate property; *Baby v. Ross* (1892) 14 P.R. 440; *Cooney v. Sheppard* (1895) 23 A.R. 4. The expression "proprietary interest" is not employed in any technical or limited sense; it signifies simply "interest as an owner" or "legal right or title;" per Osler, J. A., *ib.* at p. 6. The stock in trade with which the business is carried on by the wife is also her separate property; *Ashworth v. Outram* (1877) 5 Ch. D. 923; *Dominion Savings and Investment Co. v. Kilroy* (1888), 15 A. R. 487. The wife's earnings in connection with her husband's property by keeping boarders, selling milk, butter or eggs are his and not hers; *Young v. Ward* (1897) 24 A. R. 147; *Hamill v. Henry* (1886) 69 Iowa 752.

Property Held Jointly. Property conveyed to a husband and wife was formerly held by them by entireties, and neither could convey without the other.

The enactment that, on a conveyance to two or more persons, it should be considered that they held as tenants in common (R. S. O. c. 119, s. 11), was held not to affect this rule; *Re Shaver and Hart* (1871) 31 U.C.R. 603, where the property was acquired before 1836, and therefore before The Married Women's Property Act of 1859. A conveyance to a husband and wife after that Statute and before 1872 would not, however, entitle the wife to a moiety as separate property; *Britton v. Knight* (1879) 29 C. P. 567; *Griffin v. Patterson* (1881) 45 U. R. C. 536; *Re Morse* (1875) 8 P.R. 475. It has been held that land, conveyed in 1874 to husband and wife who were married in 1864, is held by them as tenants in common and not by entireties, and that the wife's moiety is separate estate; *Re Wilson and Toronto Electric Light Co.* (1891) 20 O.R. 397. In *Griffin v. Patterson* (1881) 45 U.C.R. 536 at p. 554, *Armour, J.*, said: "I think it might well be contended that the effect of The Married Women's Acts is to do away with the estate by entireties, and to make the devisees tenants in common." At common law husband and wife were treated as one person; *Co. Litt.* 187 a. Where a residue was bequeathed to A, B his wife, C, D, E, F and G his wife, to be equally divided between them, it was held that B and G were each entitled to one-seventh; *Re Dixon, Bryan v. Tull* (1889) 42 Ch. D. 306. In *Re March, Mander v. Harris* (1885) 24 Ch. D. 222, *Mr. Justice Chitty* said: "It appears to me that the Act makes such alterations in the relation of husband and wife that it severs that unity of person, and divided that compound person which the law formerly recognized, to such an extent as to render it wrong for the Court to apply the old principle which was founded on unity of person." The decision was reversed on another point in appeal (1884) 27 Ch. D. 166, and it was dissented from in *Re Jupp, Jupp v. Buckwell* (1888) 39 Ch. D. 148, where on a gift to a husband and a wife and a third person, it was held that the husband and wife took only one moiety, and that the only effect of the Statute is that, as between husband and wife, what the wife takes is her separate property. The rules as to gifts to a husband and wife was, however, only a rule of construction, and long before the Act it was held that any indication, however slight, of an intention that each should take separately was sufficient to defeat the application thereof; *Warrington v. Warrington* (1842) 2 Hare 54; *Dias v. Livera* (1879) 5 App. Cas. 123, 136.

Property Covered by Marriage Settlement. S. 21 declares that nothing in the Act shall affect settlements or agreements therefor made either before or after marriage. Where a marriage settlement contained a provision for the settlement of any future acquired property of the wife, and after the Act she became entitled to a bequest without any limitation as to separate use, the bequest was held to come within the covenant to settle, and therefore had to be dealt with as if the Act had not been passed. The section, however, has not the effect of preventing the interest of a married woman in settled funds, with respect to which she has a general power of appointment, with remainder in default of appointment to her executors, administrators or assigns, being by virtue of the Act her separate property, and therefore she is entitled to be paid the corpus of the fund for her separate use; *Re Onslow, Plowden v. Gayford* (1888) 39 Ch. D. 622; *Re Davenport, Turner v. King* (1895) 1 Ch. 361. The words "interfere with or affect any settlement" mean invalidate or render inoperative any settlement; *Re Armstrong* (1888) 32 Sol. J. 577.

SUMMARY.

- (1) All property, which under the doctrines of the Court of Chancery was equitable separate estate, continues to be such and subject to the rules respecting the same, except that the married woman may now possess the legal estate.
- (2) All property of a woman married on or before 4th May, 1859 (not comprised in any marriage contract or settlement: *Dawson v. Moffatt* (1886) 13 O. R. 170) is her statutory separate property except (a) property taken possession of by her husband before that date, (b) property received from her husband during coverture. The latter is probably in all cases equitable separate estate; *Sherratt v. Merchants' Bank* (1894) 21 A. R. 473; *Trusts Corporation v. McCue* (1896) 28 O. R. 116.
- (3) All property of a woman married after 4th May, 1859 (not comprised in any marriage contract or settlement) is statutory separate property, except property received from her husband during coverture which is probably equitable separate estate.

(4) All property of a woman married after 2nd March, 1872, is separate estate.

(5) All property of a married woman her title to which accrued after 1st July, 1884, is separate estate, no matter when she was married.

Power of Disposition. A married woman now has full power to dispose by deed of her real estate whenever acquired. R. S. O. c. 165, s. 1. Every married woman has full power to dispose of her statutory separate personal property acquired since 1884, and personal earnings acquired after 1872, and perhaps all personalty; *Lawson v. Laidlaw* (1878) 3 A. R. 77. All property of a married woman which would devolve upon her heirs, executors or administrators, may be disposed of by will; R. S. O. c. 128, ss. 9 (5), 10, 26, *ante* p. 645. Equitable separate estate which was free from restraint upon anticipation was always subject to be disposed of by the married woman either *inter vivos* or by will; *Taylor v. Meads* (1865) 4 DeG. J. & J. 597; *Fetipplace v. Gorges* (1789) 1 Ves. Jr. 461, 1 R. R. 79; *Sturgis v. Corp* (1806) 13 Ves. 190, 9 R. R. 169; *Adams v. Gamble* (1861) 12 Ir. Ch. R. 162.

Liability for Debts. At common law a married woman was not liable for debts contracted during coverture. For her antenuptial debts, both husband and wife could be sued, and until 1859 both might be taken in execution under a *capias*, and the wife would not be discharged if she had separate property; *Sparkes v. Bell* (1828) 8 B. & C. 1; *Ferguson v. Clayworth* (1844) 6 Q. B. 269; *Larkin v. Marshall* (1850) 4 Ex. 804; *Edwards v. Martin* (1851) 17 Q. B. 693; *Ivens v. Butler* (1857) 7 E. & B. 159; see *Scott v. Morley* (1887) 20 Q. B. D. 129, and the separate estate might be reached in equity to satisfy such obligations; *Chubb v. Stretch* (1870) L. R. 9 Eq. 555. In equity, obligations incurred by a married woman could be enforced against her separate estate, if either expressly or by implication she had contracted with reference to it, and with the intention of binding it; *Matthewman's case* (1866) L. R. 3 Eq. 781. The onus of proving this was on the plaintiff; *Murray v. Barlee* (1834) 3 Myt. & K. 209, 41 R. R. 32. The separate estate was not in any way fettered by the contract, nor could the married woman be prevented from disposing thereof; *Johnson v. Gallagher* (1861) 3 DeG. F. & J. 494; *Robinson v. Pickering*, (1881) 16 Ch. D. 660; *Henningway v. Braithwaite* (1889) 60 L. T. 224. The debt could be enforced only against such separate estate as she was possessed of free from restraint on anticipation at the time of the contract, and which remained at the time judgment was given; *Pike v. Fitzgibbon* (1881) 17 Ch. D. 454; *Picard v. Hine* (1870) L. R. 5 Ch. 274; *King v. Lucas* (1883) 23 Ch. D. 712. After acquired separate property, not being at the time of the contract the property of the married woman, was not property to be made available in a Court of Equity, because the contract was, as against that property, no contract at all; *Pike v. Fitzgibbon* (1881) 17 Ch. D. 454, 466. In 1872 the Legislature, as we have seen enacted (35 V. c. 16, s. 9) that a married woman might be sued (at law and in equity) in respect of her separate debts, engagements, contracts or torts, as if she were unmarried. The Courts, rightly or wrongly, adopted the rules relating to equitable separate estate, and it was settled that in an action against a married woman, it was necessary to show that she was possessed of separate estate; *Darling v. Rice* (1876) 1 A. R. 43; *Lawson v. Laidlaw* (1878) 3 A. R. 77; *Standard Bank v. Boulton* (1878) 3 A. R. 93; *Clarke v. Creighton* (1881) 45 U. C. R. 514.

It would seem also that the equitable rule was extended by requiring that the separate estate should be an immediate possessory interest, and that an existing trust to take effect in possession in the future was insufficient; *Field v. McArthur* (1876) 27 C. P. 15; *Clarke v. Creighton* (1881) 45 U. C. R. 514.

The Act of 1884 enacted that every contract should be deemed a contract with respect to and to bind the married woman's separate property unless the contrary should be shewn, i.e., unless the property was of such a nature that the presumption could not arise; *Bonner v. Lyon* (1890) 38 W. R. 541.

The enactment of 1884 is in this respect of importance only as to contracts made before 13th April, 1897. The presumption of intention to bind separate estate has been held not to arise where the married woman had no other property but her own and her children's clothes, as it would be absurd to assume an intention to enter into a contract with respect to property which she could not do without; *Leak v. Driffield* (1890) 24 Q. B. D. 102. Clothing and personal effects, such as a wedding ring and a watch and chain, are not such separate property as will be sufficient to raise the presumption; *Abraham v. Hacking*, (1896) 27 O. R. 431; *Braunstein v. Lewis* (1891) 65 L. T. 449. The extent of

the engagement which she entered into was material, and where she bought jewellery on her own credit, and had no other separate estate than other jewellery and a wardrobe of furs, dresses and jackets, the presumption of an intention to bind the same as her separate estate was made; *Bonner v. Lyon* (1890) 38 W.R. 541. And where she had an income of £300 a year, subject to restraint on anticipation, and a house rent free, which she sometimes rented, and some jewellery and wearing apparel, the presumption of intention to bind the same for goods supplied was also made; *Everitt v. Paxton* (1891) 65 L.T. 383. But where the amount of the contract was large, and the separate property consisted only of articles of personal adornment, the presumption did not arise; *Harrison v. Harrison* (1888) 13 P.D. 180; *Braunstein v. Lewis* (1891) 65 L.T. 449. The question is one of fact, to ascertain whether the separate property is such as she could and might reasonably have contracted credit upon; *Sweetland v. Neville* (1891) 21 O.R. 412; evidence of the intention, or absence of intention so to contract, as to bind the particular property, is inadmissible; *Bonner v. Lyon* (1890) 38 W.R. 541. A distributive share to which a married woman became entitled, under the Devolution of Estates Act three days before the contract, was sufficient to raise the presumption; *Mulcahy v. Collins* (1894) 24 O.R. 441. Property over which a married woman has a power of appointment by deed or will, with a gift over to a third person in default of appointment, is not such separate estate as would before 1897, enable her to contract; *Gordon v. Warren* (1897) 24 A.R. 44. Where in a deed to a married woman grantee, a covenant to pay off a mortgage was inserted, but she did not execute the deed, she was, nevertheless, held bound by the undertakings expressed in it on her part to be performed, so as to bind the separate estate; *Small v. Thompson* (1897) 28 S.C.R. 219; and a claim for indemnity can be enforced against her; *Whittaker v. Kershaw* (1890) 45 Ch. D. 320; but see *McMichael v. Wilkie* (1891) 18 A.R. 464. A wife is liable to her husband for moneys borrowed after marriage but not for those borrowed before; *Butler v. Butler* (1885) 16 Q.B.D. 374.

The onus of proving an enforceable contract is upon the plaintiff, and the possession of separate estate at the time of the contract must, as to contracts before 13th April, 1897, be alleged and proved; *Field v. McArthur* (1876) 27 C.P. 15; *Darling v. Rice* (1877) 1 A.R. 43; *Re Shakespeare, Deakin v. Lakin* (1885) 30 Ch. D. 169; *Palliser v. Gurney* (1887) 19 Q.B.D. 519; *Stogdon v. Lee* (1891) 1 Q.B. 601; *Canadian Bank of Commerce v. Woodcock* (1889) 13 P.R. 242. In the absence of such allegation judgment by default could not be obtained; *Tutley v. Griffith* (1887) 57 L.T. 673; *Holtby v. Hodgson* (1889) 24 Q.B.D. 103 at p. 105; and a special endorsement was insufficient; *Nesbitt v. Armstrong* (1892) 14 P.R. 366.

Under the Act of 1884 a contract bound not only the separate property which the married woman was possessed of at the time of the contract, but also all her subsequently acquired separate property. It would not bind property which she acquired on or after the death of her husband; *Re Price, Stafford v. Noble* (1885) 28 Ch. D. 709; *Beckett v. Tasker* (1887) 19 Q.B.D. 7; *Pelton v. Harrison* (1891) 2 Q.B. 422; *Re Hewitt* (1895) 1 Q.B. 328; *Hammond v. Keachie* (1897) 28 O.R. 455, but upon her remarriage all separate property not subject to restraint upon anticipation will be liable for debts contracted during the first coverture; *Jay v. Robinson* (1890) 25 Q.B.D. 467; but a restraint imposed only by herself on entering into the second marriage would be ineffectual; s. 21; unless made before the Act of 1884 was passed; *Beckett v. Tasker* (1887) 19 Q.B.D. 12; *Smith v. Whitlock* (1886) 34 W.R. 414. Property appointed by will under a general power of appointment was liable, although the married woman had no separate estate at the time of contracting; *Re Ann, Wilson v. Ann* (1894) 1 Ch. 549.

Act of 1897. The act of 1897 removed from 13th April in that year all incapacity of a married woman to contract; and renders liable all property of a married woman, whether acquired during coverture or widowhood, for the satisfaction of her contract debts. The only exception is separate property, which she is restrained from anticipating; s. 4. The Act was taken from The Married Women's Property Act 1893 (56 & 57 V. c. 63). An important change, however, was made in the clause dealing with the restraint on anticipation. The proviso in the English Act, s. 1, reads "Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating;" see *Lowry v. Derham* (1895) 2 Ir. R. 123. The italicised words are omitted in the Ontario Act. It may be that under

the Ontario Act any property which becomes freed from a restraint upon anticipation, may thereupon be taken in execution to satisfy contract debts, although at the time of the contract or judgment, or both, the restraint was in force. As the restraint ceases with the coverture, it would follow that the benefit thereof would be lost on the husband's death.

Joint Contract. A married woman may contract jointly with her husband or a third person; *Hulme v. Tenant* (1778) 1 Bro. C. C. 16; *Hoare v. Niblett* (1891) 1 Q. B. 781; *Kerr v. Stripp* (1876) 40 U. C. R. 125; *Davies v. Jenkins* (1877) 6 Ch. D. 728; *Frazee v. McFarland* (1878) 43 U. C. R. 281; *Dingman v. Harris* (1894) 26 O. R. 84; but see *Horner v. Kerr* (1880) 6 A. R. 30.

Restraint on Anticipation. A restraint on anticipation may be created by the words "without power of anticipation," or words importing that the married woman shall not have power to deal therewith, or with the income, before it becomes payable to her; *Harrison v. Harrison* (1888) 13 P. D. 180; *Field v. Evans* (1846) 15 Sim. 375; *Baker v. Bradley* (1857) 7 D. M. & G. 597. A mere expression of wish or desire not to sell will be insufficient; *Re Hutchings to Burt* (1883) 59 L. T. 490. It may apply to either real or personal property, and either to income alone, or to the corpus; *Baggett v. Meux* (1846) 1 Phil. 627; *Re Currey, Gibson v. Way* (No. 1) (1886) 32 Ch. D. 361; *Re Grey, Acaeson v. Greenwood* (1887) 34 Ch. D. 712; *Re Tippet and Newbould* (1888) 37 Ch. D. 444. Formerly a gift to the separate use would not be implied from the mere existence of the restraint; *Stogdon v. Lee* (1891) 1 Q. B. 661; but the effect of the Statutes, as they now exist, is that any devise or gift to a married woman is for her separate use, and a restraint on anticipation will therefore attach to such property, although the property is not also expressed to be for the separate use of the married woman; *Re Lumley, Ex parte Hood-Barrs* (1896) 2 Ch. 690. After the death of the husband, the restraint falls with the separate use; *Re Woods* (1889) 61 L. T. 197, but it will generally revive upon re-marriage; *Tullett v. Armstrong* (1838) 1 Beav. 1; 4 Myl. & Cr. 377; *Hawkes v. Hulback* (1870) L. R. 11 Eq. 5; see *Moore v. Morris* (1857) 4 Drew. 33. The restraint ceases to attach to income which has become payable; *Hood-Barrs v. Heriot* (1896) A. C. 174, and a receiver may be appointed of any arrears due at the date of the judgment; *ib.*; *Whiteley v. Edwards* (1896) 2 Q. B. 48. Arrears accruing subsequently to a judgment, would not formerly be bound by the judgment; *Hood-Barrs v. Cathcart* (1894) 2 Q. B. 559; *Whiteley v. Edwards* (1896) 2 Q. B. 48; *Lowry v. Derham* (1895) 2 Ir. R. 123, but the case may be different here as to contract debts incurred after 13th April, 1897; see s. 4 (2) and notes *supra*. The fact that a married woman is estopped from setting up the restraint, will not prevent it from being effectual; *Bateman v. Faber* (1897) 2 Ch. 223.

Where the direction is that after a particular estate, a fund is to be paid to a married woman for her separate use, as the same shall become due and payable, and not by way of anticipation, the restraint ceases upon the cessation of the particular estate; *Re Bown, O'Halloran v. King* (1884) 27 Ch. D. 411; *Re Holmes, Hallows v. Holmes* (1892) 67 L. T. 335.

Removal of Restraint. S. 9 authorizes the Court to bind a married woman's interest in property, notwithstanding the restraint. Upon an application under that section, it is the duty of the Court to inquire, not merely how it has come to pass that money is wanted, who is responsible for that result, and who is liable for debts already incurred, but also to what extent and in what manner, benefit will be secured to the wife by granting the application, and what, if any, conditions can be reasonably and properly imposed; *Paget v. Paget* (1898) 1 Ch. 47, 55. The jurisdiction is discretionary only; *Re Little, Harrison v. Harrison* (1889) 40 Ch. D. 418; *Re Jordan, Kino v. Picard* (1886) 55 L. J. Ch. 330, and strong grounds must be shewn; *Tamplin v. Miller* (1882) 30 W. R. 422. The Court must consider whether it is for the wife's benefit pecuniary or otherwise; *Re Pollard* (1896) 2 Ch. 552. The Court has bound the property by approving of a scheme for discharging the liabilities of a married woman; *Re Wilson-Stewart, Keown-Boyd v. Gilmour* (1896) 75 L. T. 381; *Re C's Settlement* (1887) 56 L. J. Ch. 556; *Hodges v. Hodges* (1882) 20 Ch. D. 749; by sanctioning the compromise of litigation, with reference to an annuity, with respect to which restraint was imposed, by the payment of a lump sum; *Musgrave v. Sandeman* (1883) 48 L. T. 215; by authorizing money to be raised, to enable life policies to be kept up, and interest on a mortgage paid; *Re Milner, Milner v. Milner* (1891) 3 Ch. 547; and to complete a purchase; *Re Tennant* (1890) 25 L. R. Ir. 522; and for an advance to a son; *Re Sawyer* (1896) Ir. R. 40, or to pay off a mortgage; *Re Seugrave* (1886) 17 L.

R. Ir. 375; by authorizing shares to be taken in a Company, in lieu of an annuity charged on a partnership business; *Re Millar* (1860) 25 L. R. Ir. 107; by authorizing an advantageous sale of a life interest; *Re Flood* (1883) 11 L. R. Ir. 373; by authorizing leases to be made; *Re Currey, Gibson v. Way* (1837) 56 L. J. Ch. 389. On reforming certain instruments, the Court bound the property for the payment of the costs, notwithstanding the restraint; *Sedgwick v. Thomas* (1883) 48 L. T. 100. The Court refused an application where the proposed dealing might cause a forfeiture of the wife's life interest; *Re Jordan, Kino v. Picard* (1886) 55 L. J. Ch. 330, and where it would benefit only the estate of a deceased person; *Thomson v. Thomson* (1896) P. 263. The Court will only enable some particular disposition to be made, and will not altogether remove the restraint; *Re Warren* (1883) 52 L. J. Ch. 928. It is the order of the Court which binds the estate, and not what she does when the restraint is removed; *Paget v. Paget* (1898) 1 Ch. 470.

It is not necessary to serve the trustees with notice of the application; *Re Little* (1887) 36 Ch. D. 701. Where an order is obtained for the purpose of charging the property with money to be applied in paying the husband's debts, the order should show on the face of it that the husband is to be liable to indemnify the wife, if he is to be under any such liability, and if it does not do so, he is under no such liability; *Paget v. Paget* (1898) 1 Ch. 470.

Liability for torts and costs. By s. 17 the liability of the husband for wrongs committed by the wife after marriage, is limited to such property as he acquires through her, after deducting liabilities already satisfied and judgments recovered against him, in respect of her ante-nuptial liabilities and post-nuptial torts. It is, however, provided that the liability of a husband married before 1st July, 1884, is not to be increased or diminished by the Act. For torts authorized by the husband he was, at common law, and probably still is personally liable; see *Capell v. Powell* (1864) 17 C. B. N. S. 743.

For torts committed by the wife independently of her husband, both were at common law liable to be sued jointly, during the coverture. "Strictly speaking," said Jessel M. R., "she cannot commit torts; they are torts of the husband, and therefore she creates, as against her husband, a liability." *Wainford v. Heyl* (1875) L. R. 20 Eq. 321. If the husband died before judgment, the widow became personally liable; *Wright v. Leonard* (1861) 11 C. B. N. S. 258. If the wife died, or the parties were divorced before judgment, the husband was not liable; *Capell v. Powell* (1864) 17 C. B. N. S. 743. The Act of 1859 (s. 3) provided that nothing therein contained should protect the property of a married woman from seizure and sale on any execution against her husband for her torts, and that in such case, execution should be first levied on her separate property. The husband therefore still continued liable to be sued. The Act of 1872 (s. 9) enabled a married woman to be sued separately from her husband in respect of her torts. The liability of the wife to be sued alone, did not depend upon her having separate property; *Consolidated Bank v. Henderson* (1879) 29 C. P. 549; *Barker v. Westover* (1884) 5 O. R. 116. The Act of 1872 merely allowed her to be sued alone, where formerly she could only be sued with her husband; *Stone v. Knapp* (1879) 29 C. P. 605. In *Amer v. Rogers* (1880) 31 C. P. 195, Osler J. held that a husband was no longer liable to be sued in respect of his wife's tort, but in *Seroka v. Kattenburg* (1886) 17 Q. B. D. 177, and *Lee v. Hopkins* (1890) 20 O. R. 666, it is held that where the marriage preceded 1st July, 1884, the husband is still liable as at common law. The wife's separate estate was not in equity liable to satisfy her torts or breaches of trust; *Wainford v. Heyl* (1875) L. R. 20 Eq. 321; but at law upon a judgment being recovered, and upon the wife being taken in execution on a *capias*, the Court might refuse to discharge her, if she had separate property, until the judgment was paid; *Fergusson v. Clayworth* (1844) 6 Q. B. 269. Any damages or costs recovered against a married woman for liabilities incurred during coverture, are payable out of her separate estate, and not otherwise; ss. 3 (2), 18; *Scott v. Morley* (1887) 20 Q. B. D. 120; *Whittaker v. Kershaw* (1890) 45 Ch. D. 320. Only such separate estate as she is possessed of at the date of the judgment will be bound; *Cox v. Bennett* (1891) 1 Ch. 677, 625. Arrears of income which accrue after the judgment, but which she was restrained from anticipating, could not be reached; *Re Glanvil, Ellis v. Johnson* (1886) 31 Ch. D. 532; *Hood-Barrs v. Cathcart* (1894) 2 Q. B. 559; *Whitely v. Edwards* (1896) 2 Q. B. 48. Where a bear belonging to the husband was allowed to be confined on the separate property of the wife, and escaped therefrom, she was held responsible for injuries inflicted thereby upon the principle of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330; *Shaw v. McCreary* (1890) 19 O. R. 39.

Household liabilities. A woman who lives with her husband and family, and who orders household supplies or provisions in the ordinary way, as managing the household is not, by the mere fact of possessing separate estate, deemed to contract with reference thereto; *Brown v. Winning* (1878) 43 U. C. R. 327; *Griffin v. Patterson* (1881) 45 U. C. R. 536; but the circumstances may be such, as to lead to the conclusion that she was contracting, not for her husband, but for herself in respect of her separate estate,* which would then be liable; *Matthewman's case* (1867) L. R. 3 Eq. 787. S. 4 expressly excepts contracts entered into by a married woman as an agent.

Husband's liability for ante-nuptial debts. As we have seen, the husband is liable for his wife's debts before marriage, only to the extent of the property acquired through her; s. 17. He may be sued either alone or jointly with her; an unsatisfied judgment against her separate estate is no bar to an action against him; *Beck v. Pierce* (1880) 23 Q. B. D. 316.

Liability as executrix, administratrix or trustee. The liabilities incurred by a married woman by reason of a breach of trust or devastavit are declared by the Act (s. 1) to be contractual liabilities. The husband is not liable, unless he has acted or intermeddled in the trust or administration. Formerly the wife could not be executrix, administratrix or trustee without her husband's assent. His assent to her acceptance of the trust made him liable for her breaches of trust; *Bahin v. Hughes* (1886) 31 Ch. D. 390. The husband need not now join in the administration bond of his wife; *Re Ayres* (1883) 8 P. D. 168.

Judgment Proprietary. For debts incurred by a married woman during coverture, no personal judgment can be given against her; it is her separate estate which is liable. The same rule applies to judgments recovered during the coverture, for torts committed after marriage. The judgment is proprietary; it is her property only which is liable; *Kerr v. Stripp* (1876) 24 Gr. 198; *Scott v. Morley* (1887) 20 Q. B. D. 120; *Holtby v. Hodgson* (1889) 24 Q. B. D. 103; *Re McLeod v. Emigh* (1888) 12 P. R. 450; *Re Lynes, Ex parte Lester* (1893) 2 Q. B. 113; *Re Hewitt, Ex parte Levine* (1895) 1 Q. B. 428. Summary proceedings upon specially endorsed writs were in *Cameron v. Heighs* (1890) 14 P. R. 56, said to be inapplicable to proprietary judgments; but see *contra*, *Nesbitt v. Armstrong* (1892) 14 P. R. 366; *Downe v. Fletcher* (1888) 21 Q. B. D. 11. The judgment against a married woman for ante-nuptial liabilities is personal and not proprietary; *Re Teasdale v. Brady* (1898) 18 P. R. 104; *Robinson v. Lynes* (1894) 2 Q. B. 577; but see s. 18 and *Downe v. Fletcher* (1888) 21 Q. B. D. 11, where the judgment was limited to separate estate.

Enforcing Judgment. If the property is in the hands of trustees, the judgment is enforced by a order charging the property, and appointing a receiver; *Lawson v. Laidlaw* (1878) 3 A. R. 77, 91, 92; *Whiteley v. Edwards* (1896) 2 Q. B. 48. If it is tangible property owned by the married woman, it may be reached in the ordinary way by a *fiery facias*; *Beemer v. Oliver* (1884) 10 A. R. 650, 661; *Moore v. Jackson* (1893) 22 S. C. R. 210, 235; C. R. Form 167. An inquiry may be directed to ascertain what the separate estate consists of, and appointing a person to receive it, until the debt and costs are paid; *Re Pearce and Waller* (1883) 24 Ch. D. 405; the plaintiff may be appointed receiver; *McGarry v. White* (1885) 16 L. R. 1r. 322. The trustees of any settlement may be ordered to produce it; *Bursill v. Tanner* (1885) 16 Q. B. D. 1; and the defendant may be examined as to the particulars of her separate property; *Aylesford v. Great Western Ry. Co.* (1892) 2 Q. B. 626. Where furniture is settled for the joint use of the husband and wife, with a power of appointment, there is no power to appoint a Receiver of the wife's interest therein; *Whittaker v. Cohen* (1893) 69 L. T. 451.

Remedies of Married Women. The Act of 1872 (s. 9) gave to the married woman the power to maintain actions for the protection of her separate estate against all persons whomsoever. In 1884 the present s. 15, which is taken from s. 12 of the English Act, was substituted for the section theretofore in force. An injunction restraining the husband from entering a house which is her separate property may be obtained; *Donnelly v. Donnelly* (1885) 9 O. R. 673; *Wood v. Wood* (1871) 19 W. R. 1049; *Symonds v. Hallett* (1883) 24 Ch. D. 346. Her own undertaking as to damages will be accepted; *Re Prynne* (1885) 53 L. T. 465; and it may be enforced by her husband; *Hunt v. Hunt* (1885) 54 L. J. Ch. 289. She may also maintain an action for trespass against any one who enters her own house against her will, though by the authority of the husband, and unconnected with the desire of the husband to live with her; *Weldon v. De Bathe* (1884) 14 Q. B. D. 339. Where a husband is sued for moneys lent out of separate estate, a distinct contract for payment must be

proved; *Re Miller* (1877) 1 A. R. 396; *Hopkins v. Hopkins* (1883) 7 O. R. 224; *Defresne v. Defresne* (1885) 10 O. R. 773; *Warner v. Murray* (1889) 16 S. C. R. 720; *Ex parte Horne, Re Horne* (1886) 54 L. T. 301. Income of separate estate received by the husband, and used for the joint purposes of the husband and wife, or even in the husband's business, does not constitute a debt of his to the wife; *Beresford v. Armagh* (1844) 13 Sim. 643; *Caton v. Rideout* (1849) 1 Mac. & G. 599; *Rice v. Rice* (1899) 31 O. R. 59, unless there is clear evidence that her husband received the income by way of loan; *Alexander v. Barnhill* (1888) 21 L. R. Ir. 511. Investments of income received by the husband with the wife's assent will belong to him; *Edwards v. Cheyne* (1888) 13 App. Cas. 385. A wife who has assented to the trustee of separate property paying the income to her husband, cannot maintain an action against the trustee; *Payne v. Little* (1858) 26 Beav. L. It makes no difference if the husband himself is the trustee; *Caton v. Rideout* (1849) 1 Mac. & G. 599, or that the wife is restrained from anticipation; *Rowley v. Unwin* (1855) 2 K. & J. 138; *Edwards v. Cheyne* (1888) 13 App. Cas. 385; or that the income remains unspent in the husband's hands; *Beresford v. Armagh* (1844) 13 Sim. 643. There is a great difference between the receipt of the income, and of the corpus. In the latter case the onus of proof of a gift by the wife to the husband is upon him, and must be clearly established, or else the husband will be held to be a trustee for the wife; *Alexander v. Barnhill* (1888) 21 L. R. Ir. 511; *Green v. Carlill* (1877) 4 Ch. D. 882; *Re Flamante, Wood v. Cook* (1889) 40 Ch. D. 461; *Re Balke* (1889) 60 L. T. 663; and the Statute of Limitations will be no defence if the money is unaccounted for; *Wassell v. Laggett* (1896) 1 Ch. 554; *Briggs v. Wilson* (1897) 24 A. R. 521; unless the husband could show that he received it by way of loan or can bring himself within s. 32 of the Trustee Act; *ante* pp. 393-4. An action by a wife is not maintainable against another woman, for the alienation of the husband's affections; such an action is not one for the protection or security of her separate property; *Lellis v. Lambert* (1897) 24 A. R. 653. She may, however, sue for personal injuries to herself, in cases in which, before the act, she would have had a right of action, to which action the husband was a necessary party; e.g. for libel; *Spahr v. Bean* (1889) 18 O. R. 70; for assault and libel; *Weldon v. Winslow* (1884), 13 Q. B. D. 784. The damages recovered will be her separate property; s. 3 (2). Even when the husband joins in an action for personal injuries to the wife, the damages awarded to her will be her separate estate; *Beasley v. Roney* (1891) 1 Q. B. 509.

Disputes between husband and wife. Under s. 19 disputes as to property between a husband and wife may be settled in a summary manner. A reference may be directed; *Phillips v. Phillips* (1888) 13 P. D. 220; but an order for delivery must be made by the Court or Judge; *Wood v. Wood* (1889) 14 P. D. 157. Money expended by husband or wife on the property of the other, will enure to the benefit of the owner of the property, unless expended under mistake, when a lien may be declared; *Neesom v. Clarkson* (1844) 4 Hare 97; *Till v. Till* (1887) 15 O. R. 133.

Statute of Limitations. When power was given to a married woman to maintain actions, she became discover, within the meaning of the Statute of Limitations; *Lowe v. Fox* (1885) 15 Q. B. D. 667; *Weldon v. Neal* (1884) 51 L. T. 289. She must, therefore, bring her action within the same time as a *feme sole*; *Re Laws, Laws v. Laws* (1881) 28 Gr. 382, but see *Carroll v. Fitzgerald* (1880) 5 A. R. 322. In actions against a married woman, the Court will act on the analogy of the Statute of Limitations, so that an action by a husband against his wife for money loaned, would be barred at the same time as an action against a stranger; *Re Hastings, Hallett v. Hastings* (1887) 35 Ch. D. 94.

Injunction. A married woman cannot be restrained by injunction, from disposing of her separate estate; *Robinson v. Pickering* (1881) 16 Ch. D. 660; *Merchants' Bank v. Bell* (1881) 29 C. r. 413.

Commitment to Gaol. A married woman may be committed to gaol, for refusal to attend for examination as a judgment debtor; *Metropolitan Loan & S. Co. v. Mara* (1880) 8 P. R. 355; *Pearson v. Essery* (1888) 12 P. R. 466; *Watson v. Ontario Supply Co.* (1890) 14 P. R. 96; *Re Teasdale v. Brady* (1898) 18 P. R. 104, but see *Re McLeod v. Emigh* (1888) 13 P. R. 450.

Death of wife. Upon the death of the married woman, the Court will administer her separate property; *Merchants' Bank v. Bell* (1881) 29 Gr. 413. The husband is liable for her debts, to the extent of property taken by him *jure mariti*; *Surman v. Wharton* (1891) 1 Q. B. 491. Where a husband, on marriage, renounces any claim to the property of the wife, he will not be entitled on intestacy, to administration thereof, or to any share therein; *Dorsey v. Dorsey* (1899) 30 O. R. 183.

CHAPTER 164.

An Act respecting Dower.

SHORT TITLE, s. 1.	EFFECT OF BAR OF DOWER IN MORTGAGES, ss. 7-10.
DOWER OUT OF EQUITABLE ESTATES, s. 2.	PROVISIONS FOR CONVEYING FREE FROM DOWER WHERE WIFE DISENTITLED OR A LUNATIC, ss. 11-17.
DOWER WHERE HUSBAND HAD A RIGHT OF ENTRY, s. 3.	REGISTRATION AND FORM OF ORDERS, ss. 18-21.
DOWER NOT RECOVERABLE OUT OF WILD LANDS, s. 4.	CERTAIN DEEDS TO HAVE THE EFFECT OF BARRING DOWER, s. 22.
DOWER IN CERTAIN MINING LANDS, s. 5.	
NO DOWER <i>ad ostium ecclesie</i> or <i>ex assensu patris</i> , s. 6.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Dower Act*," 59 V. Short title. c. 40, s. 1.

2. Where a husband dies beneficially entitled to any land for Dower out of an interest which does not entitle his widow to dower at equitable estates. common law, and such interest, whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled to dower out of such land. R. S. O. 1887, c. 133, s. 1.

3. Where a husband has been entitled to a right of entry or Dower where husband had a right of entry. action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced. R. S. O. 1887, c. 133, s. 2.

4. Dower shall not be recoverable out of any separate and Dower not recoverable out of land in state of nature when aliened. distinct lot, tract or parcel of land, which, at the time of the alienation by the husband or at the time of his death, if he died seised thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purposes of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the dowress under section

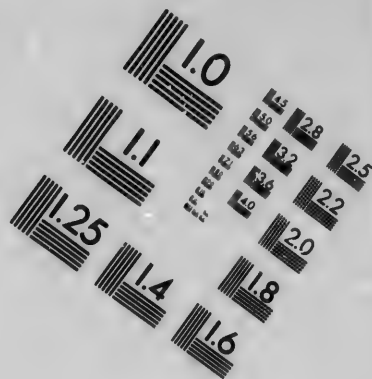
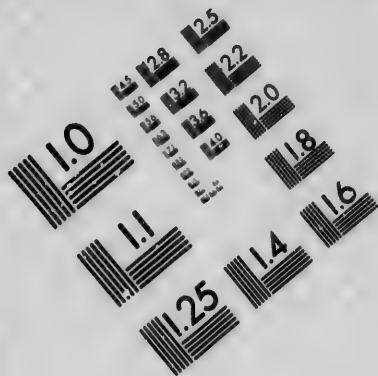
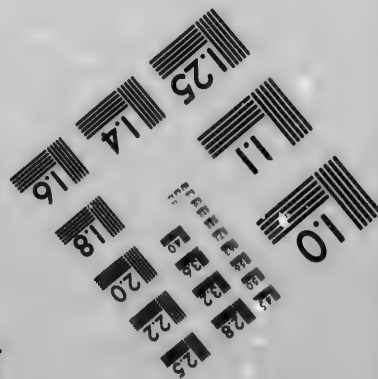
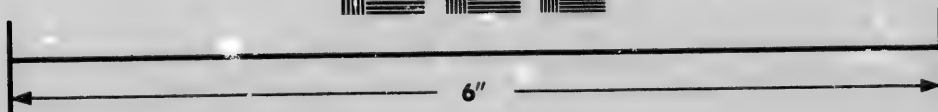
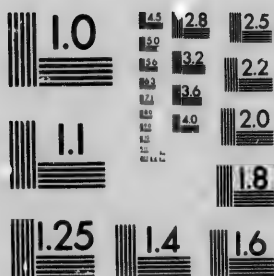


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c. 67.

9 of *The Dower Procedure Act*, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel. R. S. O. 1887, c. 133, s. 3.

Dower in land
patented as
Mining Land.

5. No dower shall be recoverable out of any land which has been heretofore or shall be hereafter granted by the Crown as mining land in case such land is on or after the 31st day of December, 1897, conveyed to the husband of the person claiming dower and such husband does not die entitled thereto. 60 V. c. 15, s. 6.

Certain dower
abolished.

6. No widow shall be entitled to dower *ad ostium ecclesie*, or dower *ex assensu patris*. R. S. O. 1887, c. 133, s. 4.

Effect of bar
of dower in
mortgages.

7.—(1) No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument. R. S. O. 1887, c. 133, s. 5.

Wife entitled
to dower
in surplus of
purchase
money arising
from sale
under mort-
gage.

(2) In the event of a sale of the land comprised in such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold. R. S. O. 1887, c. 133, s. 6.

[As to right to dower under *The Land Titles Act* where land acquired subject to a charge, or where owner after charging land marries, see *Cap. 138, s. 50*.]

Where made
on or after
16th April,
1895.

8.—(1) In the event of the land, comprised in any mortgage or other instrument executed on or after the 16th day of April, 1895, by which the mortgagor's wife barred her dower, being sold under any power of sale contained in the mortgage, or under any legal process, the wife shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land had the same not been sold; and the amount to which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only.

(2) This section shall not apply where the mortgage is for the unpaid purchase money of the land; and nothing in this section contained shall be construed to affect, by implication or

otherwise, any question in the case of mortgages executed before the said 16th day of April, 1895. 58 V. c. 25, s. 3.

9.—(1) A mortgagee or other person holding any money out of which a married woman shall be dowable under the preceding two sections of this Act may pay the same into the High Court to the credit of such married woman and the other persons interested therein. Payment of money into court.

(2) The High Court or a Judge thereof, may on a summary application by petition or motion, make such order for securing the right of dower of any married woman, in any money out of which she shall be dowable, as may be just. R. S. O. 1887, c. 123, s. 7. Order for securing right of dower.

10. A widow shall not be entitled to take her interest in money under sections 7 and 8 of this Act, and in addition thereto a share of the money as personal estate. R. S. O. 1887, c. 133, s. 8. Widow's election.

11. Where a person, whose wife is a lunatic and confined as such in a public lunatic asylum in this Province, has heretofore while his wife was so confined, become the owner of land or hereafter while she is so confined becomes the owner of land, such person may sell and convey or mortgage such land, freed and discharged of any claim of his said wife for dower therein, but no such conveyance or mortgage shall be made after the discharge of the said wife from the said asylum. 59 V. c. 40, s. 5. Where wife is a lunatic confined in an asylum and husband during such confinement acquires land.

12.—(1) Where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony, and such owner is desirous of selling or mortgaging the land free from dower, he may apply to a Judge of the High Court, and, if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon notice (to be served personally unless the Judge otherwise directs), dispense with the concurrence of the wife for the purpose of barring her dower, and he shall (unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower) ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best; and thereupon a conveyance or mortgage by the husband, expressed to be free from his wife's dower, shall, subject to any terms mentioned in the order, be sufficient to bar her right thereto, as if she had duly executed a deed jointly with her husband for that purpose. Application in order to mortgage or sell free from dower, where wife living apart from her husband.

(2) This section shall extend to any case in which an agreement for sale had been made, and a conveyance executed

by the husband before the 5th day of March, 1880, and part of the purchase money retained by the purchaser on account of dower or an indemnity given against such dower. R. S. O. 1887, c. 133, s. 9.

Application where wife is a lunatic confined in an asylum.

Dower to be ascertained and to be charge on land or secured for wife's benefit.

13.—(1) Where an owner of land whose wife is a lunatic, or of unsound mind, and confined as such in a lunatic asylum, is desirous of selling or mortgaging the land free from dower, he may apply in that behalf to the Judge of the County Court of the county in which he resides or to a Judge of the High Court, and if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon such notice as he may deem requisite, dispense with the concurrence of the wife for the purpose of barring her dower, and he shall also ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best, and thereupon a conveyance or mortgage by the husband, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto, as if she were of sound mind, and had duly executed a deed jointly with her husband for that purpose.

(2) On every such application the Judge shall be entitled to his own use to a fee of \$5, and no other fee or charge of any kind shall be payable in respect thereof.

(3) This section shall apply to any case in which an agreement for sale has been made and a conveyance has been executed by the husband, and any part of the purchase money has been retained by the purchaser on account of dower, and to any case in which an indemnity has been given against the dower of the wife. R. S. O. 1887, c. 133, s. 10.

Application where wife is lunatic but not confined in an asylum.

14.—(1) In case the gaol surgeon of any county or district in which a married woman resides, and another medical practitioner to be named by the Judge, shall each certify (Form A) that he has personally examined such married woman and that he is of opinion that she is insane, and the Judge of the County Court of the county in which such married woman resides, or a Judge of the High Court, also certifies (Form B) that he has personally examined such married woman, and that from such examination and from the evidence adduced before him, if such Judge thinks it expedient to hear evidence, he is of opinion that such married woman is insane, the said Judge may make the like order as by the preceding section of this Act, is authorized in the case of a married woman of unsound mind who is confined in an asylum for the insane.

(2) The examination and certificates required by this section must all be made and granted within a period of one month,

or such certificates shall not be acted upon by the said Judge, and the application shall not be entertained unless it is made within one month of the day upon which the last of such examinations took place. R. S. O. 1887, c. 133, s. 11.

15. In case a Judge makes an order under any of the preceding three sections of this Act, with reference to any parcel of land, he may afterwards make orders in respect of other sales or mortgages, either on the like evidence as is required for the first application, or on any other evidence which may satisfy him, of the continued insanity of the married woman. R. S. O. 1887, c. 133, s. 12.

Subsequent orders by judge as to other sales or mortgages.

16. Sections 12, 13, 14 and 15 of this Act shall apply to any case where any person owns, or has the right to sell or mortgage (whether as trustee or otherwise), land which is subject to dower, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the dowress. R. S. O. 1887, c. 133, s. 13.

Application of ss. 12-15.

17.—(1) Where the wife of an owner of land has been living apart from her husband for five years or more, and the husband sells and conveys, or has sold and conveyed the land, or mortgages, or has mortgaged the same, the wife not joining in the conveyance or mortgage, and the purchaser or mortgagee having no notice that the grantor or mortgagor had a wife living at the time, such purchaser or mortgagee, may apply to a Judge of the High Court and have the same relief, or to the same effect, and subject to the same conditions, and by the same proceedings, as provided for a husband of a lunatic wife under this Act. 59 V. c. 40, s. 2.

Where wife of vendor or mortgagor has been living apart from husband for five years.

(2) The rule and practice shall be the same where the husband is living with or recognizing another woman as his wife, the purchaser or mortgagee having no notice of her not being his wife and no notice that the grantor or mortgagor had a rightful wife with whom he is not living. 59 V. c. 40, s. 3.

Where husband is living with another woman as his wife.

(3) Any person claiming under the grantee or mortgagee shall be entitled to apply in like manner and obtain like relief on the foundation of the right of the said grantee or mortgagee in that behalf, or of the applicant's own interest having been acquired by purchase for value in good faith without notice of the owner aforesaid having had a wife at the time of the conveyance or mortgage, and such owner may apply in like manner and have like relief. 59 V. c. 40, s. 4.

Relief of persons claiming under grantee or mortgagee.

18. The order may be in duplicate or in as many parts as are necessary, and shall be signed by the Judge, and may be registered in the registry office of the registry division wherein the lands to which the same relates are situate, upon its production and deposit, without any proof thereof; and

Registration of order.

such registration may take place either before or after the execution of the deed made in pursuance of such order. R. S. O. 1887, c. 133, s. 14.

Order may be indorsed on deed.

19. The order may, if desired, be indorsed or written upon the deed to which the same relates, in which case it shall be registered as part of the deed. R. S. O. 1887, c. 133, s. 15.

Fee for registration of order.

20. For the registration of the order including all necessary entries and certificates, the registrar shall be entitled to a fee of \$1, unless the order is indorsed or written upon the deed in which case no fee shall be payable in respect of the registration thereof. R. S. O. 1887, c. 133, s. 16.

Description of land in order when order indorsed on deed.

21. If the order is indorsed or written upon the deed to be made in pursuance thereof, the real estate to which the same relates may be described in the order by reference to the description contained in the deed. R. S. O. 1887, c. 133, s. 17.

Case where action not maintainable.

22.—(1). No action of dower shall be maintained, in case the dowress has joined in a deed to convey the land, or to release her dower therein, to a purchaser for value, though the acknowledgment required by law at the time may not have been made or taken, or though there may have been an informality in the making, taking or certifying such acknowledgment. R. S. O. 1887, c. 56, s. 2.

Deeds barring dower before 2nd March, 1877, confirmed.

(2) Nor shall an action of dower be maintained where a husband has before the 2nd day of March, 1877, duly conveyed land of which he was owner, and his wife has before the said day executed a deed or conveyance for the purpose of barring her dower, notwithstanding her husband is not a party to such deed or conveyance, and the said deed or conveyance shall be taken and adjudged to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwithstanding the absence or want of a certificate touching her consent to be barred of her dower, and notwithstanding any irregularity, informality, or defect in the certificate (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act on or before the said day in force, respecting the barring of dower. R. S. O. 1887, c. 133, s. 18.

Wife joining in deed without releasing dower.

(3) Nor shall an action of dower be maintained where a wife on or after the 16th day of April, 1895, has joined or hereafter joins in a deed purporting to convey the land, or has signed or signs, otherwise than as a witness, a deed by which her husband conveys or purports to convey the land, notwithstanding that the deed in either case contains no words purporting to convey or release her dower or other estate or interest in the land. 58 V. c. 25, s. 1.

Deeds executed before 16th April, 1895.

(4) Nor shall an action of dower be maintained where the wife died prior to the said 16th day of April, 1895, join in or

sign any such deed; but this subsection is not to be construed as prejudicing or affecting in any way the rights of third persons claiming the land or some interest therein under a subsequent deed or mortgage executed by the wife prior to the said 16th day of April, 1895, and containing a conveyance or release of her dower or other estate or interest. 58 V. c. 25, s. 2.

[For right of married women to convey or release dower, see Chap. 165.]

FORM A.

(Section 14.)

CERTIFICATE OF MEDICAL PRACTITIONER.

I, the undersigned (here set forth the qualification or degree of the person certifying: for example, "Licentiate of the Medical Board," "M.D. of the University of Toronto," etc.)
 legally qualified Medical Practitioner, residing and practising at
 in the County of _____ do hereby certify that I, on the
 day of _____ A.D. 18____, at _____
 in the County of _____ separately from any other Medical
 Practitioner, personally examined A. B. of the Township of _____
 in the County of _____ wife of C. B., of the Township of _____
 in the County of _____ and I further certify that the said
 A. B. is insane and that I have formed this opinion upon the following
 grounds namely: (here state the facts upon which the Certificate is based).

Signed this _____ day of _____
 A.D. 18____, at _____ in the County of _____

R. S. O. 1887, c. 133, Form A.

FORM B.

(Section 14.)

CERTIFICATE OF JUDGE.

Province of Ontario. }
 County of _____ }
 I, the undersigned, E. F.
 Judge of the County Court of the County of _____
 do hereby certify that I on the _____ day of _____
 A.D. 18____, personally examined A. B., of the _____ of _____
 in the County of _____ wife of C. B. of the _____ of _____
 in the County of _____ and I do hereby further
 certify that from such personal examination (and from the evidence of
 G. H. and J. K. adduced before me, if evidence has been taken by the judge)
 I am of opinion that the said A. B. is insane.
 Signed this _____ day of _____ A.D. 18____, at _____
 in the County of _____

R. S. O. 1887, c. 133, Form B.

NOTES.

Objects of Act. The principal objects of the act are:—

- (a) To give dower out of equitable estates.
- (b) To dispense with the necessity of actual seisin.
- (c) To take away the right to dower from mining lands.
- (d) To preserve the right of the wife of a mortgagor, who has barred her dower, and to define her rights.
- (e) To enable lands to be sold free from dower.

Common Law Dower. Dower, at common law, is an estate for life, to which a wife is entitled after the decease of her husband, in the third part of every estate of inheritance, of which her husband was solely seised, at any time during the coverture; Co. Litt. 32 a.

Seisin Necessary. It is necessary (except where the dower is out of an equitable estate) that the husband should be seised at some time during the coverture. A seisin in law was sufficient; Litt s. 681. But wherever actual entry was necessary to give effect to a conveyance, e. g. an exchange at common law, (see ante p. 589) the wife was not entitled to dower, unless the husband had entered; Cameron on Dower 6, 122. A right of entry is now sufficient; s. 3. As a joint tenant is not seised in severalty, his widow is not entitled to dower; Haskill v. Fraser (1862) 12 C. P. 383. Where a husband dies entitled to a reversion expectant on a life estate, there is no dower; Leitch v. McLellan (1883) 2 O. R. 587. Where a purchaser of land subject to a mortgage, paid off and obtained a discharge of the mortgage in favor of his vendor, and on the same day received his conveyance and gave a mortgage back, and all three documents were subsequently registered in the foregoing order, it was held that all that passed by the conveyance and mortgage, was the equity of redemption, that by the registration of the discharge the legal estate became vested in the vendor-mortgagee, and that the purchaser was never even momentarily seised, so as to entitle his wife to dower; Re Luckhardt (1898) 29 O. R. 111; see 34 C. L. J. 399.

Equitable Estates. Where the husband has never been seised during the coverture of a legal estate in the land, his widow is not entitled to dower, unless he dies beneficially entitled; s. 2. If at the time of the marriage, the land is subject to a mortgage in fee, and so continues during the coverture, dower will be allowed only out of the equity of redemption; Dobbin v. Dobbin (1886) 11 O. R. 534, and if the husband's title passes from him before his death, his widow is not entitled to dower; Dixon v. Saville (1783) 1 Bro. C. C. 326; and the rule is the same if the husband, during coverture, acquires an equity of redemption and parts with it; Gardner v. Brown (1890) 19 O. R. 202; or the land is sold under the mortgage; Re Luckhardt (1898) 29 O. R. 111. But she is entitled to dower if the husband dies beneficially entitled; s. 2. Dower in equitable estates, attaches at the time of the husband's death, and not before; Re Croskery (1888) 16 O. R. 207, 213. The widow of a purchaser of mortgaged lands, who dies beneficially entitled, has dower out of the surplus; Thorpe v. Richards (1869) 15 Gr. 403. The widow of a man who has given an absolute deed with a right of redemption has an equitable right to dower; McIntosh v. Wood (1868) 15 Gr. 92.

Mortgaged Lands. So soon as the husband becomes seised, an inchoate right of dower attaches. The fact that he immediately gives back a mortgage for unpaid purchase money, will not prevent the wife's right from attaching; Potts v. Myers (1857) 14 U. C. R. 499; Smith v. Norton (1861) 7 L. J. 263; Lynch v. O'Hara (1851) 6 C. P. 259. But as between the widow and the mortgagee, he would probably be entitled to priority, by virtue of his vendor's lien for unpaid purchase money; Nevitt v. McMurray (1886) 14 A. R. 126.

Where a wife has (since 10th March, 1879,) Martindale v. Clarkson (1880) 6 A. R. 1; Re Howish (1889) 17 O. R. 454) joined in a mortgage to bar dower, the dower is not barred to any greater extent than is necessary to give full effect to the mortgage; s. 7. The section adopts the decisions of the Ontario

Courts in Sheppard v. Sheppard (1867) 14 Gr. 174; Forest v. Laycock (1871) 18 Gr. 611; which, however, were at variance with the subsequent decisions in Dawson v. Bank of Whitehaven (1877) 6 Ch. D. 218; Black v. Fountain (1876) 23 Gr. 174; and Fleury v. Pringle (1878) 26 Gr. 67.

The husband cannot defeat the right by alienation, i. e. he need not die beneficially entitled; Re Croskery (1888) 16 O. R. 207; Martindale v. Clarkson (1880) 6 A. R. 1, 6; and the right may form a valuable consideration for a conveyance to the wife; Beavis v. McGuire (1882) 7 A. R. 704; Morris v. Martin (1896) 19 O. R. 504, but see Calvert v. Black (1880) 8 P. R. 255; Smart v. Sorenson (1885) 9 O. R. 640.

The right is preserved to the extent of the surplus, in the event of the property being sold in the lifetime of the mortgagor; s. 7 (2). Without the act the widow became entitled to dower out of the equity of redemption remaining in the husband at his death. If his estate was solvent, she was, as against his representatives, entitled to have the mortgage paid; Sheppard v. Sheppard (1867) 14 Gr. 174, but her right did not extend to the exoneration of the estate from the mortgage, out of either the personal estate or other real estate, left by her insolvent husband at his death; White v. Bastedo (1869) 15 Gr. 546; Baker v. Dawbarn (1872) 19 Gr. 113. She was, however, to the extent of the equity of redemption, entitled to priority over the creditors; Re Morris (1872) 8 C. L. J. 284. The same principles would probably now be applied in the administration of the estate of a deceased mortgagor.

Extent of Right. The extent of the widow's right, is to be measured by the purpose for which the mortgage is given. If it is given for unpaid purchase money, dower is allowable only out of the surplus; Campbell v. Royal Canadian Bank (1872) 19 Gr. 334; Pratt v. Bunnell (1891) 21 O. R. 1; Re Hopkins, Barnes v. Hopkins (1879) 8 P. R. 160. But if it is made to secure a loan, the widow is entitled to dower out of the surplus, computed on what would be the full value of the land if unencumbered; Doan v. Davis (1876) 23 Gr. 207; Re Robertson, Robertson v. Robertson (1877) 24 Gr. 442; 25 Gr. 276, 486; Re Hague, Trader's Bank v. Murray (1887) 14 O. R. 660; Re Croskery (1888) 16 O. R. 207; Gemmill v. Nelligan (1895) 26 O. R. 7; 30 Martindale v. Clarkson (1880) 6 A. R. 1, 6.

Section 5, enacted in 1895, must be deemed to merely declare the law as it theretofore existed, according to the cases just cited.

It is advisable to pay the surplus into Court; Re Croskery (1888) 16 O. R. 207. If it is ascertained that the wife has no inchoate right, it may be paid out to the husband or to his creditors or other persons having charges thereon; Re Luckhardt (1898) 29 O. R. 111. Nothing can be paid out to the wife during the husband's life, as she is not entitled to dower unless she survives him.

Right of Redemption. The wife of a mortgagor who has joined in a mortgage to bar her dower, has the right to redeem the mortgage in her husband's lifetime; Blong v. Fitzgerald (1893) 15 P. R. 467; Ayerst v. McClean (1890) 14 P. R. 15, but see Casner v. Haight (1884) 6 O. R. 451.

Contribution to Encumbrance. When a widow is dowerable only out of an equity of redemption, she must, if she seeks more than dower in the value of the estate, after deducting the amount of the mortgage, contribute ratably to the payment of the encumbrance; Dobbin v. Dobbin (1886) 11 O. R. 534. The yearly value of the dower is ascertained by deducting one-third of the yearly interest on the mortgage, from one-third of the rents and profits; *ib.*

Arrears of Equitable Dower. A widow entitled to equitable dower, is not entitled to arrears as of right, but only upon the equitable consideration of the Court, which will be exercised in her favor, and not requiring her to account for all the rents received, and payable by her. She should be allowed one-third of what remains after the rents have been properly applied, in meeting necessary outlay and expenditure, in respect of the land and the buildings thereon; Re Percy, Stewart v. Percy (1886) 11 O. R. 374.

Dower Abolished in What Cases. Dower is abolished in land which was in a state of nature when aliened by the husband or at the time of his death, if he died seized; s. 4. Dower *ad ostium ecclesiae* i. e. where a tenant in fee, openly at the church door, after affiancing and troth plighted, endowed his wife with the whole or some part of his lands and Dower *ex assensu patris*, where in the same circumstances, he endowed his wife with part of his father's land with the latter's consent, are abolished; s. 6.

Lands dedicated for a street or public highway, are not subject to any claim for dower by the widow of the person by whom they were dedicated; R. S. O. c. 223, s. 602.

Bar by Contract. Where the wife's trustees in a separation deed, covenanted that she would release her dower in any lands which her husband might thereafter acquire, she was debarred from claiming dower; *Eves v. Booth* (1899) 30 O. R. 689; see also *Toronto General Trusts Co. v. Quin* (1894) 25 O. R. 250.

Conveyance free from Dower. In applications to be allowed to convey free from dower, great care should be taken to ascertain that the case comes within the provisions of the act, and except under very exceptional circumstances, an order should not be made *ex parte*; *Re King* (1899) 18 P. R. 365. The Judge making such an order acts as *persona designata*, and there is no appeal; *ib.* On the sale of an infants' lands by the Court, the dower of his lunatic mother, who was confined in an asylum, was barred by order; *Re Colthart* (1882) 9 P. R. 356. In applying s. 17. *Hoig v. Gordon* (1870) 17 Gr. 599 may be referred to. There a wife, who concealed from the public her relation to her husband and allowed him to live with another woman as his wife, was restrained from claiming dower as against a purchaser in good faith and without notice.

Deed Not Containing Bar of Dower. In *Bellamy v. Badgerow* (1893) 24 O. R. 278, the wife had without any consideration to her, joined in a mortgage, but the mortgage did not contain the formal bar of dower. The Court refused to reform the mortgage by inserting a bar of dower, on the ground that the deed was voluntary as to the wife. S. 22 was passed to provide for cases of similar mistakes after 16th April, 1895.

CHAPTER 165.

An Act to facilitate the conveyance of Real Estate by Married Women.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:—

1. This Act may be cited as "*The Married Woman's Real Estate Act.*" R. S. O. 1887, c. 134, s. 1. Short title.

2. In the construction of this Act

1. "Real estate" shall extend to lands, chattels real, rents and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof; to any estate, right or interest therein, whether legal or equitable; to any charge, lien or incumbrance in, upon, or affecting real estate, to money subject to be invested in real estate; and to any interest, charge, lien or incumbrance in, upon, or affecting such money as aforesaid. R. S. O. 1887, c. 134, s. 2 (1). Interpretation
"Real estate."

2. "Judge" shall mean a Judge of the High Court. R. S. O. 1887, c. 127, s. 2 (2); 51 V. c. 27, s. 1. "Judge."

3. Every married woman being of the full age of twenty-one years, may, by deed, convey her real estate, and convey release, surrender, disclaim, or extinguish any interest therein, and may also, by deed, release or extinguish any power which may be vested in, or limited or reserved to her in regard to real estate, and may also, by deed, bar her dower, and any right or inchoate right of dower in any real estate, and may also, by deed, appoint an attorney or attorneys for the purposes aforesaid and every of them as fully and effectually as she could do if she were a *feme sole*. R. S. O. 1887, c. 134, s. 3. A married woman may convey real estate, and release or extinguish powers and appoint an attorney as a *feme sole*.

4. Where a conveyance to a purchaser for value purporting to bar or release dower in any land was before the 5th day of May, 1894, executed by a wife entitled to an inchoate right of dower, and such wife was at the time of such execution under age, but the purchaser had at or before the execution of the conveyance and payment of the purchase money no notice that she was under age, the conveyance shall be effectual to bar her dower, unless prior to the 1st day of January, 1899, she brings an action for dower, or gives to the owner of the land written notice of her claim to dower by reason of her minority as aforesaid, but nothing in this section contained shall affect any conveyance which prior to the 31st day of December, 1897, became valid under the Act passed in the Wife purporting to bar dower prior to 5th May, 1894, when under age.

59 V. c. 40. fifty-ninth year of Her Majesty's reign, entitled *An Act relating to Dower in Certain Cases*. 60 V. c. 3, s. 3; c. 15, Sched. A (80).

Married women under twenty-one barring dower.

5. Any married woman, under twenty-one years of age, of sound mind, might on and since the 5th day of May, 1894, and hereafter may bar her dower in any land or hereditaments by joining with her husband in a deed or conveyance thereof to a purchaser for value, or to a mortgagee, in which deed or conveyance a release or bar of her dower is contained, and she may in like manner release her dower to any person to whom such lands or hereditaments have been previously conveyed. 57 V. c. 41, s. 1.

Defective conveyances to be valid.

6.—(1) Every conveyance before the 29th day of March, 1873, executed by a married woman of or affecting her real estate, in which her husband was a party, is, and shall be taken and adjudged to be valid and effectual to have passed the estate which such conveyance professed to pass of such married woman in the said real estate, notwithstanding the absence or want of a certificate of her consent to convey the same; and notwithstanding any irregularity, informality, or defect in the certificate (if any); and notwithstanding that such conveyance may not have been executed, acknowledged or certified as required by any Act at or before the said date in force respecting the conveyance of real estate by married women, or may not have been executed by the married woman in presence of her husband, or on the same day on which or at the same place at which such conveyance was executed by her husband. R. S. O. 1887, c. 134, s. 4.

Certain titles not to be prejudiced.

(2) Nothing in this section contained shall render valid any conveyance to the prejudice of any title, subsequently to the execution of such conveyance and before the said date acquired from the married woman by deed duly executed and certified as by law required, unless the actual possession or enjoyment of the real estate conveyed or intended to be conveyed by the prior conveyance has been had at any time subsequent thereto by the grantee therein, or those claiming by, from or under him, and he or they have been in such actual possession, or enjoyment, continuously for the period of three years before the said date, and he or they were at the said date in the actual possession or enjoyment thereof; and nothing in this Act contained shall render valid any conveyance from the married woman which was not executed in good faith, or any conveyance of land of which the married woman or those claiming under her, is or are in the actual possession or enjoyment contrary to the terms of such conveyance. R. S. O. 1887, c. 134, s. 5.

Deeds made by married women without their husbands before 29th March, 1873.

7.—(1) Every conveyance before 29th March, 1873, executed by a married woman, of or affecting her real estate shall, notwithstanding her husband did not join therein, be taken and adjudged to be, and to have been valid and effectual to have

passed the estate which such conveyance professed to pass, of such married woman in the said real estate. 59 V. c. 41, s. 1.

(2) Nothing in this section contained shall render valid any such conveyance as aforesaid to the prejudice of any title subsequently to the execution of such conveyance and before the 7th day of April, 1896, acquired from the married woman by deed duly executed and certified as by law required, unless the actual possession or enjoyment of the real estate conveyed or intended to be conveyed by the prior conveyance shall have been had at any time subsequent thereto by the grantee therein, or those claiming, by, from, or under him, and he or they shall have been in such actual possession or enjoyment continuously for the period of three years before the said 7th day of April, and he or they was or were at such date in the actual possession or enjoyment thereof; and nothing in this Act contained shall render valid any conveyance from the married woman which was not executed in good faith, or any conveyance of land of which the married woman or those claiming under her, is or are in the actual possession or enjoyment contrary to the terms of such conveyance, nor shall this section affect any litigation pending on the 7th day of April, 1896. 59 V. c. 41, s. 2.

Certain titles not to be prejudiced.

8.—(1) Every conveyance made on or after the 29th day of March, 1873, by a married woman of or affecting her real estate which her husband signed or executed, shall be taken and adjudged to be valid and effectual, to have passed or to pass the estate which such conveyance professed or shall profess to pass of such married woman in said real estate. R. S. O. 1887, c. 134, s. 6.

Validity of conveyances made since March 29th, 1873.

(2) Nothing in this section contained shall render valid any conveyance to the prejudice of any title lawfully acquired from any married woman prior to the 23rd day of April, 1887, nor render valid any conveyance from the married woman not executed in good faith or any conveyance of any land, of which the married woman, or those claiming under her was or were on the said day in actual possession or enjoyment contrary to the terms of such conveyance, or affect any action or proceeding then pending. R. S. O. 1887, c. 134, s. 7.

Certain titles not to be prejudiced.

(3) This section shall not be deemed to declare or imply any construction of any statute passed prior to the 23rd day of April, 1887, as affecting the matters mentioned in this section, or any other matters relating to the rights or powers of married women. R. S. O. 1887, c. 134, s. 8.

This section not to affect construction of any statute.

9.—(1) In any case where a husband is entitled to tenancy by the curtesy in the real estate of his wife, and in any case where a married woman is unable to give a valid deed of her real estate without her husband joining therein, if the husband of a married woman is in consequence of being a lunatic, idiot

Judge may dispense with concurrence of husband in certain cases.

or of unsound mind (and whether he has been found such by inquisition or not), or is from any other cause incapable of executing a deed or conveyance, or if his residence is not known, or he is in prison, or is living apart from his wife by mutual consent, or under circumstances which entitle her to alimony, or if he has deserted her, or if there is in the opinion of the Judge any other cause for so doing, a Judge may, by an order to be made by him in a summary way upon the application of the wife—upon such evidence as to him seems meet, and upon such notice to the husband as he deems requisite, dispense with the execution of the deed or conveyance by or concurrence of the husband therein in any deed or conveyance of the real estate of his wife and enable the wife effectually to convey such real estate without such execution by or concurrence of the husband, and free from any estate of the husband by the curtesy, and all acts or deeds done or executed by the wife, in pursuance of such order in regard to her real estate shall be done, executed, or made by her in the same manner, and with the same effect as if she were a *feme sole*, and when so done, executed, or made by her shall be as good, valid and effectual as they would have been if the husband had become a party to and executed the same. Where the residence of the husband is not known notice to him shall not be necessary. 51 V. c. 21, s. 2 (9).

Right of married women to convey real property not affected.

(2) Nothing in this section contained shall be taken or construed as implying that a married woman may not, without and irrespective of the provisions of this section validly execute and make any deed, transfer or conveyance of her real estate, or of any right or interest therein, in all respects as if she were a *feme sole*. 51 V. c. 21, s. 3.

order 10. The order may be in the form following, or to the like effect :—

“THE MARRIED WOMAN’S REAL ESTATE ACT.”

Upon application of *A. B.*, of _____ the wife of *C. B.*,
(or formerly of, etc.) I, _____ one of the Judges of the
High Court of Justice for Ontario (or as the case may be), do, pursuant to
“*The Married Woman’s Real Estate Act*,” order that the said *A. B.* may,
in the same manner, and with the same effect, as if she were a *feme sole*,
and free from any estate of her husband by the curtesy, bargain, sell, and
convey all or any part of her estate, title, and interest of, in, to or out of
all and singular (*describe the premises*).

Dated this _____

day of _____

A. D.

(Signature of Judge.)

51 V. c. 21, s. 2 (10).

Order may be registered.

11. The order may be in duplicate or in as many parts as are necessary, and shall be signed by the Judge, and may be

registered in the registry office of the registry division wherein the lands to which the same relates are situate, upon its production and deposit, without any proof thereof; and such registration may take place either before or after the execution of the deed made in pursuance of such order. 51 V. c. 21, s. 2 (11).

12. The order may, if desired, be indorsed or written upon the deed to which the same relates, in which case it shall be registered as part of the deed, and the real estate to which the order relates may be described therein by reference to the description contained in the deed. 51 V. c. 21, s. 2 (12, 15).

Order may be written on deed.

Description of property where order written on deed.

13. The affidavits and papers upon which the order is obtained shall be filed with the Clerk in Chambers and shall be transmitted by him to the Central Office. 51 V. c. 21, s. 2 (16) part.

Filing of papers on application.

14. For every such order including every duplicate or other part thereof, the Judge shall be entitled for his own use to a fee of \$2; but no other fee or charge of any kind, either to the clerk or otherwise, shall be payable in respect thereof, except that for filing the affidavits and papers the Clerk shall charge the same fees as are chargeable for filing papers in other cases; the fees for filings shall be paid in law stamps. 51 V. c. 21, s. 2 (14), (16 part); 60 V. c. 3, s. 3.

Judge's fee for order.

15. For the registration of such order, including all necessary entries and certificates, the registrar shall be entitled to a fee of \$1, unless the order is indorsed or written upon the deed, in which case no fee shall be payable in respect of the registration thereof. 51 V. c. 21, s. 2 (13).

Fee for registration of order.

NOTES.

Husband's Concurrence Unnecessary. Since 1st July, 1884, a married woman has been capable of transferring her own interest in real estate, and to bar her dower, and to appoint an attorney for either of said purposes, by deed, to which her husband was not a party; 47 V. c. 18 s. 22; *Moore v. Jackson* (1893) 22 S. C. R. 210, 223, 235.

Before 29th March, 1873, a married woman could convey her real estate only by deed, executed jointly with her husband, and acknowledged and certified as directed by the Statutes then in force; 1 W. IV c. 2; C. S. U. C. c. 85. The fact that a husband signed a deed, to which, however, he was no party, did not give it validity, it was wholly inoperative; *Doe d. Bradt v. Hodgkins* (1832) 2 O. S. 213; *Foster v. Beall* (1868) 15 Gr. 244. Joint execution did not necessarily mean that the husband must execute the deed in his wife's presence; *Burns v. McAdam* (1865) 24 U. C. R. 449; *Monk v. Farlinger* (1866) 17 C. P. 41.

By 35 Vict. c. 18, the acknowledgment and certificate were dispensed with for the future, and, subject to certain specified exceptions, all past conveyances in which the husband had joined were made valid, notwithstanding the absence of, or any defect in the examination or certificate.

That act also contained provisions somewhat similar in language to ss. 9-15, authorizing a Judge to dispense with the concurrence of the husband in certain cases. No power was given to deprive the husband by order, of any estate by the curtesy in the lands until 1888; 51 Vict. c. 21. Care had to be taken, where a husband joined in a conveyance, to expressly convey his interest, for if the deed merely showed that the husband joined for conformity, and to manifest his assent, his interest would not pass; *Doe d. McDonald v. Twigg* (1848) 5 U. C. R. 167. The same care must still be taken when the husband is tenant by the curtesy initiate.

The act of 1872 did not authorize a conveyance by a married woman to her husband; *Ogden v. McArthur* (1875) 36 U. C. R. 246; although the same might operate as a declaration of trust if it were separate estate; *Sanders v. Malsburg* (1882) 1 O. R. 178.

Bar of Dower. Until 5th May, 1894, an infant married woman could not execute an effectual bar of dower. Dower can, for the future, only be claimed by such married woman, as against purchasers without notice of her minority, where before 1st January 1899, she either commenced an action of dower, or gave written notice of her claim; s. 4.

Detective Conveyances. Various Statutes have from time to time been passed to cure defects in conveyances by married women. See 2 Vict. c. 6; *McNally v. Church* (1867) 27 U. C. R. 103; 22 Vict. c. 35; and C. S. U. C. c. 85; *Mark v. Farlinger* (1866) 17 C. P. 41; *Commercial Bank v. Smith* (1867) 18 C. P. 214; 36 V. c. 18, s. 12, and R. S. O. (1877) c. 127, s. 13, which extended to the absence of or irregularities in the certificate or in the execution of conveyances before 29th March, 1873; 59 V. c. 41, s. 1 (s. 7) which extends to conveyances before 29th March, 1873, in which the husband did not join and 50 Vict. c. 7, s. 23, R. S. O. (1887) c. 134, s. 6 (s. 8) which extended to conveyances made on or after 29th March, 1873, which the husband signed or executed. The only case omitted is a conveyance made on or after 29th March, 1873, which the husband did not sign or execute.

Exceptions. The act, 22 Vict. c. 35, s. 5, contained certain exceptions in favor of (1) persons who have acquired a valid deed from the married woman; (2) the married woman herself, and those claiming under her when (a) the conveyance was not executed in good faith or (b) she or they had been in the actual possession or enjoyment of the land, notwithstanding the conveyance. The subsequent acts contain provisions substantially similar, but the title of the grantee under the invalid deed is preserved, as against a subsequent grantee, if he or those claiming under him have been in actual possession for three years, before and up to the time of the validating act. The principle of the exceptions is to give legal validity to those deeds which, though invalid for want of compliance with the law respecting conveyances by married women.

men, have nevertheless been regarded and acted upon, as if they were valid by the parties who made them; but to leave the defects uncured, when the understanding of the parties themselves was that the deeds were inoperative; per Patterson J. A., *Elliott v. Brown* (1885) 11 A. R. 228, 230. The "actual possession and enjoyment" required is not the pedal possession necessary for a trespasser to acquire a title under the Statute of Limitations; actual possession is not necessary if there is actual enjoyment; the open and notorious exercising of acts of ownership over the lands, by preventing trespasses thereon or by appropriating timber on wild land, is sufficient; *Elliott v. Brown* (1885) 11 A. R. 228; but see *Armour on Titles*, 2nd Ed. 320-325. Litigation which was pending on 7th April, 1896, prevents a defect in a conveyance executed before 29th March, 1873, which was not made valid by the acts in force before that time, from being cured, e. g. the absence of the husband as a party to a conveyance made in 1846; *Hartley v. Maycock* (1897) 28 O. R. 508.

Orders Passing Husband's Interest. Since 1888, the interest of the husband as tenant by the curtesy in land of his wife, may be cut out by the order of a Judge; s. 9. "It is a strong thing to deprive a man of a right who has had no opportunity of exercising it"; *Hicks v. Williams* (1888) 15 O. R. 228, 236. Great care should be taken to ascertain that the applicant comes clearly within the provisions of the act, and an order should not be made unless under very exceptional circumstances, and possibly not at all, without notice to the husband unless his residence is not known; see *Re King* (1899) 18 P. R. 365.

The Judge acts as *persona designata* and his order is not appealable; *ib.* The Master in Chambers has no jurisdiction to make the order; *Re Nolan* (1873) 6 P. R. 115.

Infant's Conveyance. Conveyances by infant *femes covert*, have now the same characteristics as are by law to be attributed to the conveyances of male infants, i. e. if such deeds are of benefit to the infant, or operate to pass an estate or interest, they are voidable not void; *Whalls v. Learn* (1888) 15 O. R. 481.

3. LANDLORD AND TENANT.

CHAPTER 170.

An Act respecting the Law of Landlord and Tenant.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2.

RELATION OF LANDLORD AND TENANT, s. 3.

APPORTIONMENT OF RENTS AND CERTAIN OTHER PERIODICAL PAYMENTS, ss. 4-8.

APPORTIONMENT OF CONDITION OF RE-ENTRY, s. 9.

MERGER OF REVERSION EXPECTANT ON A LEASE, s. 10.

RIGHT OF RE-ENTRY, s. 11.

ASSIGNMENTS BY PERSONS UNDER DISABILITY, s. 12.

RESTRICTIONS ON AND RELIEF AGAINST FORFEITURE OF LEASES, s. 13.

RESTRICTION ON EFFECT OF LICENSE UNDER A LEASE, s. 14.

RESTRICTED OPERATION OF PARTIAL LICENSE, s. 15.

WAIVER OF COVENANT, s. 16.

COVENANT TO PAY TAXES, s. 17.

NOTICES TO QUIT, s. 18.

TENANT TO NOTIFY LANDLORD OF ACTION FOR RECOVERY OF LAND, s. 19.

RECOVERY OF PREMISES BY LANDLORDS

When half year's rent in arrear, ss. 20-25.

When lease is determined and tenant refuses to quit, ss. 26-29.

EXEMPTIONS FROM DISTRESS:

Goods exempt from execution exempt from distress for rent, s. 30.

Goods not the property of tenant exempt, s. 31.

Surrender of premises when exemption claimed, s. 32.

SET-OFF AGAINST RENT, s. 33.

WHERE ASSIGNMENT FOR BENEFIT OF CREDITORS, s. 34.

RE-ENTRY OF LANDLORD, s. 35.

SALE OF CROPS, ss. 36, 37.

APPLICATION OF SECTIONS 30 to 33, s. 38.

PROTECTION OF GOODS OF LODGERS FROM DISTRESS, ss. 39-42.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short Title

1. This Act may be cited as "*The Landlord and Tenant's Act*."

INTERPRETATION.

Interpretation

2. Where the words following occur in sections 4, 5, 6, 7 and 8 of this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

1. "Rents" shall include rent-service, rent-charge and rent-seck, and all periodical payments or renderings in lieu of or in the nature of rent ;

2. "Annuities" shall include salaries and pensions ; and

3. "Dividends" shall include (besides dividends, strictly so called) all payments made by the name of dividend, bonus or otherwise out of the revenues of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments are usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment, during and within the period for or in respect of which the payment of the same revenue is declared or expressed to be made ; but the said word "dividend" shall not include payments in the nature of a return or reimbursement of capital. R. S. O. 1887, c. 143, s. 1.

Imp. Act
33-34 V. c.
35, s. 5.

Reversion or
remainder not
necessary to
create relation
of landlord
and tenant.

3. The relation of landlord and tenant did not since the 15th day of April, 1895, and shall not hereafter depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation ; nor shall any agreement between the parties be necessary to give a landlord the right of distress. 59 V. c. 42, s. 3.

APPORTIONMENT OF RENT AND OTHER PERIODICAL PAYMENTS.

4. All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. R. S. O. 1887, c. 143, s. 2.

Rents, etc., to
accrue from
day to day,
and be apportionable in
respect of time.
Imp. Act
33-34 V. c.
35, s. 2.

5. The apportioned part of such rent, annuity, dividend or other payment shall be payable or recoverable in the case of a continuing rent, annuity or other such payment when the entire portion, of which such apportioned part forms part, becomes due and payable, and not before ; and in the case of a rent, annuity or other such payment determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before. R. S. O. 1887, c. 143, s. 3.

Apportioned
part of rent,
etc., to be
payable when
the next entire
portion be-
comes due.
Imp. Act
33-34 V. c.
35, s. 3.

Persons shall have the same remedies for recovering apportioned parts as for entire portion.
Imp. Act 33-34 V. c. 35, s. 4.

Proviso as to rents reserved in certain cases.

6.—(1) All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively.

(2) Provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same. R. S. O. 1887, c. 143, s. 4.

Act not to apply to policies of assurance.
Imp. Act 33-34 V. c. 35, s. 6.
Nor where stipulation made to the contrary.
33-34 V. c. 35, s. 7.

7. Nothing in the preceding provisions of this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description. R. S. O. 1887, c. 143, s. 5.

8. The preceding provisions of this Act shall not extend to any case in which it is expressly stipulated that no apportionment shall take place. R. S. O. 1887, c. 143, s. 6.

APPORTIONMENT OF CONDITION OF RE-ENTRY.

Apportionment of condition of re-entry in certain cases.
Imp. Act 22-23 V. c. 35, s. 3.

9. Where the reversion upon a lease is severed and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him. R. S. O. 1887, c. 143, s. 7.

MERGER, ETC., OF REVERSIONS.

Effect of surrender or merger of reversion expectant on a lease in certain cases.
See Imp. Act 8 & 9 V. c. 106, s. 9.

10. Where the reversion expectant on a lease of land merges or is surrendered, the estate, which for the time being confers, as against the tenant under the same lease, the next vested right to the same land, shall, to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease. R. S. O. 1887, c. 143, s. 8.

RIGHT OF RE-ENTRY.

11. In every demise made or entered into after the 25th day of March, 1886, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, it shall be lawful for the landlord, at any time thereafter into and upon the demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess, and enjoy as of his former estate. R. S. O. 1887, c. 143, s. 9.

Right of
entry.

ASSIGNMENTS BY PERSONS UNDER DISABILITY.

12. Where any person being under the age of twenty-one years, or a lunatic, or a person of unsound mind, shall be seised of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sublet without leave, the guardian of such infant or the committee of such lunatic, or person of unsound mind may, with the approbation of the Judge of the Surrogate Court of the county in which the land is situate, consent to any assignment or transfer of such leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability. R. S. O. 1887, c. 143, s. 10.

Assignments
by persons
under dis-
ability.

FORFEITURE OF LEASES.

13.—(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach.

Restrictions
on and relief
against forfeit-
ure of leases.
Imp. Act, 44-
45 V. c. 41,
s. 14.

(2) Where a lessor is proceeding by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

Meaning of in this section.

"Lease"
"Lessee"
"Lessor."

(3) For the purposes of this section, a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

Where right of entry is under a statute.

(4) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease, in pursuance of the directions of any Act of Parliament or of the Legislature of this Province.

Lease until breach.

(5) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach. R.S.O. 1887, c. 143, s. 11 (1-5.)

Limitation of section.

(6) This section shall not extend—

(a) To a covenant or condition, against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(b) To a mining lease.

A "mining lease" is a lease for mining purposes, that is, the searching for, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes. R.S.O. 1887, c. 143, s. 11 (6); 60 V. c. 15, Sched. A (28).

(7) This section shall not affect the law relating to re-entry or forfeiture or relief in cases of non-payment of rent.

Application of section.

(8) This section shall apply to leases made either before or after the enactment thereof, and shall have effect notwithstanding any stipulation to the contrary. R. S. O. 1887, c. 143, s. 11 (7, 8).

LICENSES.

Restriction on effect of license under power contained in lease, etc.
Imp. Act 22-23 V. c. 35, s. 1.

14. Where a license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease heretofore granted, or to be hereafter granted, has been, at any time since the 18th day of September, 1865, given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually

given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent a proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made punishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done. R. S. O. 1887, c. 143, s. 12.

15. Where in a lease heretofore granted or to be hereinafter granted, there is a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and at any time since the 18th day of September, 1865, a license has been or is given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or has been or is given to a lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license. R. S. O. 1887, c. 143, s. 13.

Restricted operation of partial licenses. Imp. Act 22-23 V. c. 35, s. 2.

WAIVER OF COVENANT.

16. Where an actual waiver of the benefit of a covenant or condition in a lease, on the part of a lessor, or his heirs, executors, administrators or assigns, is proved to have taken place after the 18th day September, 1865, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears. R. S. O. 1887, c. 143, s. 14.

Waiver not to extend further than to the particular instance mentioned.

COVENANT TO PAY TAXES.

17. In the case of leases made on or after the 1st day of September, 1897, unless it is therein otherwise specifically

Covenant to pay taxes not include local improvement

provided a covenant by a lessee for payment of taxes shall not be deemed to include an obligation to pay taxes assessed for local improvements. 60 V. c. 14, s. 28 (1), part.

LENGTH OF NOTICES TO QUIT.

Notice to quit in case of weekly or monthly tenancies.

18. In the case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit, respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine, respectively, a weekly or monthly tenancy. R. S. O. 1887, c. 143, s. 15.

TENANTS TO NOTIFY LANDLORDS.

Penalty on tenant receiving writ for recovery of land and not notifying his landlord.

19. Every tenant to whom a writ in an action for the recovery of land has been delivered, or to whose knowledge it comes, shall forthwith give notice thereof to his landlord, or to his bailiff or receiver, and if he omits so to do, he shall forfeit to the person of whom he holds, the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to be recovered by action in any Court having jurisdiction for the amount. R. S. O. 1887, c. 143, s. 16.

RECOVERY OF PREMISES BY LANDLORDS.

Where a half-year's rent is arrear.

Landlord having power to re-enter for non-payment of rent, may recover possession.

20. In all cases between landlord and tenant, as often as it happens that one-half year's rent is in arrear, and the landlord or lessor to whom the same is due has the right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a writ for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant is in actual possession of the premises, then the landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case the action is not for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in the writ; and such affixing shall be good service thereof, and shall stand instead of a demand and re-entry. R. S. O. 1887, c. 143, s. 17.

How such right shall be exercised.

21. In case of judgment against the defendant for non-appearance, if it is shewn by affidavit to the Court, or is proved upon the trial in case the defendant appears, that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, the lessor shall recover judgment and have execution in the same manner as if the rent in arrear had been demanded, and re-entry made. R. S. O. 1887, c. 143, s. 18.

22. In case the lessee or his assignee, or other person claiming or deriving title under the lease, permits and suffers judgment to be had on such trial and execution to be executed thereon, without paying the rent and arrears together with full costs, and without proceeding for equitable relief within six months after execution executed, then and in every such case the lessee and his assignee and all other persons claiming and deriving under the lease, shall be barred and foreclosed from all relief or remedy other than by proceedings by way of appeal from the judgment, and the landlord or lessor shall from thenceforth hold the demised premises discharged from the lease. R. S. O. 1887, c. 143, s. 19.

Consequences
of the exercise
of such right.

23. Nothing hereinbefore contained shall bar the right of any mortgagee of such lease or any part thereof who is not in possession, if the mortgagee, within six months after such judgment obtained and execution executed, pays all rent in arrear, and all costs and damages sustained by the lessor or person entitled to the remainder or reversion, and performs all covenants and agreements which on the part and behalf of the first lessee are to be, or ought to be performed. R. S. O. 1887, c. 143, s. 20.

As to mortga-
gees of lease.

24. In case the lessee, his assignee or other person claiming any right, title or interest of, in or to the lease, proceeds for equitable relief within the time aforesaid, such person shall not be entitled to a stay of the proceedings, unless within forty days next after an application for a stay of the proceedings he brings into Court and lodges with the proper officer such sum of money as the lessor or landlord swears to be due and in arrear over and above all just allowances, and also the costs taxed in the said action, there to remain until the hearing of the application for equitable relief, or to be paid out to the lessor or landlord on good security, subject to the judgment or order of the Court; and in case such proceedings for equitable relief are taken within the time aforesaid, and after execution has been executed, the lessor or landlord shall be accountable only for so much as he really and *bona fide*, without fraud, deceit or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof, and if what he has so made is less than the rent reserved on the lease, then the lessee or his assignee, before being restored to his possession, shall pay the lessor or landlord what the money so by him made fell short of the reserved rent for the time the lessor or landlord held the lands. R. S. O. 1887, c. 143, s. 21.

Proceedings if
the tenant
ejected seeks
equitable
relief.

If such
proceedings
be after
execution
executed.

25. If the tenant or his assignee at any time before the trial in the action pays or tenders to the lessor or landlord, or to his solicitor in the cause, or pays into Court all the rent and arrears together with the costs, all further proceedings in the action shall cease; and if the lessee or his assigns, upon such pro-

Discontinu-
ance if tenant
pays arrears
of rent and
costs before
trial, etc.

ceeding as aforesaid, obtains equitable relief he and they shall have, hold and enjoy the demised lands according to the lease thereof made, without any new lease. R. S. O. 1887, c. 143, s. 22.

Where lease is determined and tenant refuses to go out.

Circumstances under which landlord may give notice to tenant to find security.

26. In case (1) the term or interest of any tenant of any lands, tenements or hereditaments, holding the same under a lease or agreement in writing for any term or number of years certain, or from year to year, expires or is determined either by the landlord or tenant by regular notice to quit; and (2) in case a lawful demand of possession in writing, made and signed by the landlord or his agent, is served personally upon the tenant or any person holding or claiming under him, or is left at the dwelling house or usual place of abode of such tenant or person; and (3,) in case such tenant or person refuses to deliver up possession accordingly, and the landlord thereupon proceeds by action for recovery of possession, he may, at the foot of the writ of summons, address a notice to such tenant or person, requiring him to find such security, if ordered by the Court or a Judge, and for such purposes as are hereinafter next specified. R. S. O. 1887, c. 143, s. 23.

Court or judge may order.

27. Upon the appearance of the party, or in case of non-appearance then on making and filing an affidavit of service of the writ and notice, and on the landlord's producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit (as the case may be), and that possession has been lawfully demanded in manner aforesaid, the landlord may apply to the Court or a Judge for a rule or summons for such tenant or person to shew cause, within a time to be fixed by the Court or Judge on a consideration of the situation of the premises, why such tenant or person should not enter into a bond by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which may be recovered by the plaintiff in the action, and the Court or Judge, upon cause shewn or upon affidavit of the service of the rule or summons in case no cause is shewn, may make the same absolute in whole or in part, and order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such bond to the plaintiff with such conditions and in such manner as may be specified in the said rule or summons, or the part of the same so made absolute. R. S. O. 1887, c. 143, s. 24.

If order not obeyed judgment may be signed.

28. In case the party neglects or refuses to comply with such rule or order, and gives no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor

or landlord, upon filing an affidavit that such rule or order has been made and served and not complied with, may sign judgment for the recovery of possession and costs of suit. R. S. O. 1887, c. 143, s. 25.

29. No action or other proceeding shall be commenced upon the bond after six months from the time when the possession of the premises or any part thereof has been actually delivered to the landlord. R. S. O. 1887, c. 143, s. 26.

L. limitation of action upon bond.

EXEMPTIONS FROM DISTRESS.

30.—(1) The goods and chattels exempt from seizure under execution, shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the first day of October, 1887, except as hereinafter provided. R. S. O. 1887, c. 143, s. 27 (1) part.

Goods exempt from execution to be exempt from distress.

(2) In the case of a monthly tenancy the said exemption shall only apply to two months' arrears of rent. 55 V. c. 31, s. 1.

(3) The person claiming such exemption shall select and point out the goods and chattels as to which he claims exemption. R. S. O. 1887, c. 143, s. 27 (2).

31.—(1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply. 57 V. c. 43, s. 1; 60 V. c. 15, Sched. A (60).

Goods on premises not property of tenant to be exempt.

Exceptions.

(2) Nothing in this section contained shall exempt from seizure by distress goods or merchandise in a store or shop managed or controlled by an agent or clerk for the owner of such goods or merchandise when such clerk or agent is also

the tenant and in default and the rent is due in respect of the store or shop and premises rented therewith and thereto belonging, when such goods would have been liable to seizure but for this Act.

"Tenant,"
meaning of,
in this section.

(3) Subject to sections 39 and 40 of this Act the word "tenant" in this section shall extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear whether he has or has not attorned to or become the tenant of the landlord. R. S. O. 1887, c. 143, s. 28 (2, 3).

Tenant claim-
ing exemption
must sur-
render pre-
mises.

32.—(1) A tenant who is in default for non-payment of rent and claims the benefit of the exemption from distress to which he is entitled under this Act, must give up possession of the premises forthwith, or be ready and offer to do so.

(2) The offer may be made to the landlord or to his agent; and the person authorized to seize and sell the goods and chattels, or having the custody thereof for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of the possession.

Seizure of
exempted
goods.

(3) Where a landlord desires to seize the exempted goods, he shall, after default has been made in the payment of rent and before or at the time of seizure serve the tenant with a notice which shall inform the tenant what amount is claimed for rent in arrear, and that in default of payment, if he gives up possession of the premises to the landlord after service of the notice, he will be entitled to claim exemption for such of his goods and chattels as are exempt from seizure under execution, but that if he neither pays the rent nor gives up possession his goods and chattels will be liable to seizure, and will be sold to pay the rent in arrear and costs. R. S. O. 1887, c. 143, s. 30 (1, 2, 4).

(4) The notice may be in the following form or to the like effect:

Take notice that I claim \$ for rent due to me in respect of the premises which you hold as my tenant, namely, (*here briefly describe them*); and unless the said rent is paid, I demand from you immediate possession of the said premises; and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by law entitled to seize and sell and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

This notice is given under the Act of the Legislature of Ontario, respecting the Law of Landlord and Tenant.

Dated this day of

A.D.

(Signed) A.B. (landlord).

To C.D. (tenant.)

R. S. O. 1887, c. 143, s. 30 (5); 59 V., c. 42, s. 2.

(5) The surrender of possession in pursuance of the notice by the landlord shall be a determination of the tenancy. R. S. O. 1887, c. 143, s. 30 (3).

(6) Service of papers under this Act shall be made either personally or by leaving the same with some grown person being in and apparently residing on the premises occupied by the person to be served.

(7) If the tenant cannot be found and his place of abode is either not known, or admission thereto cannot be obtained, the posting up of the paper on some conspicuous part of the premises, shall be deemed good service.

(8) No proceeding under this section shall be deemed defective or rendered invalid by any objection of form. R. S. O. 1887, c. 143, s. 30 (6-8).

33.—(1) A tenant may set-off against the rent due a debt due to him by the landlord. Right of set-off.

(2) The set-off may be by a notice in the form or to the effect following, and may be given before or after the seizure:

Take notice, that I wish to set-off against rent due by me to you, the debt which you owe to me on your promissory note for _____, dated _____, (or for eight months' wages at \$20 per month, \$160, or as the case may be).

(3) In case of such notice the landlord shall only be entitled to distrain for the balance of rent after deducting any debt justly due by him to the tenant. R. S. O. 1887, c. 143, s. 29.

34.—(1) In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased. Lien of landlord for rent after assignment for benefit of creditors.

(2) Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in any case of an assignment for the general benefit of creditors, or in case an order is made for the winding-up of an incorporated company, being lessees, the assignee or liquidator shall be at liberty within one month from the execution of such assignment or the making of such winding-up order by notice in writing under his hand given to the lessor to elect to retain the premises occupied by the assignor or company as aforesaid at the time of such assignment or winding-up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease and paying the rent therefor provided by said lease. 58 V. c. 26, s. 3. Assignee may retain possession for remainder of term.

RE-ENTRY OF LANDLORD.

Common law
strict demand
of rent dis-
pensed with
when landlord
entitled to
re-enter.

Proviso.

35. Where a landlord has by law a right to enter for non-payment of rent, it shall not be necessary to demand the rent on the day when due, or with the strictness required at common law, and a demand of rent shall suffice notwithstanding more or less than the amount really due is demanded, and notwithstanding other requisites of the common law are not complied with: Provided that, unless the premises are vacant, the demand be made fifteen days at least before entry; such demand to be made on the tenant personally anywhere, or on his wife or some other grown up member of his family on the premises. R. S. O. 1887, c. 143, s. 31.

SALE OF GROWING CROPS.

Sale of grow-
ing crops.

36. When growing or standing crops, which may be seized and sold under execution, are seized for rent, they may, at the option of the landlord or upon the request of the tenant, be advertised and sold in the same manner as other goods, and it shall not be necessary for the landlord to reap, thresh, gather or otherwise market the same. R. S. O. 1887, c. 143, s. 32.

Liability of
purchaser of
growing crops.

37. Any person purchasing a growing crop at such sale, shall be liable for the rent of the lands upon which the same is growing at the time of the sale, and until the crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied, and the rent shall, as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of land and to the time during which the purchaser shall occupy it. R. S. O. 1887, c. 143, s. 33.

APPLICATION OF CERTAIN SECTIONS.

Application of
ss. 30, 31, 32
and 33.

38. Sections 30, 31, 32, and 33, shall apply only to tenancies created on or after the first day of October, 1887. R. S. O. 1887, c. 143, s. 42.

PROTECTION OF GOODS OF LODGERS FROM DISTRESS.

Declaration
by boarder or
lodger that
immediate
tenant has no
property in
goods dis-
trained.

39. If a superior landlord shall levy or authorize to be levied a distress on any furniture, goods or chattels of any boarder or lodger for arrears of rent due to the superior landlord by his immediate tenant, the boarder or lodger may serve the superior landlord, or the bailiff or other person employed by him to levy the distress, with a declaration in writing, made by the boarder or lodger, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels

are the property or in the lawful possession of such boarder or lodger; and also setting forth whether any and what amount by way of rent, board or otherwise is due from the boarder or lodger to the said immediate tenant; and the boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the amount, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of the superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the furniture, goods and chattels referred to in the declaration. R. S. O. 1887, c. 143, s. 44.

40. If a superior landlord, or a bailiff or other person employed by him, after being served with the before mentioned declaration and inventory, and after the boarder or lodger shall have paid or tendered to the superior landlord, bailiff or other person, the amount, if any, which, by the last preceding section, the boarder or lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person shall be deemed guilty of an illegal distress, and the boarder or lodger may replevy such furniture, goods or chattels in any court of competent jurisdiction and the superior landlord shall also be liable to an action at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may likewise be inquired into. R. S. O. 1887, c. 143, s. 45.

41. Any payment made by a boarder or lodger pursuant to section 39 of this Act shall be deemed a valid payment on account of the amount due from him to the immediate tenant mentioned in the said section. R. S. O. 1887, c. 143, s. 46.

Payment by
boarder or
lodger to
superior
landlord.

42. The declaration hereinbefore referred to shall be made under and in accordance with *The Canada Evidence Act, 1893*. R. S. O. 1887, c. 143, s. 47.

Declaration
how made.

[As to costs of Distress for Rent, see Cap. 75.]

NOTES.

History. The law of landlord and tenant is, to a large extent, affected by the English Statutes in force on the 15th day of October, 1792; R.S.O. c. 111, s. 1. The principal English Statutes dealing with the subject in force are:

1266.—51 Hen. 3, Stat. 4. Owner may feed cattle impounded. Beasts of the plow or sheep are not distrainable.

1267.—52 Hen. 3, Stat. 4. (Statute of Marlbridge) Distress ought not to be excessive.

Stat. 15. Distress not to be taken on the highway or street.

Stat. 23. No waste to be committed without license.

1275.—3 Edw. 1, Stat. 16, 17: (Westminster the First) Distress not to be driven out of the County.

1278.—6 Edw. 1, c. 1, s. 2: Plaintiff in replevin entitled to costs.

C. 5: Waste, tenants for life or years liable for.

1285.—13 Edw. 1, c. 2, 3, 37: (Westminster the Second) Replevin Bonds.

1290.—18 Edw. 1, c. 1: Attornments.

1381.—5 Rich. 2, Stat. 1, c. 7: Forcible entry (but see Criminal Code 1892, s. 89).

1429.—8 Hen. 6, c. 9: Forcible Entry.

1515.—7 Hen. 8, c. 4, s. 3: Defendant in replevin entitled to costs and damages.

1529.—21 Hen. 8, c. 9, s. 3: Extends 7 Hen. 8, c. 4, s. 1.

1540.—32 Hen. 8, c. 9: Rights of Entry.

C. 34: Assignees of reversion take benefit of covenants and agreement of lessees.

C. 37: Distress may be by executors or administrators, or by tenants, *pur autre vie* after death of *cestui que vie*.

1554.—2 Ph. & Mary, c. 12, s. 1: Cattle distrained must not be driven out of the hundred, rape, wapentake or lathe except to a pound overt without the shire, not above three miles.

S. 2. Costs of impounding.

1606.—4 Jas. 1, c. 3. Defendant in replevin, whether claiming property or not, entitled to costs.

1623.—21 Jas. 1, c. 16. Forcible Entry (but see Criminal Code 1892, s. 89).

C. 16. Limitation in actions without specialty for six years.

1665.—17 Car. 2, c. 7, s. 2. Defendant proceeding by Writ of inquiry shall recover costs.

S. 4. If value of cattle distrained is insufficient, distress may be made again.

1666. 19 Car. 2, c. 6. *Cestui que vie* abroad accounted dead if no sufficient proof otherwise.

1677.—29 Car. 2, c. 8, s. 1. (Statute of Frauds) Leases by parol create estate by will.

S. 2. Leases for three years, excepted if rent is two-thirds of improved value.

1690.—2 Wm. & M. Sess. 1, c. 5, s. 2. Power to sell distress after notice if not replevied in five days; goods must be appraised by the sworn appraisers and sold for best price, overplus to be held for owners use.

S. 3. Hay, straw or corn in sheaves or cocks or loose may be distrained.

S. 4. Treble damages and treble costs for pound breach or rescue.

S. 5. If no rent due at time of distress and goods sold, double value of goods recoverable and full costs.

1705.—4 Ann c. 16, s. 9. Grants of reversion valid without attornment of tenant.

6 Ann c. 18, s. 1-5. Remaindermen, reversioners or expectant heirs have right to production of *cestui que vie*.

1709—8 Anne c. 14, s. 1. No goods to be taken in execution unless execution creditor pay the landlord or his bailiff the rent due up to one year's arrears.

S. 2. Where fraudulent and clandestine removal, goods might be followed for five days (extended by 11 Geo. 2, c. 19, s. 1.)

Ss. 6, 7. Distress may be made within six months after determination of term for rent due before.

1731—4 Geo. 2, c. 28 s. 1. Double value recoverable by suit on holding over after landlord's notice to quit.

S. 5. Distress for rent seck ;

S. 6. Renewals without surrender of under leases ;

1738—11 Geo. 2, c. 19 s. 1. Where goods of tenant ; (Martin v. Hutchinson (1891) 21 O. R. 388), fraudently or clandestinely removed by tenant to prevent distress for arrears due or made payable, they may be distrained within thirty days.

S. 2. Excepts goods bona fide sold for valuable consideration before seizure.

S. 3. Tenants and persons wilfully and knowingly assisting them in such fraudulent and clandestine removal or concealment are liable in action of debt to double value of goods carried off or concealed.

S. 4. If goods carried off or concealed do not exceed £50, offender or offenders may be fined double value of such goods before two justices of peace, and if unpaid, distress may be levied and if insufficient offender may be committed for six months.

S. 5 & 6. Appeal given to next general or quarter sessions from order. If recognizance be given in double the sum, order not to be executed.

S. 7. If goods locked up, building may be broken open in day time, with assistance of peace officer, and if in a house oath must first be made before justice of peace.

S. 8. Cattle or stock on common appendant or appurtenant to premises may be distrained.

S. 8 & 9. Growing crops may be distrained and when ripe to be cut and appraised and sold ; notice of place of storing to be given in one week.

S. 10. Distress may be impounded and sold on premises.

S. 11. Attornments to stranger void unless under decree or order or to a mortgagee after mortgage forfeited or with consent of landlord.

S. 14. *Use and occupation may be recovered for.

S. 15. Rent apportioned where tenant for life dies before a gale day.

S. 16 & 17. Recovery of deserted premises before justice of peace where one year's rent in arrear.

S. 18 Where tenant holds over after giving a notice to quit, double rent may be distrained for.

S. 19. Where rent due, distress not unlawful for irregularity and only special damage recoverable.

S. 20. Parties distraining may tender amends.

S. 21. Defendant may plead the general issue in actions of trespass and illegal distress.

S. 22. Defendant may plead that plaintiff held premises at certain rent then past due.

S. 23. Replevin Bonds in two sureties in double value of goods to be given by plaintiff to officer replevying.

1774—14 Geo. 3, c. 78, s. 83. Insurers may expend insurance moneys in e-building. (Repealed by 50 V. c. 26, s. 15 O.)

S. 86. Unless specially agreed tenant not liable for accidental fire ; Gaston v. Wald (1860) 19 U. C. P. 586 ; Furlong v. Carroll (1882) 7 A. R. 145, 169.

What is Rent ? Rent is a certain profit issuing out of lands and tenements corporeal ; Gilb 9. It is usually in money but may be payable in goods, services or manual operations ; Nowery v. Connolly (1860) 29 U.C.R. 39 ; Doe v. Benham (1845) 7 Q. B. 976 ; Doe v. Hinde (1843) 2 Moo. & R. 441 ; Marlborough v. Osborn (1864) 5 B. & S. 67 ; it may be payable one-half in cash and

one-half in work; *Jones v. Montgomery* (1870) 21 C. P. 157; or one third of a crop; *Richardson v. Trinder* (1862) 11 C. P. 130.

Rent service is where the tenant holds the land of his lord by fealty and certain rent, or by a certain rent together with homage, fealty or other services. Distress is an incident of rent service; *Gilb. Rents*.

Rent charge is where land is charged with a rent by deed or will with power to distrain for the same, but the owner has no reversion in the land.

Rent seek or barren rent is, in effect, nothing more than a rent reserved by deed or will, but without any clause of distress. A right to distrain for rent seek, however "as in the case of rents reserved upon lease" is given by the Statute 4 Geo. 2, c. 28 s. 5; *Hope v. White* (1869) 19 C. P. 479; *Harpelle v. Carroll* (1896) 27 O. R. 240.

An annuity is an annual sum of money granted to another in fee, for life or years, which charges the person of the grantor only; or it may be due by prescription, which always implies a grant. It may be distrained for, where the deed creating it expressly confers a power to distrain; *Chapman v. Beecham* (1842) 3 Q. B. 723; but not generally in other cases; *Co. Litt.* 32 a.

Reversion or Remainder Not Now Necessary. Prior to the 15th April, 1895, it was necessary that the landlord be legally entitled to the immediate reversion or remainder in the land demised to give him the right of distress, and if the landlord afterwards assigned the reversion either absolutely or by way of mortgage the remedy by distress for arrears was lost; *Dauphinais v. Clark* (1885) 5 M. L. R. 225; *Meagher v. Coleman* (1880) 13 N. S. R. 271; *Wittrock v. Halliman* (1850) 13 U. C. R. 135; *Oliver v. Mowat* (1874) 34 U. C. R. 472; but in 1895, 58 Vict. c. 26 (O) s. 4 was passed "to avoid that difficulty, but that section was not happily expressed; *Harpelle v. Carroll* (1896) 27 O. R. 240; and it was repealed, and 59 Vict. c. 42 s. 3 substituted. Section 3 renders it unnecessary that the relation of landlord and tenant should depend upon tenure or service; the section is not retrospective; *Harpelle v. Carroll* (1896) 27 O. R. 240.

Apportionment. The apportionment sections, 4-8 inclusive of the act, seem rather out of place in the law of landlord and tenant. These sections are taken from the Apportionment Act, 1870, (33 & 34 Vic. c. 35 Imp.)

Rent may be attached before the gale day, but only the sum due up to the time of attachment; *Massie v. Toronto Ptg. Co.* (1889) 12 P. R. 12. Distress for the portion attached is illegal; *Patterson v. King* (1896) 27 O. R. 56. In the Division Court it was held by *Ketchum J. J.* following *Webb v. Stenton* (1883) 11 Q. B. D. 518 at p. 523, that the apportioned part could not be attached, as under R. S. O. c. 60, a debt to be attachable must be "due or owing"; *Christy v. Casey* (1895) 31 C. L. J. 35; but *Dean Co. J.* decided that such rent was attachable; *Birmingham v. Malone* (1896) 32 C. L. J. 717; *Patterson v. Richmond* (1881) 17 C. L. J. 324. Before the gale day the apportioned part of rent is not a debt; *Re United Club & Hotel Co.* (1889) W. N. 67; a liquidator is not liable for an accelerated rent, but only for the apportioned part, so long as he retains possession; *Strackell v. Charlton* (1895) 1 Ch. 378. Where a tenant pays rent quarterly and becomes bankrupt between two quarters, the rent is apportionable to date of adjudication, and after the expiry of the current quarter, may be distrained for; *Re Howells, Ex parte Mandilebarg & Co.* (1895) 1 Q. B. 844.

The apportionment takes place when a lease is assigned over by a trustee in bankruptcy; *Swansea Bank v. Thomas* (1879) 4 Ex. D. 94; *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92, and also where the lease is determined by "re-entry, death or otherwise," and it would seem to include the case of surrender or re-entry for forfeiture; s. 5. Apportionment was made when the lease was ended without any fault of the lessee; *Kinnear v. Aspden* (1892) 19 A. R. 468.

Where the lessee surrendered, the rent was only collectable to the last gale day; *Palmer v. Wallbridge* (1888) 15 S. C. R. 650; 14 A. R. 460; and when the lessor gave a second lease to a third party, revoking the first lease, he could only collect his rent to the last gale day; *R. v. Davenport* (1859) 16 U. C. R. 411.

There can be no apportionment where there is a wrongful eviction by the lessor; *Clapham v. Draper* (1883) 1 C. & E. 484; but see *Elvidge v. Meldon* (1888) 24 L. R. Ir. 91.

Where a prior mortgagee brings ejectment against the mortgagor's lessee, the rent is apportioned to the date of the writ; *Barnes v. Bellamy* (1880) 44 U. C. R. 303; *Boulton v. Blake* (1886) 12 Q. O. R. 532; *Hartcup v. Bell* (1883)

1 C. & E. 19; Mayor of Swansea v. Thomas (1882) 10 Q. B. D. 48; and where a prior mortgagee sells the demised property under the power of sale, and the lease becomes determined thereby, the tenant is liable to pay rent up to the date of such determination, and the principle was applied in favor of a subsequent mortgagee, who notified the tenant to pay the rent to him; Kinnear v. Aspden (1892) 19 A. R. 468.

These sections seem to be retrospective; Capron v. Capron (1874) L. R. 7 Eq. 288; Re Chines Estate (1874) L. R. 18 Eq. 213; Hasluck v. Pedley (1875) L. R. 19 Eq. 271; Constable v. Constable (1879) 11 Ch. D. 681.

No apportioned part of any payment becomes payable until the time for payment of the entire portion is past; Sec. 5.

These sections apportion not only rights, but liabilities also; Re Howell (1895) 1 Q. B. 844; Re Wilson (1893) 62 L.J.Q.B. 628; Hopkinson v. Lovering (1883) 11 Q. B. D. 92.

The Act does not apply where a testator forgave his tenant all rent or arrears which might be due or owing at the time of his decease, and the rent was not apportioned where the testator died between two gale days; Re Lucas (1886) 55 L. J. Ch. 101.

Annuity. Where under an annuity bond designated interchangeably a "policy" and "annuity bond" the annuity was payable quarterly, and the testator died between quarter days, the payment was apportioned to the death of the testator; Cuthbert v. North Am. Life Assce Co. (1894) 24 O. R. 511.

Under sec. 8 parties may contract themselves out of the Act; Linton v. Imperial Hotel Co. (1889) 16 A. R. 337.

Apportionment of condition of re-entry. The assignee of a part of the reversion may exercise the right of re-entry for non-payment of an apportioned part of the rent; sec. 9.

Merger of Reversion. Merger of a term, is where there is a union of the term with the immediate reversion, both being vested at the same time in one person, in the same right; Bac. Abr., Tit. Leases (R); Salmon v. Swand (1622) 3 Cro. R. Jac. 619; Burton v. Barclay (1831) 7 Bing. 745.

Formerly if a tenant for a term of years leased for a less term and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants of the sub-lease incident to that reversionary interest were thereby extinguished; Webb v. Russell (1789) 3 T. R. 393; 1 R. R. 725; Thorn v. Woolcombe (1832) 3 B. & Ad. 586; but now sec. 10, which is taken from Imp. Act 8 & 9 V. c. 106, s. 9, preserves the incidents and obligations as they would have subsisted but for the merger or surrender of the reversion.

By the Judicature Act, R. S. O. c. 51, s. 58 (3), it is enacted

"There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to The Ontario Judicature Act, 1881, have been deemed merged or extinguished in equity"; *ante*, p. 180.

Forfeiture.—Re-entry. At common law, when a forfeiture was claimed by the landlord, for non-payment of rent reserved in a lease, great strictness was required. A demand of the precise sum of rent had to be made upon the demised land before sunset on the day when due; if any requisite was omitted, the forfeiture was not complete. Where the lease, however, gave a right of re-entry for non-payment of rent "though no formal or legal demand should be made for payment thereof," ejectment might be maintained, without any entry or demand of rent; Doe v. Masters (1824) 2 B. & C. 490; Campbell v. Baxter (1864) 15 C. P. 42 at p. 47, per Richards C. J.

The demand at common law

- (a) must be made by landlord or his agent duly authorized in that behalf; Roe v. Davis (1806) 7 East 363; Toms v. Wilson (1862) 32 L. J. Q. B. 33.
- (b) must be made on very last day; Doe v. Roe (1849) 7 C. B. 134; Doe v. Wandless (1797) 7 T. R. 117, 4 R. R. 393; Smith and Bustard's case (1589) 1 Leon 141.
- (c) must be made a convenient time before and continued till sunset; Wood and Chiver's case (1573) 4 Leon 179; Acocks v. Phillips (1890) 5 H. & N. 183.

- (d) must be made on the land and at the most notorious place on it; *Cole Ejec.* 413; and if the lease or agreement mentions a place where rent is to be paid, it must be made there; *Borough's case* (1596) 4 Co. R. 73; *Buskin v. Edmonds* (1595) Cro. Eliz. 415.
- (e) must be made of the exact sum then payable; *Fabian and Windsor's case* (1590) 1 Leon 305; *Fabian v. Winston* (1589) Cro. Eliz. 209.
- (f) must be of only the last quarter, even if more is due; *Scot v. Scot* (1588) Cro. Eliz. 73; *Tomkins v. Pincent* (1702) 7 Mod. 97; *Doe v. Paul* (1829) 3 C. & P. 613.

The common law strictness is modified by s. 35, but that only applies where the demand is made fifteen days at least before entry, unless the premises are vacant; it can be made on the tenant anywhere but if made on his wife, or some other grown up member of his family, it must be still made on the premises.

In cases provided for in section 11, unless otherwise agreed, where the rent remains unpaid for fifteen days, although no formal demand thereof shall have been made, there is the right in the landlord to re-enter and under section 20, where a half year's rent is in arrear, there is no necessity for any formal demand or re-entry.

The agreement for re-entry is deemed to be included in every demise by parol or in writing made after 25th March, 1886; s. 11.

Where the lease gave a right of re-entry "if and whenever any one quarters rent should be arrear for twenty-one days, and no sufficient distress could be found," and a distress yielded only sufficient to pay two out of three quarters rent owing, the right of re-entry was enforced; *Shepherd v. Berger* (1891) 1 Q.B. 597. Where a lease provided for re-entry if the lessees, being a Company, should enter into liquidation voluntary or compulsory, and the lessees, a solvent company, went into liquidation for reconstruction purposes only, there was a right of re-entry; *Horsev v. Steiger* (1898) 2 Q.B. 259.

Waiver of Forfeiture. A distress is an acknowledgment of the subsistence of the tenancy up to the time that the rent distrained for became due and will therefore be a waiver of any forfeiture committed before that time; *Walrond v. Hawkins* (1875) L.R. 10 C.P. 342; *Ward v. Day* (1863) 4 B. & S. 386; 5 B. & S. 359; but if the breach is a continuing one the forfeiture will not be waived; *Doe v. Peck* (1830) 1 B. & Ad. 428; 35 R. R. 339.

A landlord who sued for possession for non-payment of rent, and also claimed arrears not realized on a prior distress, was entitled to the rent but was denied possession; *Kirkland v. Briancourt* (1890) 6 T.L.R. 441. See also *Linton v. Imperial Hotel Co.* (1889) 16 A.R. 337; *Baker v. Atkinson* (1886) 11 O.R. 735; (1887) 14 A.R. 409.

If the lessor brings ejectment for a forfeiture, and afterwards accepts rents, distrains or sets up as a cause for forfeiture, a subsequent non-payment of rent, it is no waiver; *Doe v. Meux* (1825) 4 B. & C. 606, 1 C. & P. 346; *Jones v. Carter* (1846) 15 M. & W. 718; *Grimwood v. Moss* (1871) L.R. 7 C.P. 360, 239; *Toleman v. Portbury* (1872) L.R. 7 Q.B. 344.

The landlord after commencing an action of ejectment may distrain for rent, subsequently accruing due, and the receipt of such rent will not *per se* set up the former tenancy which ended on the election to forfeit manifested by the issue of the writ; *McMullen v. Vannatto* (1894) 24 O.R. 625.

The lessor may be estopped from declaring a forfeiture, where after knowledge of the breach, he permits the lessee to expend large sums of money without objection, which would be lost if a forfeiture were allowed; *Benavides v. Hunt* (1891) 79 Texas 383; also see *Ramsden v. Dyson* (1865) L.R. 1 H.L. 129; *Plimmer v. Wellington* (1884) 9 A.C. 699.

Mere knowledge of or acquiescence in an act constituting a forfeiture is no waiver, but permitting expenditure of money in improvements, or receipt of rent may be; *McLaren v. Kerr* (1876) 39 U.C.R. 507.

If the lessor brings an action for possession claiming forfeiture for non-payment of rent, and also for the arrears, the election to forfeit is complete, and payment of arrears and costs before trial does not allow the lessor to retract the forfeiture; *Denison v. Maitland* (1893) 22 O.R. 166.

An unqualified demand of rent would appear to waive a forfeiture; *Doe v. Birch* (1836) 1 M. & W. 402.

If rent is demanded without qualification and paid, a receipt "without prejudice" will not prevent the payment from waiving a forfeiture; *Strong v. Stringer* (1889) 61 L.T. 470.

Receipt of rent of telephone wires for one day after the tenancy would otherwise have determined, by reason of a notice, prevented the tenancy from coming to an end; *Keith v. National Telephone Co.* (1894) 2 Ch. 147.

Where the lessee requested the lessor to credit a balance of a note on rent, but it was credited on another account, it was no acceptance of rent; *McDonald v. Peck* (1859) 17 U.C.R. 270.

If there is a continuing breach of covenant, the forfeiture may be claimed, even though rent was accepted after the breach commenced but before it ended; *Leighton v. Medley* (1882) 1 O.R. 207.

The following are covenants which may have continuing breaches: To keep in repair, *Ainley v. Baladen* (1857) 14 U.C.R. 535; to keep buildings insured, *Doe v. Gladwin* (1845) 6 Q.B. 953; *Pentell v. Harborne* (1848) 11 Q.B. 368; *Hyde v. Watts* (1843) 12 M. & W. 254; *Doe v. Peck* (1830) 1 B. & Ad. 428, 35 R.R. 339; to keep an hotel furnished, *Rossin v. Joslin* (1859) 7 Gr. 198; not to use rooms in a particular manner, *Doe v. Woodbridge* (1829) 9 B. & C. 376, 33 R.R. 203.

By s. 16 actual waiver of a covenant or condition in a particular instance is not to be extended or to be deemed a general waiver, unless such intention appears.

Relief against Forfeiture. A lessee is not entitled, as of right, to relief against forfeiture for non-payment of rent, that relief may be refused on collateral grounds; *Coventry v. McLean* (1892) 22 O.R. 1; (1894) 21 A.R. 176.

Where the lease provided "in case the said premises . . . become and remain vacant and unoccupied for the period of ten days, without the written consent of the lessors, this lease shall cease and be void, and the term hereby created expire and be at an end, and the lessor may re-enter. . . ." as in the case of a holding over, the lessee cannot take advantage of that condition, it is a condition subsequent, a breach of which could only avoid the lease at the instance of the lessors; *Palmer v. Mail Printing Company* (1897) 28 O.R. 656.

Sec. 13 was taken from Imp. Act 44-45 Vic. c. 41, s. 14; it is retrospective, ss. 8; but the provisions do not affect or extend to the case of a mining lease, ss. 6 (b), or where forfeiture is claimed for breach of a covenant or condition against assigning, underletting, parting with the possession or disposing of the land leased, nor where the lessee's interest is seized under execution, nor to forfeiture for bankruptcy; ss. 6 (a).

The lessee's interest cannot be sold under a Division Court execution; R.S. O. c. 60 s. 218 does not cover it; and where the landlord purchased his tenant's term under such an execution, and brought ejectment on the ground that there was a merger, and that he was entitled to immediate possession, he could not recover; *Duggan v. Kitson* (1861) 20 U.C.R. 316; but the sheriff may sell it under a fi. fa. but cannot sell part of the term; *Osborne v. Kerr* (1859) 17 U.C.R. 134.

A lessor may become purchaser of his lessee's interest at Sheriff's sale, under a third party's execution, and the term will merge in the fee, and the lessor will be entitled to possession; *Stroud v. Kane* (1856) 13 U.C.R. 459; but there must be an assignment by deed by the sheriff of the term to the purchaser; *Duggan v. Kitson* (1861) 20 U.C.R. 316. Forfeiture or re-entry for nonpayment of rent is specially excepted from the provisions of this section; ss. 7.

Under Sec. 30 of the Judicature Act, R.S.O. c. 51, ante p. 171, the High Court has power to relieve against forfeiture in a breach of covenant, in a lease, to insure where no loss or damage has happened and where at the time of application for relief, the insurance is in force in conformity with the covenant.

Notice of breach. A sufficient notice is a condition precedent to forfeiture in cases where notice is required; *Horsely v. Steiger* (1899) 2 Q. B. 79. The notice must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. A mere general notice of breach of a specified covenant, such as "you have broken the covenants for repairing the inside and outside of the houses" describing them, is not sufficient; *Fletcher v. Nokes* (1897) 1 Ch. 271; followed by *Re Serle, Gregory v. Serle* (1898) 1 Ch. 652. A letter

written to the tenant complaining of his cutting timber without authority, and followed by a notice given in the words, "You have broken the covenants as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation was decided to be sufficient; *McMullen v. Vannatto* (1890) 24 O. R. 625. The notice may be good, though it alleges a breach which has not been committed; *Gannell v. London Brewing Co.* (1900) W. N. 16.

Where the breach is capable of remedy the notice should require the lessee to remedy it, but if the lessor does not want it he need not in addition ask compensation in money, and the notice is good even if compensation in money is not asked for; *Lock v. Pearcel* (1893) 2 Ch. 271, (1892) 2 Ch. 328, in which *North London Land Co. v. Jacques* (1884) 49 L. T. 659, was disapproved.

Surveyor's fees and solicitor's charges in respect of preparation of the notice of the breach cannot be allowed as compensation for breach of the covenants in a lease; *Skinnors Co. v. Knight* (1891) 2 Q. B. 512; *Lock v. Pearce* (1893) 2 Ch. 271. Where the breach of covenant was a continuing one, the covenant being one to repair, and three days after the expiration of notice to repair was given a quarter's rent became due, and the lessor brought an action to recover possession and the quarter's rent due, it was decided that the covenant, being a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and the claim for rent did not affect the right to possession in respect of non-repair after the date when the rent fell due; *Penton v. Barnett* (1898) 1 Q. B. 276.

Relief need not necessarily be claimed by the pleadings; *Mitchison v. Thompson* (1883) 1 C. & E. 72. The relief may be asked for in the lessor's action to enforce a forfeiture or right of re-entry, or the lessee may ask for relief by his own action; ss. 2.

The relief must be asked for before the lessor has actually re-entered; *Rogers v. Rice* (1892) 2 Ch. 170. This is now altered in England by Imp. Act, 55 & 56 Vic., c. 13, s. 2 (1).

An under lessee of part of the demised premises cannot be relieved from a forfeiture incurred for breach of covenant to repair contained in the head lease; *Bert v. Gray* (1891) 2 Q. B. 98.

When the trial of an action for relief from forfeiture for non-payment of rent took place after the lease expired by effluxion of time, no relief was granted, even though the lease gave an option of purchase; *Coventry v. McLean* (1894) 21 A. R. 176. Relief may be refused on collateral grounds; *ib.*

The recovery may be limited to the land alone, and not extend to the buildings if the latter have been purchased by the lessee from the lessors; *Toronto Hospital Trustees v. Denham* (1880) 31 C. P. 203.

Licenses. A license in variation of a sealed instrument must be under seal; *Kaatz v. White* (1868) 19 C. P. 36; and whether by deed or not, unless it is coupled with a valid grant, it is revocable upon reasonable notice by the grantor; *Wood v. Leadbitter* (1845) 13 M. & W. 838; *Cornish v. Stubbs*, (1870) L. R. 5 C. P. 334; *Mellor v. Watkins* (1874) L. R. 9 Q. B. 400. SS. 14 & 15 (Imp. Act, 22 & 23 Vic., c. 35, ss. 1 & 2), were doubtless passed to abrogate the rule in *Dumport's case*, 1 Sm. L. C. (9 Ed.) 43, where it was decided that a license once given put an end to the right of re-entry for any subsequent assignment without license. Upon a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or sub-letting without leave, when the lessor gives a license to assign part of the demised premises, he may re-enter upon the remainder for breach of covenant not to assign or sub-let, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Where a lessor gave a license to alien part of the demised premises, it was held that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave he might re-enter; sections 14 and 15 are to be read together, the former referring generally to all cases and making licenses to alien applicable *pro hac vice*, the latter referring to a specific case of licensing the alienation of a part and reserving the right of re-entry as to the remainder; *Baldwin v. Wanzer* (1892) 22 O. R. 612.

A lessee obtained from his lessor a license to assign, on condition that the assignee would not at any time assign without the consent of the lessor, further arrangements were made by the assignee without license and a forfeiture was upheld; *Eyton v. Jones* (1870) 21 L. T. 789.

Taxes. In leases made after 1st September, 1897, the covenant for payment of taxes does not include local improvement taxes unless specifically provided; *s. 17*.

Taxes under the Municipal Drainage Act are not included in the covenant, unless specially provided for; *R. S. O., c. 226, s. 87*; but taxes for repairs to ordinary drains would be; *Farlow v. Stevenson (1899) W. N. 30, 233*; *Brett v. Rogers (1897) 1 Q. B. 525*.

Where any lease was made prior to 1st September, 1897, the lessee is liable under the usual covenant to pay taxes, for local improvement taxes and for additions made under the Assessment Act year by year to the amount of the taxes in arrear or additions made by the municipality; *Boulton v. Blake (1886) 12 O. R. 532*, or for a specific rate created by a corporation by-law as well as all other taxes; *Wilkie v. Toronto (1862) 11 C. P. 379*.

Where a lessee covenanted in 1872 in a lease commencing 27th September, 1872, to pay "all taxes, rates or assessments whatsoever, whether parliamentary, municipal or otherwise which now are, or which during the continuance of said term, . . . shall at any time be rated, charged, assessed or imposed in respect of the said premises," with a proviso for re-entry for breach, he was not liable for the taxes in 1872 which had been assessed and charged on 15th April, 1872, because the words "all rates, etc., which now are" refer to the kind or character of the tax assessable, and the words "or which shall at any time, etc.," to any other kind of taxes which might thereafter be imposed; *MacNaughton v. Wigg (1875) 35 U. C. R. 111*.

The tenant is not liable for taxes where the lease is silent on the subject; *Dove v. Dove (1868) 18 C. P. 424*.

By the Assessment Act, *R. S. O., c. 223, s. 26*, "Any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary"; but this applies only where the tenant could have been compelled to pay the taxes; *Carson v. Veitch (1885) 9 O. R. 706*.

Notices to Quit. A notice to quit is a certain reasonable notice required by law or by custom, or by special agreement, to enable the landlord or tenant, or the assignees, or representatives of either of them without the consent of the other, to determine a tenancy from year to year or month to month; *Cole Ejec. 30*.

The notice must be clear and certain in its terms, and not ambiguous or optional. It is not defective if it states that double rent will be charged, as that is a penalty for holding over under the Statute; *Doe v. Jackson (1779) 1 Doug. 175*.

A notice in other respects sufficient was good though it contained the following "and I hereby further give you notice that should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance; *Ahern v. Bellman (1879) 4 Ex. D. 201*.

Where a lease was determinable at the end of seven years by six months' notice, a letter by the lessee stating "that he would not be able to stop over the first seven years of his term, unless his rent was reduced," did not invalidate the notice. *Bury v. Thompson (1895) 1 Q. B. 231, 696*.

A notice to quit on the anniversary of the day "at," or "in," or "from," or "on and from" which the term commenced, is good. It is, however, well settled that a notice ought to expire on the last day of the current term; *Sidebotham v. Holland (1895) 1 Q. B. 378*.

A parol notice to quit is good. *Bird v. Defonville (1846) 2 C. & K. 415*.

Weekly tenancies require a week's notice to quit, ending with the week, and monthly tenancies, a month's notice, ending with the month. It is submitted that the last day of the week or month of the tenancy is meant; *s. 18*.

Month means a calendar month, and year, a calendar year, in construing a Statute; *R. S. O. c. 1, s. 8 (15)*, but in construing a legal document, a lunar month is meant, unless there is something to show that a calendar month is intended. *Nudell v. Williams (1865) 15 C. P. 348*; *Simpson v. Margitson (1847) 11 Q. B. 23*; *Hutton v. Brown (1881) 45 L. T. 343*.

Tenancies from year to year require a half-year's or 183 days' notice to quit at the end of the first or some other year of the tenancy. *Good v. Howells* (1838) 4 M. & W. 198; *Doe v. Horn* (1838) 3 M. & W. 333.

If a corporation is the landlord, the notice should be directed to the corporation and not to its officers. *Doe v. Woodman* (1807) 8 East. 228; *Burwell v. London Free Press Co.* (1895) 27 O. R. 6; but it, of necessity, will be served on one of its officers, if served personally.

Tenant to give Notice of Writ of Ejectment. In dower actions, the tenant in possession who is not also the tenant of the freehold, must notify his landlord on being served with a writ, under penalty of forfeiting three years improved rent of the premises; R. S. O. c. 67, s. 3, *ante* p. 251. And in actions of ejectment when a tenant is served he likewise must immediately give notice to his landlord, or forfeit the value of three years improved or rack rent; s. 19.

Ejectment where Half-Year's Rent in Arrears. 4 Geo. II. c. 28 (Imp.) was the one from which sections 20-25 were taken.

The sections apply where possession only is sought; a claim for rent should not be added; s. 20; *Denison v. Maitland* (1893) 22 O. R. 166, and where the lease provides that it is void on non-payment of rent, whether demanded or not, the forfeiture is by agreement, and the section does not govern; *McDonald v. Peck* (1859) 17 U. C. R. 280. Where the lease governs the forfeiture, it makes no difference whether there is a sufficient distress on the property or not; *Campbell v. Baxter* (1864) 15 C. P. 42.

When advantage is desired to be taken of these sections, it must be shewn that not sufficient distress was to be found on the premises; s. 21; *Doe d. Cubbitt v. McLeod* (1841) R. & J. Dig. 5035; and the distress must be sufficient to countervail all the arrears then due, and not merely half a year's rent; s. 21; *Cross v. Jordan* (1852) 3 Exch. 149. A distress levied by the landlord will not operate as a waiver of his rights under section 20; *Thomas v. Lulham* (1895) 2 Q. B. 400; unless less than half a year's rent remains due after realizing the distress; *Cotesworth v. Spokes* (1861) 10 C. B. N. S. 103.

The rights of a mortgagee of the lease not in possession are protected by section 23, by which he can, within six months after judgment and execution, pay all rent in arrear and all damages and costs, and also perform the lessee's covenants.

Relief will be granted the lessee or his assignee on his bringing the arrears of rent and taxed costs into Court; *Campbell v. Baxter* (1864) 15 C. P. 42.

The Court may refuse relief after the term has expired, even though the lessee had an option to purchase during the term; *Coventry v. McLean* (1893) 22 O. R. 1; (1894) 21 A. R. 176.

Security from Tenant in Ejectment Actions. No security will be ordered where a bona fide defence or dispute is set up; *Kelly v. Wolff* (1887) 12 P. R. 234.

It is not now necessary for the plaintiff to sign the notice requiring the defendant to give security; it may be endorsed on the writ in the usual manner; *ib.*

Exemptions from Distress. R. S. O. c. 77, ss. 2-5 provides what goods and chattels are exempt from seizure under execution, and therefore not liable to seizure by distress for rent where the tenancy commenced after 12th October, 1887; s. 30; see *ante*, p. 328.

Before the revision of the Statutes in 1897, sub-section 2 of section 30 was a part of section 1 of that section; it was added by 55 Vic. c. 31, s. 1.

The exemption given by s. 30 (1) has not been lessened by s. 30 (2), as that sub-section is not capable of an intelligible construction and is therefore inoperative; *Harris v. Canada Permanent L. & S. Co.* (1897) 17 C. L. T. 424, 34 C. L. J. 39; *Shannon v. O'Brien* (1898) 34 C. L. J. 421.

An injunction may be granted restraining the sale of exemptions; *Harris v. Canada Permanent* (1897) 17 C. L. T. 424, 34 C. L. J. 39. The person claiming exemptions must select and point out the things he claims as exemptions; s. 30 (3); and he must give up possession of the premises or be ready and offer to do so; s. 32, s. 1.

The exemption only applies to goods owned by the tenant himself and not where merely claimed by his wife as hers; *Dutton v. Wilkinson*, (Meredith, C.J., unreported), Sept. 22nd, 1898.

The exemptions may be seized and sold if the tenant refuses to give up possession after receiving a notice from the landlord to give up possession or pay the rent : ss. 3 and 4.

Goods and chattels of third persons are exempt except in the following cases :

- (a) Where title is claimed under an execution against the tenant.
- (b) Where title is derived by purchase, gift, transfer or assignment from tenant, whether absolute, or in trust, or by way of mortgage.
- (c) Where the tenant has an interest in goods under a contract of purchase or hiring agreement, his interest only may be sold ; *Carroll v. Beard* (1890) 27 O. R. 349.
- (d) Where goods have been exchanged, with the object of defeating the distress.
- (e) Where the property is claimed by the tenant's wife, husband, daughter, son, daughter-in-law or son-in-law.
- (f) Where the property is claimed by any other relative of the tenant who lives on the premises as a member of his family.
- (g) Where the property is claimed by virtue of a purchase, gift, transfer or assignment from any relative mentioned in (e) or (f).

A mortgagee from the tenant's wife is entitled to the exemption ; *Stott v. Spain* (1892) 28 C. L. J. 409.

The following are also exempt :—Sheep, where there are other goods sufficient to pay the rent ; *Hope v. White* (1871) 22 C. P. 5.

Beasts that gain the land while there is other sufficient distress to be found ; 51 Hen. 3, Stat. 4.

Goods entrusted to persons carrying on certain trades to exercise their trades upon them ; *Patterson v. Thompson* (1881) 46 U. C. R. 7, 9 A. R. 326 ; See also *Mitchell v. Coffee* (1880) 5 A. R. 525.

Goods in the custody of the law cannot be distrained ; *Grant v. Grant* (1883) 10 P. R. 40.

A hardwood flooring put down by the tenant of a roller rink which might be removed ; *Howell v. Listowel R. & P. Co.* (1887) 13 O. R. 476.

Trade fixtures attached to the freehold ; *Davey v. Lewis* (1859) 18 U. C. R. 21 ; see *Rogers v. Ontario Bank* (1891) 21 O. R. 416.

Timber being used by a tenant, who is a shipbuilder, in repairing vessels and the vessels being repaired ; *Gildersleeve v. Ault* (1858) 16 U. C. R. 401.

Goods of an ambassador ; 7 Anne c. 12, s. 3.

Who are Tenants Within s. 31 (3). Persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession, are not tenants and are not in occupation "under" the assignees, and their goods are not liable to distress ; *Farwell v. Jameson* (1896) 25 S. C. R. 588.

Attachment of Rent. The right of distress is suspended where rent is attached as to the part attached ; *Patterson v. King* (1896) 27 O. R. 56.

Set off Against Rent—s. 33. A claim for damages for breach of the lessor's covenants can not be set off ; *Walton v. Henry* (1889) 18 O. R. 620.

The notice of set-off may be given after the distress, but before sale, and if the debt set-off exceeds the rent, the landlord should abandon proceedings, or he becomes a trespasser ; *Brillinger v. Ambler* (1897) 28 O. R. 368. The notice does not make the distress illegal *ab initio*, and, if the sale proceeds, "double value" under 2 W. & M. sess. 1, c. 5, s. 5, cannot be recovered as that Statute requires both seizure and sale to be unlawful ; *ib.* If an hotel owner does not provide fire escapes the tenant may do so, and have a right of set-off for all actual necessary and reasonable disbursements ; R. S. O. c. 264 s. 2 (2).

The right to set-off under this section only applies where the tenancy was created after 1st October, 1887 ; s. 38.

Rent Under Assignment for Benefit of Creditors. See *ante* p. 470.

Growing Crops. By 2 Wm. & M. Sess. 1, c. 5, s. 3, "Any person having rent in arrear and due upon any demise, lease or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary or upon any hovel, stack or rick or otherwise,

upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found for or in the nature of a distress until the same shall be replevied or sold, but the same must not be removed from any such place to the damage of the owner."

And under 11 Geo. 2, c. 19, ss. 8 and 9. The landlord may take and seize as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever growing upon any part of the estate demised, as a distress for arrears of rent and the same may cut, gather, make, cure, carry and lay up when ripe in the barns or other proper place in the premises; and if there should be no barn or other proper place on the premises, then in any other barn or proper place which he shall hire or otherwise procure for that purpose, and as near as may be to the premises, and in convenient time appraise, sell or otherwise dispose of the same towards satisfaction of the rent, and of the charges of such distress, appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made and not before, provided that the notice of the place where such distress shall be lodged shall within the space of one week after the lodging or depositing thereof in such place be given to the tenant or left at his last place of abode, and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn be cut, the distress shall cease and the corn be delivered up.

Hop poles in the ground after the hops are gathered are not distrainable; *Alway v. Anderson* (1848) 5 U. C. R. 34.

SS. 36 and 37 are taken from Imp. Act. 14 & 15 Vict. c. 25 and alter the law laid down in *Wright v. Dewes* (1834) 1 A. & E. 641, 40 R. R. 384 and *Wharton v. Naylor* (1848) 12 Q. B. 673.

Boarders and Lodgers. The goods of boarders and lodgers seized for rent of the premises must be freed from distress if the steps prescribed by s. 39 are taken. A lodger is a tenant with the right of exclusive possession of a part of a house, the landlord, by himself or an agent, retaining general dominion over the house itself; *Wharton* 8th Ed. 439; *Stroud* 443. A man will be a lodger within s. 38 although he may have substantially the whole house, his immediate landlord only retaining possession of a housekeeper's room in the basement and of two or three empty attics, and a stable, and although he may in law be an under tenant; *Phillips v. Henson* (1877) 3 C. P. D. 26; and although he has the right of exclusively occupying the greater part of the premises and has separate and uncontrolled power of ingress and egress, and neither his landlord nor his agent sleeps or resides in the house and the lodger acts as caretaker of the part reserved; *Ness v. Stephenson* (1882) 9 Q. B. D. 245; but the person under whom he holds must retain some control and dominion over the house; *Morton v. Palmer* (1882) 51 L. J. Q. B. 7. Persons who occupy rooms for business purposes in the day time are not lodgers; *Heawood v. Bone* (1884) 13 Q. B. D. 179.

The question whether the claimant is a lodger should not be left to the jury as that is in effect asking them to construe the section; *Morton v. Palmer* (1882) 51 L. J. Q. B. 7.

Persons living at an hotel at an agreed sum per month are boarders and not guests; *Newcombe v. Anderson* (1886) 11 O. R. 665.

Declaration of Lodger. The declaration under the Statute must be made after each distress against which protection is sought; *Thwaites v. Wilding* (1883) 12 Q. B. D. 4, 15 L. J. Q. B. 1; it need not necessarily state that no rent is due; *Ex parte Harris* (1885) 16 Q. B. D. 4.

A declaration made on the fifth day after distress levied is good as under 2 W. & M. Sess. 1, c. 5, s. 2 a sale cannot be held till after that day; *Sharp v. Fowle* (1884) 12 Q. B. D. 385.

CHAPTER 171.

An Act respecting Overholding Tenants.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2.

APPLICATION AGAINST OVERHOLDING

TENANT, s. 3.

PROCEEDINGS BEFORE COUNTY JUDGE,

ss. 4, 5.

REMOVAL TO HIGH COURT, s. 6.

COSTS, s. 7.

WITNESSES, s. 8.

OTHER REMEDIES SAVED, s. 9.

ENTITLING AND SERVICE OF PAPERS,

ss. 10, 11.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the of the Province of Ontario,
enacts as follows:—

1. This Act may be cited as "*The Overholding Tenants Short title.
Act.*"

2. In the construction of this Act—

Interpretation

1 "Tenant" shall mean and include an occupant, a sub-
tenant, under-tenant, and his and their assigns and legal repre-
sentatives; "Tenant."

2 "Landlord" shall mean and include the lessor, owner,
the person giving or permitting the occupation of the premises
in question and the person entitled to the possession thereof,
and his and their heirs and assigns and legal representatives.
R. S. O. 1887, c. 144, s. 1. "Landlord."

3.—(1) In case a tenant, after his lease or right of occupation
whether created by writing or by verbal agreement, has expired,
or been determined, either by the landlord or by the tenant,
by a notice to quit or notice pursuant to a proviso in any lease
or agreement in that behalf, or has been determined by any
other act whereby a tenancy or right of occupancy may be
determined or put an end to, wrongfully refuses, upon demand
made in writing, to go out of possession of the land demised
to him, or which he has been permitted to occupy, his landlord,
or the agent of his landlord, may apply upon affidavit to the
Judge of the County Court of the county, or union of counties,
in which the land lies, and wherever such Judge then is, to
make an inquiry as is hereinafter provided for.

Application to
be made to the
County Court
Judge against
overholding
tenant.

Judge
to appoint
time and place
for determin-
ing matter.

(2) Such judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or has been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise. R. S. O. 1887, c. 144, s. 2; 59 V. c. 42, s. 4 (1). 60 V. c. 14, s. 28 (2).

Notice thereof
to be served
on the tenant.

4. Notice in writing of the time and place so appointed for holding such inquiry, and stating briefly the principal facts alleged by the landlord to entitle him to possession, shall be served by the landlord, upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place so appointed is not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the Judge's appointment and of the affidavit on which the appointment was obtained, and of the papers attached thereto. R. S. O. 1887, c. 144, s. 4; 59 V. c. 42, s. 4 (3); 60 V. c. 14, s. 28 (3).

Proceedings
in default of
appearance.

In case of
appearance.

Proceedings
to form part
of the records
of the Court.

Removal on
certiorari.

5. If at the time and place appointed, as aforesaid, the tenant, having been duly notified, as above provided, fails to appear, the Judge, if it appears to him that the tenant wrongfully holds, may order a writ to issue to the sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place, the Judge shall, in a summary manner, hear the parties, and examine into the matter, and shall administer an oath or affirmation to the witnesses called by either party, and shall examine them; and if after such hearing and examination it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 3 of this Act, and that the tenant wrongfully holds against the right of the landlord, then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; and the proceedings in any such case, shall form part of the records of the County Court; and the said writ may be in the words or to the effect of Form 1 or Form 2, in the Schedule to this Act, according as the tenant is ordered to pay costs or otherwise. R. S. O. 1887, c. 144, s. 5; 58 V. c. 13, s. 23 (3); 59 V. c. 18, Sched. 47.

6. Where such writ has been issued, the High Court or a Judge thereof may on motion, within three months after the issue of the writ, command the Judge to send up the proceedings and evidence in the case to the Court, certified under his

hand, and the Court may examine into the proceedings, and, if the Court finds cause, may set aside the same, and may if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land. R. S. O. 1887, c. 144, s. 6.

Writ of restitution.

7. The Judges of the High Court may from time to time, make such Rules respecting costs, in cases under this Act, as to them seem proper; and the County Court Judge before whom any such case is brought may, in his discretion, award costs herein, according to any such Rule then in force, and if no such Rule is in force, reasonable costs, in his discretion, to the party entitled thereto; and in case the party complaining is ordered to pay costs, execution may issue therefor, out of the County Court as in other cases in the County Court, where an order is made for the payment of costs. R. S. O. 1887, c. 144, s. 7.

Judges of High Court may make rules as to costs.

Execution.

8. The Judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the County Court, and under like penalties for non-attendance, or refusing to answer in such case. R. S. O. 1887, c. 144, s. 8.

Summoning witnesses.

9. Nothing herein contained shall in any way affect the powers of any Judge or Judges of the High Court under sections 26, 27 and 28, of *The Act respecting the Law of Landlord and Tenant*, or shall prejudice or affect any other right or right of action or remedy which landlords may possess in any of the cases herein provided for. R. S. O. c. 144, s. 9.

Other remedies of landlords.

Rev. Stat. c. 170.

10. The proceedings under this Act shall be entitled in the County Court of the county or union of counties in which the premises in question are situate, and shall be styled:

Proceedings, how entitled.

"In the matter of (giving the name of the party complaining), Landlord, against (giving the name of the party complained against) Tenant."

R. S. O. 1887, c. 144, s. 10.

11. Service of all papers and proceedings under this Act shall be deemed to have been properly effected if made as required by law, in respect of writs and other proceedings in actions for the recovery of land. R. S. O. 1887, c. 144, s. 11.

Service papers.

SCHEDULE.

FORM 1.

(Section 5.)

WRIT OF POSSESSION (WITH COSTS).

ONTARIO,
To Wit : }

Victoria, by the Grace of God, of the United Kingdom of Great Britain
and Ireland, Queen, Defender of the Faith.

L S.]

[To the Sheriff of the

Greeting :

Whereas

of _____, Judge of the County Court
day of _____, by his order dated the
_____ A. D. 18 _____, made in pursuance of *The*
Act respecting Overholding Tenants, on the complaint of
_____ against _____, adjudged

that _____ was entitled to the possession
of _____
with the appurtenances in your Bailiwick, and that a Writ should
issue out of Our said Court accordingly, and also ordered and directed that
the said _____
should pay the costs of the proceedings had under the said Act, which by
Our said Court have been taxed at the sum of _____ :

THEREFORE, WE COMMAND YOU that without delay you cause the said
_____ to have possession of the said land
and premises, with the appurtenances : And We also command you that of
the goods and chattels and lands and tenements of the said
in your Bailiwick, you cause to be made
being the said costs so taxed by Our said Court as aforesaid, and have that
money in Our said Court immediately after the execution hereof, to be
rendered to the said _____

And in what manner you shall have
executed this Writ make appear to Our said Court, immediately after the
execution hereof, and have there then this Writ.

Witness,
Court at _____

_____ , this
_____ , A.D. 18 _____

Judge of our said
day

Clerk.

R. S. O. 1887, c. 144, Form 1 ; 57 V. c. 26, s. 1.

Issued from the office of the Clerk of the
County Court of the County (or United
Counties) of _____
Clerk.

FORM 2.

FORM 2.

(Section 5.)

WRIT OF POSSESSION (WITHOUT COSTS.)

ONTARIO, }
To Wit. }

Victoria, by the Grace of God, of the United Kingdom of Great Britain
and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the

Whereas

Court of the

Greeting.

Judge of the County

by his order dated the
day of A. D. 18 , made in pursuance of *The Act*
respecting Overholding Tenants, on the complaint of
against adjudged that
was entitled to the possession of

And ordered that writ should issue out of Our said Court accordingly
THEREFORE, WE COMMAND YOU that without delay you cause the said
to have possession of the said land and
premises with the appurtenances, and in what manner you shall have ex-
ecuted this Writ make appear to Our said Court, immediately after the
execution hereof, and have there then this Writ.

Witness
Court a
of

, this
A. D. 18 .

Judge of our said
day

Clerk.

R. S. O. 1887, c. 144, Form 2.

Issued from the Office of the Clerk of the
County Court of the County (or United
Counties) of
Clerk.

NOTES.

Scope of the Act. This Act was intended as a cheap and speedy method of ejecting tenants from premises wrongfully occupied by them, as often in ejectment actions defendants set up such defences as necessitate the parties going to a trial and hold possession without right until the time of a sittings of the court arrives. The Act until 1895 (58 Vic. c. 15 s. 23) contained the words "without color of right" and had a very limited application; *Price v. Guinane* (1888) 16 O. R. 264. The Act had its origin in 4 Wm. IV. c. 1. ss. 53-58.

Who are Tenants. A tenant is a person who holds of another, he does not necessarily occupy. In order to occupy a person must be personally resident by himself or his family; *R. v. Ditchet* (1827) 9 B. & C. 183, per Littleale J.

An occupant, sub-tenant or under-tenant is included in the meaning of the word "tenant" as also the assigns and legal representatives of them; s. 2 (1).

The tenant, though absent, is, speaking generally, the "occupier of premises"; *R. v. Poynder* (1822) 1 B. & C. 178. A servant or other person who may be there *virtute officii* is not a tenant but has merely the use, not the occupation of the premises; *White v. Bayley* (1861) 10 C. B. N. S. 227; *Mayhew v. Suttle* (1855) 4 E. & B. 346; *Clark v. St. Marys Bury St. Edmonds* (1856) 1 C. B. N. S. 23; *Bent v. Roberts* (1877) 3 Ex. D. 66; *R. v. Spurrell* (1865) L. R. 1 Q. B. 72; but such a person may be ejected under the Act; *Fowke v. Turner* (1876) 12 C. L. J. 140.

Jurisdiction. To give the County Court Judge jurisdiction under the Act, the following requisites must appear upon affidavit:—

1. That there was a lease or right of occupation created by writing or by verbal agreement.

2. That the term or right of occupation has expired or been determined. The determination may be (a) by notice to quit, (b) notice pursuant to a proviso in the lease or agreement, (c) by any other act whereby a tenancy or right of occupancy may be determined or put an end to, such as cessation of employment; *White v. Bayley* (1861) 10 C. B. N. S. 227; forfeiture; *R. S. O. c. 170, s. 13*; *Longhi v. Sanson* (1881) 46 U. C. R. 446; *Dobson v. Sootheran* (1888) 15 O. R. 15; forfeiture for breach of contract; *Nash v. Sharp* (1869) 5 C. L. J. 73; or for non-payment of rent; *R. S. O. c. 170, s. 11*.

3. That demand has been made in writing on the tenant or occupant to go out of possession of the land demised or occupied.

4. That the tenant or occupant *wrongfully refuses* to go out of possession.

It would seem that a trespasser or squatter does not come within the Act as he does not hold under a lease, and his right of occupation is not created by writing or verbal agreement.

Notice to quit. In weekly tenancies and monthly tenancies, a week's notice to quit and a month's notice to quit respectively, ending with the week or the month is required; *R. S. O. c. 170, s. 18*; see *Jones v. Mills* (1861) 10 C. B. N. S. 788; *Bowen v. Anderson* (1894) 1 Q. B. 164. In construing the Statutes, month means calendar month, and year calendar year; *R. S. O. c. 1, s. 8* (15) and in construing leases and other documents month means (unless something to show a calendar month is intended) a lunar month; *Nudel v. Williams* (1865) 15 C. P. 348; *Rogers v. Hull Docks Co.* (1865) 34 L. J. Ch. 165; *Hutton v. Brown* (1881) 45 L. T. 343; *Simpson v. Margitson* (1848) 11 Q. B. 23; *Barlow v. Teal* (1885) 15 Q. B. D. 501.

In the case of a yearly tenancy, the notice to quit required is a half-yearly one, or 183 days, to quit at the end of the first or some other year of the tenancy; six lunar months is insufficient; *Clayton v. Blakey* (1798) 2 Sm. L. C. (9 Ed.) 122, 8 T. R. 3; *Duppa v. Mayo* 1 Wm. Saund (1871 Ed.) 385-6.

Where there is a verbal lease for more than three years to continue and expire on a day certain, and the tenant takes possession, he, as well as his sub-tenant for an indefinite period, is bound to quit possession without notice, and if either remain in possession after the expiration of the lease he is an overholding tenant; *Magee v. Gilmour* (1889) 17 O. R. 620.

Where the tenant holds over after the expiration of his tenancy, the terms on which he continues to hold are matters of evidence rather than law, and where the overholding tenant's term was one for eleven months, he was only entitled to a month's notice to quit after his lease expired; *Eastman v. Richard* (1896) 17 C. L. T. 315, (1899) 29 S. C. R. 438.

No particular contract is to be inferred from the mere fact of a holding over after the expiration of the term; *Lindsay v. Robertson* (1899) 30 O. R. 229.

Defence of Tenant. The words "without color of right" which were in the Act prior to 58 Vic. were decided to mean "having no right or wrongfully holding"; *Gilbert v. Doyle* (1874) 24 C. P. 60, but this case was not followed in *Price v. Guinane* (1888) 16 O. R. 624, where "color of right" was interpreted as meaning such semblance or appearance of right as shews the right is really in dispute. The Act, before its amendment by striking out "color of right," conferred no authority upon the County Judge to try the question of the tenant's right or title, and as soon as the question that the tenant's right was made to appear as being really in dispute, then there was that color of right that the Act contemplated and the judge was bound to dismiss the case; *Price v. Guinane* (1888) 16 O. R. 264; *Pearson v. Glazebrook* (1871) L. R. 6 Ex. 27.

Where there was a dispute as to the date when the tenancy commenced and an application was made at a time when, according to the tenant's contention, his lease had not expired, "color of right" was decided to have been shewn; *Bartlett v. Thompson* (1888) 16 O. R. 716.

Where the dispute was whether "months" meant lunar or calendar months, and whether a notice given after conveyance of the reversion was sufficient, the Act even after the amendments of 58 Vic. c. 13, s. 23 (6) and 59 Vic. c. 42, s. 4 (6) was held not to apply, as it was not a case clearly coming under the true intent and meaning of the present section 3; *Magann v. Bonner* (1896) 28 O. R. 37.

But the Queen's Bench Divisional Court on the other hand decided that where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding and the tenant a yearly tenancy, that the Act applied, as the judge tries the right and finds whether the tenant wrongfully holds; *Moore v. Gillies* (1897) 28 O. R. 358.

The question of right seems still to be important, as will be noticed by section 6 of the Act, where the High Court is given power to examine into the proceedings in order that the question of right, if any appears, may be tried as in ordinary ejectment actions.

Affidavit not Evidence. The affidavit filed by the landlord on the application is inceptive only and intended to show some grounds for proceeding; *Re O'Connell* (1865) 1 C. L. J. 163.

Service of Demand. The demand of possession must be personally served and the notice of the time and place appointed must be personally served or left at the tenant's place of abode; s. 4; *Nash v. Sharp* (1870) 5 C. L. J. 73.

"At least three days" means "clear days," i. e. excluding the first as well as the last day; *Young v. O'Rielly* (1864) 24 U. C. R. 172.

Certiorari. An application under s. 6 may properly be made to the Divisional Court and it is the only Court in which the motion can be made; *Re Scottish Ontario and Manitoba Land Company* (1892) 21 O. R. 676.

There is no appeal or right to a certiorari where the application is dismissed and only when a writ of possession issues can an order of certiorari be obtained, and then only when it is applied for within three months after the issue of a writ of possession; s. 6; and where an appeal was made to the Divisional Court, costs as of a contested motion for a certiorari were allowed; *Magann v. Bonner* (1896) 28 O. R. 37.

Action against Landlord. A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings under the Act; *Rees v. Davis* (1858) 4 C. B. N. S. 56; *Jones v. Foley* (1891) 1 Q. B. 730.

62 VICTORIA, CHAPTER 18.

An Act to amend the Law with respect to Compensation of Workmen.

Assented to 1st April, 1899.

HER MAJESTY by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows :—

Short title.

1. This Act may be cited as *The Workmen's Compensation for Injuries Act, 1899.*

Interpretation.

2. In this Act the word "claimant" shall include the word "plaintiff," and the word "respondent" shall include the word "defendant," and in *The Workmen's Compensation for Injuries Act* the word "plaintiff" shall include the word "claimant," and the word "defendant" shall include the word "respondent," and the words "suit," "action" or "proceeding" where mentioned in *The Workmen's Compensation for Injuries Act* shall include the word "arbitration," and the word "court" or "judge" shall include the word "arbitrator."

Burden of proof.

3. Where the machinery or other plant or works of or in a factory, or any part of such machinery, plant or works through or by reason of which the injury complained of was inflicted or occasioned or alleged to have been inflicted or occasioned, is or are, by *The Ontario Factories Act* or any other Act of the Provincial Legislature, or of the Parliament of Canada, required to be covered, guarded, protected or suitably enclosed in whole or in part ;

Rev. Stat.
c. 236.

- (a) Or is required by any of the Acts aforesaid to be of a special or particular kind or quality or to be kept in a particular or specified state or condition.
- (b) Or when dangerous structures or places or openings in or in connection with a factory are required by law to be kept securely guarded or protected or suitably enclosed as far as practicable, or to be kept in some particular state or condition, or that facilities for so keeping them or any of them shall be provided;
- (c) Or where any part of a railway or railway track or railway bridge or other structure is required to be of a certain kind or character or to be constructed or kept by the company in any particular or specified way or manner as provided or contemplated by *The Railway Accidents Act* or by *The Workmen's Compensation for Injuries Act* or by any other Act of the Provincial Legislature, or of the Parliament of Canada;

Rev. Stat. c.
268.
Rev. Stat. c.
160.

then upon any trial or arbitration under *The Workmen's Compensation for Injuries Act* or this Act for the recovery of damages for injury to a workman arising out of the neglect or alleged neglect on the part of the person or company required to keep the said machinery, buildings, structures, dangerous places, and railway track or structures in such a state, condition or manner or of the kind, character or quality as aforesaid and as is provided or contemplated by the said acts respectively, and it is or becomes material to the issue on the trial or arbitration, the onus of proving that the same were so kept or in such condition or that facilities were provided for so keeping the same as the case may be or as the Act or Acts require, shall be upon the party to the action whose duty it was under any of the said Acts to so keep the said machinery, works, plant, dangerous places or any part thereof, or railway tracks or works and structures or any part thereof as by the said Acts or any of them is required or provided.

4. Notwithstanding anything in *The Workmen's Compensation for Injuries Act*, chapter 160 of the Revised Statutes, 1897, contained, except where the claim is in respect of an injury resulting in death, all claims for damages under the said Act may be disposed of by arbitration as herein provided.

Settlement of
claims under
Rev. Stat. c.
160 by arbitration.

5. Proceedings under this Act by way of arbitration shall be begun and carried on in the county where the accident happened or the injury was occasioned.

Venue for
proceedings
under Act.

6. If the suit or action is begun in the County Court, all applications may be made to the Judge of the County Court instead of a Judge of the High Court in Chambers, and the Judge of the County Court shall have the same power and

Applications
to judge of
county court
instead of
judge of high
court in
chambers.

authority as a Judge of the High Court in Chambers in respect of such applications, but the respondent shall not be entitled, where notice of arbitration is given and the amount claimed is within the jurisdiction of the County Court, to apply for an order directing that the proceedings shall be by suit or action.

Notice of arbitration.

7.—(1) In case a workman claiming compensation for injuries under *The Workmen's Compensation for Injuries Act*, and this Act desires to proceed by arbitration under this Act, he shall within four months from the date upon which such injuries were sustained serve a notice (Form 1) upon the person or persons whom he claims to be liable, stating that his claim will be submitted to arbitration unless notice of objection is given as hereinafter provided.

Notice of objection.

(2) If an employer objects to an arbitration he shall within ten days after the service upon him of such notice serve notice (Form 2) that at a time therein named, which shall not be more than eight days from the date thereof, he will apply to a judge of the High Court in Chambers for an order that any proceedings in respect of the said injuries shall be by action as heretofore and not by arbitration. The judge on hearing such application may in his discretion direct that proceedings are to be carried on by action on any of the following grounds:—

- (a) If he finds that difficult questions of law not already judicially determined are likely to arise during the proceedings, or
- (b) If it is made to appear that complicated questions of fact, difficult of determination, are likely to arise on the arbitration, and which should in his opinion be determined in an action and not by arbitration, or
- (c) If the county judge is for any reason or cause disqualified, and there is no junior judge.

Extension of time.

(3) The judge may by such order extend the time for commencing an action as he may deem proper. Unless notice of objection as aforesaid is given, within ten days after the service on him of a notice of arbitration under sub-section 1, the employer shall be deemed to consent to an arbitration, provided that where it is shown to the satisfaction of the judge that the failure to give notice of objection is due to mistake, inadvertence, or oversight, or that there are other sufficient grounds, he may upon such terms as may seem just, enlarge the time for giving such notice and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed as aforesaid. (See Con. Rule 323.)

Application by defendant action to have matter imposed of by arbitration.

8, Where proceedings are begun by action instead of by notice of arbitration, the defendant may apply to a Judge in Chambers for an order directing that the proceedings shall be taken and carried on by arbitration and not by suit or action. The Judge to whom application is made, if he is of opinion that

the cause or causes of action can be more conveniently disposed of by arbitration than by suit or action, and that the same should be disposed of by arbitration rather than by suit or action, shall so order, in which case no further proceedings shall be had in the suit or action, but proceedings may be initiated and carried on by way of arbitration. The Judge may dispose of the costs of the suit or action up to the date of the order, or he may direct that such costs shall be in the discretion of the arbitrator.

9. Either the issue of a writ or notice of arbitration under this Act shall be a sufficient commencement of the action and a sufficient compliance with section 9 of *The Workmen's Compensation for Injuries Act* whether the proceedings are afterwards carried by arbitration or by suit or action.

Commencement of action.
Rev. Stat. c. 160.

10. Nothing in this Act contained shall dispense with the notice of injury required to be given under sections 9, 13 and 14 of *The Workmen's Compensation for Injuries Act*.

Notice of injury to be given under Rev. Stat. c. 160.

11.—(1) In case the proceedings are to be by way of arbitration the claimant shall obtain an appointment from the judge of the county court of the county in which the injury was received, and shall serve a copy of such appointment upon the respondent, together with a notice (Form 3) of the time so appointed. The judge by the said appointment shall name a day, hour and place, for proceeding with the hearing and such day shall be fixed with a view to as early a disposal of the case as appears practicable.

Arbitration proceedings.

(2) In case the claimant does not proceed with the arbitration with reasonable speed the respondent may obtain an appointment from the county judge to have the case heard and disposed of at a time to be named in such appointment. The respondent shall serve a copy of the appointment on the claimant and on proof of such service the judge may at the time so appointed proceed with the hearing or make such disposal of the matter as may appear just.

Right of respondent to expedite proceedings.

12. When an order is made directing that the liability of the respondent to pay compensation to the claimant shall be determined by action as heretofore, all proceedings upon the arbitration shall be stayed upon the filing of the order with the clerk of the county court and service thereof upon the claimant. The claimant if he desires in such case to proceed shall do so by action in the usual way.

Proceedings to be stayed.

13. Within eight days after the notice to the respondent of the day upon which the arbitration will be proceeded with the respondent shall file with the clerk of the county court his statement of defence (Form 4) in which he may set up any

Statement of defence.

defence which would be open to him upon the trial of an action in the High Court, and shall serve a copy thereof upon the applicant.

Judge of another county may act on request.

14.—(1) In case the county court judge is for any reason disqualified from acting or in case he desires not to act he may request some other county court judge to act for him, and the judge acting on such request shall have all the jurisdiction conferred by this Act; and no act of such judge shall be open to question on the alleged ground that he was not the proper judge to perform the duty or that the same had not been regularly or otherwise assigned to him or had not been performed at such request or in such direction as the law requires.

(2) When an application is made to a judge of the High Court in Chambers under section 4, such judge shall have power to direct that a county court judge of another county shall hear the arbitration, and in such case the travelling expenses of the judge of such other county may be paid out of any moneys appropriated by the Legislature for that purpose.

Pleadings limited.

15. No pleadings or documents in the nature of pleadings shall be necessary in case the matter is proceeded with by arbitration under this Act other than the notice of arbitration and the statement of defence hereinbefore mentioned.

Witnesses and evidence.

16.—(1) In any proceedings under this Act the judge of the county court may compel the attendance of witnesses and the production of documents in the same manner and to the same extent as in an action in the county court and shall possess the same powers in respect of all such proceedings as he would possess in an action in the county court and the claimant or respondent shall have the same right to examine the opposite party for discovery or otherwise and the judge shall have the same power to direct the examination of witnesses by commission as in an action in the county court as aforesaid.

(2) Subpœnas for witnesses may be issued out of the county courts on præcipe as in ordinary cases.

Employment of shorthand reporter.

17. In any case if the parties so desire or the judge so directs the evidence may be taken by a shorthand writer. The cost of such shorthand writer shall be borne by the parties equally unless the judge otherwise directs, and copies of evidence shall be paid for on the scale allowed to special examiners in proceedings in the county court.

Referring questions of law.

18. The judge of the county court may if he thinks fit submit any question of law for the decision of a judge of the High Court in chambers or single court and the decision of such judge on any question of law, so submitted, shall be final.

19.—(1) The costs of and incidental to the arbitration and proceedings connected therewith shall be on the scale allowed in actions in the county court and shall be subject to taxation in the same manner. Costs in all cases shall be in the discretion of the judge.

(2) The judge may fix the costs of arbitration or of any other proceedings before him as between the parties instead of directing taxation thereof, and he may also fix the costs as between the solicitor of either party and his client on the application of either.

20. The judge of the county court shall make his award in writing (Form 5), and upon the filing of the same with the clerk of the county court it shall become and be a county court judgment and execution may be issued thereon in the same manner as on a judgment in an action.

21. Where the amount of compensation payable under *The Workmen's Compensation for Injuries Act* has been ascertained by agreement between the parties a memorandum of such agreement shall be delivered or sent by registered letter to the clerk of the county court, who shall, on being satisfied as to its genuineness record such memorandum in a special register for a fee of \$1 and thereupon such memorandum shall for all purposes become and be a county court judgment and shall be enforceable as a judgment :

Provided that the judge of the county court may at any time rectify such register.

22. The duties by this Act imposed upon the judge of the county court and upon the clerk and other officers of such court shall be part of their duties as officers of the county court, and no fees shall be payable to the judge except a fee of \$10 in connection with any arbitration, or to any officer of the court in respect thereof other than the ordinary fees in a county court action as for similar work, and any sum awarded or agreed upon as compensation shall be paid on receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him or to claim a lien on or to deduct any amount for costs from the said sum awarded except such sum as may be awarded by the judge of the county court on an application (Form 6) made by either party to determine the amount of costs to be paid to the said solicitor or agent. such sum to be awarded subject to taxation if the judge so directs.

23.—(1) Any party to an arbitration under this Act may appeal from the decision of the arbitrator to a divisional court of the High Court of Justice, and sections 50 to 57 of *The Revised Statute respecting County Courts* shall, so far as applicable, apply to such appeals.

(2) The court shall also have power, on hearing any such appeal, to remit the matter for the re-consideration of the judge of the county court.

Rules.

24.—(1) The judges of the Supreme Court and of the High Court respectively shall have the same authority to make rules of court with respect to proceedings under this Act, as by sections 122 and 124 of *The Judicature Act* they have with respect to the High Court; and the judges authorized as mentioned in section 125 of that Act shall have the like authority.

Practice in cases unprovided for.

(2) Until provision is made in that behalf in any matters which are unprovided for by this Act, the rules of practice applicable to proceedings in the County Court shall, as nearly as may be, be followed.

Amount recoverable.

25. In any arbitration under this Act the claimant shall not be limited to the amount recoverable in a county court action but may recover the same amount as is provided in case of actions under *The Workmen's Compensation for Injuries Act*.

Rev. Stat. c. 160.

Arbitration optional.

26. Nothing in this Act contained shall oblige a claimant to proceed by way of arbitration, but any claimant may bring an action if he deems fit.

Rev. Stat. c. 62 not to apply.

27. *The Arbitration Act* shall not apply to an arbitration under this Act.

Use of forms.

28. The forms appended to this Act with such variations as may be necessary may be used by any party to an arbitration.

Act to be read with Rev. Stat. c. 160.

29. This Act shall, in so far as it may be necessary in order to enable the same to be carried into effect, be read with and as part of *The Workmen's Compensation for Injuries Act* where the latter Act is not inconsistent with the provisions of this Act.

FORM 1.

Notice of Arbitration by an Injured Workman with Respect to the Compensation Payable to Him.

In the County Court of the County of

In the matter of *The Workmen's Compensation for Injuries Act, 1899.*

Between

A. B.

Applicant,
and

C. D. & Co., Limited,

Respondents.

Take notice that A. B. proposes to submit to arbitration his claim for compensation under the said Act, in respect of personal injury caused to him by accident arising out of and in the course of his employment.

If you object to an arbitration you are to notify A. B. of such objection within ten days from the service of this notice upon you otherwise you will be deemed to have assented to such arbitration and the same will be proceeded with at such time as may be appointed by the judge of the county court of the county of _____, the arbitrator in this matter. Particulars are hereto appended (or annexed).

PARTICULARS.

1. Name and address of injured workman.
2. Name, place of business and nature of business of respondents.
3. Nature of employment of workman at time of accident, and whether employed under respondents or under contractors with them. (If employed under contractors, who are not respondents, name and place of business of contractors to be stated.)
4. Date and place of accident, nature of work on which workman was then engaged, and nature of accident and cause of injury.
5. Nature of injury.
6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity.
7. Average weekly earnings during the twelve months previous to the injury, if the workman had been so long employed under the same employer, or, if not, during any less period during which he had been so employed.
8. Estimated average amount which the workman is able to earn after the accident.
9. Payments not being wages received from employer in respect of the injury during the period of incapacity.
10. Amount claimed as compensation.
11. Date of service of statutory notice of accident on respondents. (A copy of the notice to be annexed.)
12. If notice not served, reason for omission to serve same.

The names and addresses of the applicant and his solicitor are :

Of the applicant,

Of his solicitor,

The names and addresses of the respondents to be served with this application :

Dated this _____ day of _____

(Signed),

Or

Claimant.

Claimant's Solicitor.

FORM 2.

Notice of objection to Arbitration.

(Heading as in Notice of Arbitration.)

Take notice, that a motion will be made before the presiding Judge in Chambers at Osgoode Hall, Toronto, (or as the case may be) on the _____ day of _____ next, at the _____ hour of _____ o'clock in the forenoon, or so soon thereafter as the application can be heard, for an order directing that any proceedings in this matter be by action and not by arbitration. The application is made on the following grounds :

(Here state grounds.)

FORM 3.

Notice to Respondent of Day Upon which Arbitration will be Proceeded with.

(Heading as in Notice of Arbitration.)

TAKE NOTICE : That the Judge of this Court will proceed with the arbitration herein, at on the day of at the hour of o'clock in the noon ; and that if you do not attend either in person or by your solicitor at the time and place above mentioned such order will be made and proceedings taken as the judge may think just and expedient.

And further take notice that if you wish to disclaim any interest in the subject-matter of the arbitration, or consider that the particulars are in any respect inaccurate or incomplete, or desire to bring any fact or document to the notice of the judge, or intend to rely on any fact, or to deny (wholly or partially) your liability to pay compensation under the Act, you must file an answer, stating your name and address and the name and address of your solicitor (if any), and stating that you disclaim any interest in the subject-matter of the arbitration, or stating in what respect the particulars are inaccurate or incomplete, or stating concisely any fact or document which you desire to bring to the notice of the judge, or on which you intend to rely, or the grounds on and extent to which you deny liability to pay compensation.

Such answer, together with a copy thereof for the judge, and a copy for the applicant and for each of the other respondents, must be filed with the Clerk of the Court 5 clear days at least before the day of

If no answer is filed, and subject to such answer, if any, the particulars and your liability to pay compensation will be taken to be admitted.

Dated this day of

To

Of

(Signed),

Claimant.

or

Claimant's Solicitor.

FORM 4.

ANSWER BY RESPONDENTS.

(Heading as in Notice of Arbitration.)

Take notice that the respondents, C. D. & Co., Limited, intend, at the hearing of the arbitration, to give in evidence and rely on the following facts :—

That no notice of the alleged action was given to the respondents as required by section 13 of the said Act ;

That the claim for compensation with respect to the alleged accident was not made within twelve weeks from the occurrence of the accident ;

or

That the respondents, C. D. & Co. Limited, deny their liability to pay compensation under the above mentioned Act in respect of the injury to A. B., mentioned in the Claimant's particulars, and that the grounds on which they deny their liability are :—

That the employment of the said A. B. was not an employment to which the said Act applies ;

or

That the said injury to the said A. B. was not caused by accident arising out of and in the course of his employment ;

or

Any other ground of defence.

FORM 5.

AWARD.

In case of application by workman.

(Heading as in Notice of Arbitration.)

Having duly considered the matters submitted to me, I do hereby make my award as follows :—

1. I order that the respondents C. D. & Co., Limited, do pay to the claimant, A. B., the sum of _____ as compensation for personal injury caused to the said A. B., on the _____ day of _____, by accident arising out of and in the course of his employment as a workman employed by the said C. D. & Co., in (state nature of employment).

2. And I order that the said C. D. & Co. do pay to the claimant, (or as the case may be) his costs of and incident to this arbitration such costs in default of agreement between the parties as to the amount thereof, to be taxed by the clerk _____ on the scale of costs in use in the county courts, and to be paid by the said C. D. & Co. to the claimant (or as the case may be) within 14 days from the date of the certificate of the result of such taxation (or if the judge fixes the costs or the parties agree upon them, this form to be adapted).

Dated this _____ day of _____

Judge.

FORM 6.

Notice of Application for Determination of Amount of Costs under section 16.

In the County Court of holden at

(Title as in Award or Memorandum.)

TAKE NOTICE : That I intend to apply to the judge at
on the day of at the hour of
 o'clock in the noon, to determine the amount
of costs to be paid to me as solicitor (or agent) for you A. B. in the
above mentioned matter ; and for an order declaring that I am entitled
to a lien for such amount on or to deduct such amount from the sum
awarded as compensation to you the said A. B. in the above
mentioned matter and for consequential directions.

Dated this day of

Applicant.

To the Clerk of the Court
and to
A. B.
of

NOTES.

Statutes Referred To. The principal statutory provisions referred to in the act would appear to be the following :—

S. 20 of The Factories Act, R. S. O. c. 256, which requires machinery and dangerous structures or places to be guarded, and openings of hoistways, elevators &c., to be provided with trap-doors or self closing hatches and safety catches, or such like devices, and all elevator cabs to be provided with a suitable mechanical device to hold them in case of accident.

SS. 4 and 5 of The Railway Accidents Act R. S. O. c. 266, which require bridges to have a clear headway of seven feet between the top of the highest freight cars in use on the railway, and the lower beams of the bridge, and contain regulations as to the packing of frogs, wing and guard rails.

S. 192 of The Railway Act 51 Vict. c. 29 (D.), which requires a similar headway under bridges and tunnels, and other like structures, and s. 262 of the same act, containing substantially the same provisions as the Ontario Act, with reference to the packing of frogs and wing and guard rails; see *Washington v. Grand Trunk Ry. Co.* (1897) 24 A. R. 183, 28 S. C. R. 184, (1899) A. C. 275.

S. 5 of The Workmen's Compensation for Injuries Act, R. S. O. c. 160, (*ante* p. 135), defining a defect in the condition of such bridges, frogs, wing and guard rails.

Onus of Proof. The exact benefit which a plaintiff will derive from section 3 has not yet been ascertained. It would appear to be necessary, notwithstanding that section, for him to prove that the alleged defect or non-performance of duty was the cause of the injury; *Cowans v. Marshall* (1897) 28 S. C. R. 161; *Canadian Colored Cotton Mills Co. v. Kervin* (1899) 29 S. C. R. 478. This will probably involve the proof of the defect, or violation of the statutory duty. The onus is cast on the defendants of proving merely the performance of their statutory duty, but not of showing that the non-performance thereof was not the cause of the injury.

Arbitration. The adoption of the arbitration proceedings is probably merely optional with the workman. S. 26 appears to be inconsistent with s. 8, and it is, in any view, very difficult for a defendant before trial to demonstrate that the cause of action can be "more conveniently disposed of by arbitration than by action." Several applications which have been made by defendants to have such causes of action referred to arbitration have been dismissed. If a plaintiff combines a claim at common law, s. 8 is evaded; *Snell v. Toronto Railway Co.* (1900) 15th January, (*Meredith C. J.* and *Rose J.*).

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INDEX.

Absconding Debtors, Act respecting. R.S.O. c. 79, 257. See also ARREST FOR DEBT.

Absconding Debtor.

- definition of, 257.
- "departs from Ontario with intent," 264.
- "indebted," 264.
- "resident," 264.

Attachment.

- affidavits for, 264, 265.
- effect of, 265.
- form of order, 265.
- of shares, 265.
- procedure to obtain in County Court, 258, 265.
 - Division Court, 259, 265.
 - High Court, 257.
- sale of goods under, 260, 266, 430.
 - costs of, 260.

Contesting claims, 266.

Costs—of Sheriff, 260.

- for first order, priority of, 266.
- for inventory, 260.

Debts due to Absconding Debtor.

- attachment of, 261, 260.
- liability of person paying to debtor after notice, 261.
- proceedings to recover by debtor, stay of, 261.
 - by Sheriff need not be brought by him until creditor gives bond of indemnity, 262.
 - statement of claim to contain averment, 261.
 - when may be brought, 261.
- sale of by Sheriff, 262, 266.
 - form for, 263.
 - purchaser entitled to sue in his own name, 262.
 - warranty not to be created by, 262.

Property of.

- exemptions, 258, 264.
- inventory, 258, 265.
 - costs of, 260.
- necessity of having at time of departure, 264.
- perishable, how disposed of, 259, 265.
 - to be restored if sufficient security not given by plaintiff, 259.
- proceeds of, how distributed, 262, 263, 266.
- surplus of, may be restored, 2 3.

Acknowledgments, Written. See LIMITATION OF ACTIONS, WRITTEN PROMISES AND ACKNOWLEDGMENTS OF LIABILITY.

Actio personalis moritur cum persona, 375, 391.

Acts. See also BILLS.

- amendment of. See Amendment of Acts.
- authorizing proceedings against absentees, validity of, 50.
- conflicting. See B.N.A. Act, Interpretation Act.
- disallowance of by Order-in-Council after assented to by Governor-General, 29.
- English, in force in Ontario, 71.
- extra-territorial, 50.
- how cited, 4.
- how proved in evidence, 81.
- Imperial, conflict of Canadian with, 50.
 - how far in force in Canada, 50.
- interpretation of. See Interpretation Act.

- Acts.** *intra vires.* See Legislative Powers, of Dominion and Quebec to be printed in French, 44.
private. See Interpretation Act.
repeal of. See Interpretation Act.
- Actions Against Public Officers.** See ACT TO PROTECT JUSTICES OF THE PEACE, for damages for breach of duties under private Act, 15.
- Administrator.** See TRUSTEES AND EXECUTORS, and EXECUTORS AND ADMINISTRATORS.
- Admissibility of Evidence.** See WITNESSES AND EVIDENCE.
- Affidavits.** Formal defects in, not to invalidate, 87.
made out of Ontario before whom to be made, 85.
of execution. See Registry Act.
- Affirmations,**
by whom may be administered, 78.
when made out of Ontario, 85.
by whom may be made instead of oath, 77, 78.
form of, 77, 78.
- Affirmative words,** how construed, 14.
- Agents,** goods entrusted to. See Goods entrusted to agents.
- Agriculture,** concurrent jurisdictions of Dominion and Provinces over, 39.
- Aliens,** exclusive jurisdiction of Dominion respecting, 36.
- Alimony,**
cannot be awarded by Senate, 54.
jurisdiction of High Court over, 172.
registration of judgment for, 172.
- Amendment of Acts.**
effect of, 13.
of B. N. A. Act, 50.
when may be made, 5.
of consolidation by provinces, 37, 59.
- Apology.** See DEFAMATION.
- Appeals.** See JUDICATURE ACT.
- Appointment of public officers.** See B. N. A. ACT.
construction of Acts respecting. See Interpretation Act.
- Appointment Under Power.**
by will. See WILLS ACT.
illusory, rule as to, 177.
- Apportionment.**
of condition of re-entry. See Landlord and Tenant.
rents and annuities. See Landlord and Tenant.
- Arrest and Imprisonment for Debt,** Act respecting (R. S. O. c. 80), 267. See also ABSCONDING DEBTORS.
- Arrest for debt.**
setting aside order for, 276.
- When may be had.**
what must be shown, 267.
good and probable cause, 275.
intent to defraud, 275.
- When may not be had.**
cause of action less than \$100, 268, 275.
foreigners, 275.
married women, 268, 278.
non-payment of judgment for costs, 268, 276.
penalties, 268, 278.
- Bail**
above, 278.
below, 278.

Arrest and Imprisonment for Debt—Continued.**Bail—Continued.**

- bond, 270.
 - application for allowance of, 271.
 - assignment of, to creditor upon breach, 272.
 - breach of, by non-attendance for examination, 278.
 - conditions of, 271.
 - endorsement of, to discharge sheriff, 271.
- deposit in lieu of, 271.
- special, 278.
- sureties for, affidavits of, 270, 272.
 - may plead re-arrest, 272.
 - " surrender debtor, 272.
- to the limits, 278.

Ca. re—writ of, 273.**Ca. sa., writ of.**

- when affidavits necessary to obtain issue of, 268.

Contempt, process for, 277.**Committal to gaol—delay to be allowed before, 269.****Criminal Custody—Act not to apply to persons in, 174.****Custody of persons arrested**

- discharge from, 273, 278.
- escape, liability of sheriff for, 278.
- gaol limits, 270.
- transfer of, to own county, 269.

Examination of debtor, 272.

- committal for refusal to answer, 172.

Execution against property of debtor on bail, 273.**Judgments.**

- for costs—no arrests under, 268.
- for penalties " " 268.
- orders for payment of money to be deemed, 269.
- person having carriage of, to be deemed the plaintiff, 269.

Ne exeat. writ of, 267, 276.**Privilege from arrest, 276.****Separation of united counties—effect of, 173.****Sheriff—liability of, for escapes, 274, 278.****Assessors.**

- appointment of by the court, 194.

Assignment by Insolvents, Act respecting. (R. S. O., c. 147), 445.

- (as to constitutionality of the Act, see B. N. A. Act.)

Accounts.

- to be prepared and kept accessible, 456, 473.

Advertisement for creditors, 473.**Affidavits.**

- how sworn, 456.

Assets.

- not to be removed from Province, 456.

Assignees.

- indemnity of, 473.
- may renew chattel mortgage, 471.
 - retain leased premises for balance of term, 817.
- must not profit by his trust, 471.
- possession by, 466.
- refusal by to proceed, creditors' rights on removal of, 449, 468.
- remuneration of, 457, 473.
- rights of, 447.
- sheriff as, 452, 466.
- suing in name of, 449, 471.
- to reside in Ontario, 448.

Assignments for Benefit of Creditors.

- amendment of by judge, 450, 466.
- assent to by creditor, 466.
- by company, 467.
- by firm, 467.

EACE.

STRATORS.

67. See also

Assignment by Insolvents—Continued.**Assignment for Benefit of Creditors—Continued.**

- description of property in, 448, 466.
- exemptions, 466.
- form and contents of, 448, 465.
- priority of, 450, 465, 467.
- “ wages over. See Act respecting Wages.
- publication and registration of, 451.
- how compelled, 452.
- omission of, effect of, 452, 466.
- liability of sheriff for, 452.
- penalty on, 451.
- revocation of, 466.
- to be subject to the Act, 448.
- when voidable under the Act, 447.
- when not, 446.

Chattel Mortgages.

- renewal of, by assignee, 471.

Claims.

- contestation of, 455, 472.
- by debtor where assignee satisfied, 455.
- for damages, 468.
- for rent, 470.
- how to rank on different estates, 448.
- preferential, 469.
- proof of, 454, 468.
- limiting time for, 454.
- when not due, 455.

Confessions of Judgment in Fraud of Creditors, to be void, 445.

- what are, 460.

Conveyances to Defeat Creditors.

- effect of, 445.
- action to set aside—effect of when brought within 60 days, 446.
- who entitled to bring, 462.
- assignment for creditors within 60 days of—effect of, 446.
- following proceeds of, 449, 465.
- how attacked, 464.
- property included in, provisions respecting, 462.
- what transactions not prohibited, 446, 463.

Creditor, when to include Sureties and Endorsers, 446.**Distribution under Creditors' Relief Act, 457.****Dividend Sheet—Notice of, 457.****Dividends.**

- when to be paid, 457.

Examination of Assignor or his Employees, 458, 472.

- appointment for and service of, 459.
- compelling attendance and production of books, 459.
- conduct of, 459.
- procedure upon, 459.
- refusal of assignor to attend, penalty for, 458.
- unsatisfactory answers, 458, 472.

Following.

- proceeds of fraudulent conveyances, 449, 465.
- trust funds, 470.

Insolvency.

- knowledge of, 460.
- meaning of, 460.

Inspectors.

- appointment of, 452.
- duties of, 474.
- remuneration of, 458.

Judgments, collusive, 445, 460.**Meeting of Creditors.**

- assignee to call, 452.
- by request of creditors, 452.

Assignment by Insolvents—Continued.**Meeting of Creditors—Continued.**

direction by judge on non attendance of creditors on, 453.
 voting at, 453.
 valuing of securities for, 453, 454.

Moneys received by Assignee to be Deposited in Bank, 456.

Payments by Debtor.

when valid, 446.

Persons having information as to Assignor's Affairs, obtaining Evidence from, 459.

Policy of Act, 460.**Preferences.**

legislation respecting not forbidden by common law or Statute of Elizabeth, 461.

Pressure—Doctrine of, 461.

what is still sufficient to rebut presumption of intent to prefer, 462.

Rent—Extent of Preferential Claim for, 470, 471, 472.

Sale by Debtor.

consideration for, when transfer of to creditor invalid, 447.
 when not voidable, 447.
 for advances to enable debtor to continue in business, 448.

Securities—Giving up by Creditor.

effect of, 477, 464.
 valuing, 453, 454, 468.

Set-off.

application of right of, 456, 473.

Time for Administration, 373.

Transactions not voidable under the Act, 446, 463.

Wages, payment of protected, 447.

Assignments of debts and choses in action, 181.

where several claimants under, 181.

Asylums, provincial, jurisdiction of provinces over, 37.**Attorney-General.**

duties of, 45.
 how appointed, 45.
 to be a member of executive council, 30.
 to be notified before argument of constitutional questions, 71, 183.

Attorney, powers of. See POWERS OF ATTORNEY.

Auctions—See LAW AND TRANSFER OF PROPERTY ACT.

Bank Act, The. (53 Vic. c. 31, Dom.), 549.

constitutionality of, 55, 56, 556.
 principle of, 556.

Advances for Building Ships, 552, 561.**Agents.**

acquisition of negotiable instruments from, 552, 558.
 definition of, 552.

Bank, meaning of, 549.**Bills of Lading.**

See WAREHOUSE RECEIPTS.

Branches, 550, 556.**Collateral Securities.**

power to take, 551, 560.
 sale of by bank, 551, 560.

Deposit Receipts, 557.**Disabilities of Banks.**

engaging in trade, 550, 558.
 lending on mortgages or bank stock, 550, 558.
 purchasing real estate, 551, 560, 561.
 taking security for debts contracted, 551, 560.

False statements.

penalty for making, 553.

Bank—Continued.**Goods.**

- loans on security of, 552, 553.
- manufactured from articles pledged, 554.
- meaning of, 549.
- penalty for alienating, when covered by warehouse receipt, 554.
- sale of, on non-payment of debt, 554, 555.
- notice to be given, 554.

Lien of bank on debtors' shares, 550.**Manufacturers, Shippers and Purchasers.**

- meaning of, 550.
- wholesale, loans to, 553.
- priority for over unpaid vendor, 554.
- security for, 553, 555.

Mortgages.

- absolute title under, 551, 552.
- power to take as security, 551.

Negotiable securities, 556.**Non-negotiable instruments, 557.****Penalty.**

- for alienating goods under bill of lading, 554.
- for false statement in warehouse receipt, 553.
- for violation of Act by bank, 555.
- negotiable securities, 556.

Real Estate, powers of bank as to.

- for occupation, 551, 560.
- purchase of, under execution, 551, 561.
- title to, under mortgage, 551, 552, 561.

Treasury Board, 549.**Warehouse receipts, bills of lading, etc.**

See also **BILLS OF LADING ACT, MERCANTILE AMENDMENT ACT.**

- admixture of property, 565.
- alienating goods covered by, penalty for, 554.
- actual visible and continued possession, 563.
- creditors following proceeds of invalid
- definition of, 549, 562.
- endorsement of, 565.
- exchanging, 553, 565.
- form of securities, 553, 565.
- insurable interest, 565.
- issue of direct to bank, 565.
- locality of goods, 562.
- negligence of bank, 565.
- negotiation of, 562.
- pledge receipts, 562.
- power to take, 552, 562.
- priority over unpaid vendor, 564.
- promise to give security, 563.
- receipts given by owner, 563.
- sale of goods, 554, 555, 564.
- power to retain surplus on, 564.
- warranty on, 564.
- transfer of, 565.
- by agent, 552, 563.
- by third person, 563.
- under Ontario Act, 566, 567.
- where agent previous holder, 552.

Bills. See B. N. A. Act.**Bills of Exchange Act, The, 502.****Acts repealed by, 534.****Acceptance**

- after dishonor, 507.
- date in, 507.
- definition of, 507.
- dishonor by non-acceptance, 515.

Bills of Exchange—Continued.**Acceptance—Continued.**

- for honor, *supra* protest, 525.
- general, 507.
- qualified, 507, 516.
- requisites of, 507.
- time for, 507.
- when overdue, 507.
 - effect of, 505.
- where drawee wrongly designated, 507

Acceptor

- liability of, 522.
 - as to presentment, 522.
 - " protest, 522.
- for honor, liability of, 525.
- presentment to, 526.

Accommodation party.

- definition of, 510.
- discharges of by payment by drawer, 543.
- evidence as to, 543.
- liability of, 510.

Agreement as to method of payment, 543.

- to renew, 543.

Alteration of bill, 535, 546.**Amount of.**

- discrepancy in, 504.
- when certain, 504.
- where left blank, 508.

Cancellation of, 524, 546.**Capacity of parties to**

- co-extensive with capacity to contract, 508.
- corporations, 509.
- infants—effect of drawing or indorsement by, 509.

Conflict of laws—rules as to, 523, 546.**Consideration.**

- suing on, 548.
- usurious, effect of, 511.
- what is, 510, 542.
- when purchase money of patent right, 511.

Damages.

- measure of, on dishonor, 523, 545.

Date.

- not true date, or a Sunday, effect of, 505.
- omission of, effect of, 503, 505.
- prima facie* evidence, 503.

Days of grace, 505.

- right of action not complete until expiration of, 548.

Defects of title, 413, 533.**Defects which do not invalidate, 503.****Delivery.**

- bill incomplete without, 508.
- requisites of, 508.
- when presumed, 508.

Discharge of bill.

- by alteration, 525.
 - acceptor becoming the holder, 524.
 - cancellation, 524.
 - payment, 524.
 - waiver, 524.

Dishonor.

- by non-acceptance, 515.
- recourse for, 516.
- unless acceptance unqualified, 516.

Bills of Exchange—Continued.**Dishonor—Continued.**

- by non-payment, 518.
- recourse for, 518.
- notice of, 518, 519, 544.
- address of, 544.
- when unnecessary, 520, 544.

Drawee.

- funds in hands of, not assigned by bill, 522.

Drawer.

- liability of, 522.
- personal, 542.
- to be named, 503.
- where more than one, 503.

Form and interpretation of bill, 541.**Holder.**

- duties of, 514.
- rights of, 514.

Holder in due course.

- defective title, what is, 511, 243.
- presumption that every holder is, 511.
- rights of, 514.
- rights of holder subsequent to, 511.
- who is, 510, 543.

Holidays.

- what are, 506.
- where last day of grace falls on, 505.

Inchoate instruments.

- filling omissions in, 508, 542.

Indorser.

- liability of, 523, 544.
- stranger signing bill liable as, 523, 545.

Infant, note by void, 542.**Inland bill.**

- how distinguished, 503.

Interest, 541.**Interpretation of terms in Act, 502.****Lost bills.**

- action on, 527, 546.
- rights to duplicate of, 527.

Negotiation, 512.

- after dishonor, 513,
- conditional, 513.
- in blank, 513.
- presumption as to, 514.
- requisites of, 512.
- restricting, 513, 541, 543.
- special, 513.
- to person already liable thereon, 514.
- when ceases to be negotiable, 513.
- without indorsement, 543.

Omissions.

- authority of holder to fill in, 508, 542.

Parties.

- same person as different parties, 503.

Patent right, bill or note given for, 511, 543.**Payable.**

- at a future time, 505.
- on a co. agency, 505.
- on demand, 505.
- to bearer, 504.
- to order, 504.

Bills of Exchange—Continued.**Payee.**

fictitious, 504, 541.
 must be certainty as to, 504.
 provisions relating to, apply to special indorsee, 513.
 where more than one, 504.

Payer for honor, 546.**Payment, 524.**

for honor *supra protest*, 526.
 oral agreement as to method of, 542.
 time for, 505, 506.

Presentment for acceptance.

necessary delay in, 514.
 omission of, effect of, 515.
 excuses for, 515.
 rules as to, 515.
 time for, 515.
 when necessary, 514.

Presentment for payment, 516, 545.

delay : when excused, 517.
 how made, 522.
 liability of acceptor as to, 522.
 rules as to, 516.
 waiver of, 517, 544.
 when not necessary, 517.

Presumption of value and good faith, 511, 543.**Protest.**

for better security, 544.
 not necessary to render acceptor liable, 522.
 rules as to, 520, 521.
 to be *prima facie* evidence, 85.
 when necessary, 520.
 when notary not accessible, 534.
 when noting equivalent to, 533.

Referee in case of need, 507.**Renunciation of Rights, 524, 545.****Sets of Bills, 527.****Signature.**

as agent, 510.
 by corporation, 533.
 by firm, 509.
 by procuration, 510, 542.
 forged or unauthorized, 509, 542.
 right to recovery on, 509.
 in an assumed name, 509.
 necessity for, 509, 543.
 need not be in party's own hand, 533.
 presumption raised by, 511.

Stipulations in by drawer or indorser, 507.**Time, computation of, 533.**

for payment, 505, 506.

Transfer by delivery, 533.

liability of, 523.
 warranty by, 523.

Unconditional Order.

definition of, 503.

Cheques—

Crossed, 529, 530, 547.
 duties of banks as to, 530.
 effect of on holder, 531.
 how reopened, 530.
 protection of bank and drawer, 531.
 provisions respecting to extend to dividend warrants, 534.
 countermanding payment of, 529, 547.
 definition of, 529, 546.

Bills of Exchange—Continued.**Cheques—Continued.**

- issue of, 541.
- presentment of for payment, 529.
- revocation of bank's authority to pay, 529.

Common Law Rules, application of, 535, 548.

Commencement of Act, 535.

Construction with other Acts, 535, 541.

Forms, 535, et seq.

Good Faith, when Act deemed done in, 533.

Promissory Notes.

- authority of Dominion over, 36.
- definition of, 531, 547.
- delivery of, necessity for, 531.
- joint and several, 531.
- maker of, liability of, 532.
- payable on demand, 532, 548.
- presentation of, 532.
- presentation of for payment, 532, 548.
- necessity for, 532.
- place of, 532.
- protest of foreign note, when necessary, 533.
- provisions of Act which relate to bills of exchange to extend to, 532.
- effect of this provision, 548.
- exceptions, 533.

Bills of Lading, Act respecting, [52 Vic. (Dom.)], 439. See also THE BANK ACT, MERCANTILE AMENDMENT ACT.

Bills of Lading.

- authority of Agents to sign, 443, 444.
- "clean," meaning of, 443.
- contract contained in, 442.
- estoppel by, 444.
- how far evidence, 443, 440, 443.
- negotiability of, 433.
- ownership of goods under, 433.
- sets of, 433.
- "through," meaning of, 443.
- transfer of, consideration for, 444.
- what are, 441.

Charter, party, effect of, 443.

Consignees and endorsees, rights and liabilities of, 433, 439, 441, 442, 443.

Fraud of Shipper, 444.

Property, passing of by endorsement of, 441.

Railways, position of under Act, 441, 443.

Stoppage in transitu, 439.

Bills of Sale and Chattel Mortgages, Act respecting (R. S. O., c. 148), 335. See also CONDITIONAL SALES OF CHATTELS.

- Dominion Bank Acts may override, 55.
- how construed, 351.
- objects of the Act, 349.
- persons entitled to the benefit of, 350.
- property within, 349.

Affidavits.

- by trustee, 351.
- by whom to be administered, 344.
- for bills of sale, 335
 - chattel mortgages, 334.
 - " to secure debentures, 341.
 - " " future advances.
 - " " endorser, 337.
- for renewals, 340, 342.
- who may make, 337, 355.
- on behalf of companies, 342, 355.
- requisites of, 355.
- untruth of, effect of, 351.

Bills of Sale and Chattel Mortgages—Continued.**Agent, authority of, 334, 335, 336, 357.**

copy to be attached to mortgage, 337.

Agreements where possession passes without ownership, 346

how filed, 346.

not to affect ordinary purchases, 346.

nor marked goods, 347.

requisites of, 346.

Agreements to give mortgages, 337, 359.**Contracts.**

made prior to 7 April, 1896, 338.

to give chattel mortgages to be deemed mortgages, 337.

to make a sale to be deemed a sale, 338.

verbal, effect of, 338.

"Creditors," meaning of under the Act, 345.**Description of property, requisites of, 344, 353.**

of property after acquired, 354.

Discharges of mortgages.

form of, 348.

how certified, 343.

how entered, 343.

where mortgage has been renewed.

Endorsers, mortgages to secure, 336, 357.**Fees, 343.****Fixtures, 354.****Future advances, mortgages to secure, 336, 356.****General authority to take or renew mortgages, 344.****Goods.**

not in possession of mortgagor, 345.

owned by foreigners, 352.

situate in a foreign country, 352.

Inspection of books, right to, 345.**New county, effect of formation of, 345.****Possession.**

actual and continual change of, meaning of, 346, 353.

agreements where passes, without ownership, 346.

mortgage or sale of goods not in, 345.

seizure, 356.

subsequent effect of, 346, 350.

Registration.

documents requiring, 351.

effect of, 335.

fees for, 343.

how effected, 339.

of agreements where possession passes without ownership, 346.

assignments of mortgages, 343.

bills of sale, 335.

contracts to give mortgages, 337, 351.

" sell " 337.

discharges of mortgage, 343.

mortgages generally, 334.

" to secure debentures, 342.

" " future advances, 336.

" " endorsers, 336.

renewals, 339.

proof of, how made, 342.

time within which to be made, 334, 335, 336, 338, 339, 342, 651.

when goods removed to another county, 339.

when time expires on a holiday, 344.

where to be made, 338, 339.

Removal of goods to another county.

procedure on, 339, 359.

Renewals of mortgages.

affidavit for, 340,

" by whom may be made, 341.

r, MERCAN-

55. See also

Bills of Sale and Chattel Mortgages—Continued.**Renewals of mortgages—Continued.**

- contents of, 339, 357.
- effect of error in, 357.
- form of, 348.
- how filed, 340.
- registration of, 309.
- to be filed annually, 340.
- where mortgage made to secure debentures, 342.

Returns to be made by clerks, 347.**Sale under Chattel mortgage.**

- effect of where mortgage invalid, 351.

Sale, what is, 353.**Seizure, 358.****Vessels, Act not to apply to mortgages of, 344.****Bond given by party appointed under an Act.**

- how affected by its repeal, 12.

Breach of promise of marriage.

- evidence in, 76.

British North America Act, The.

- (30-31 Vic. c. 3, Imp.), 19. See also LEGISLATIVE POWERS.

Admission of other colonies, 47.**Agriculture.**

- concurrent jurisdiction over, 39.

Amendment of

- can be by Imperial Parliament only, 50.

Assets and debts of provinces, 40, 41.

- arbitration respecting, 46.

Canada.

- how composed, 20.
- how divided, 20.

Census, 20.**Consolidated Revenue Fund, 40.**

- provincial, 43.

Constitutional questions, discussion of, 71, 183.**Courts.**

- constitution of, 36, 56.
- power of Dominion to establish a general Court of Appeal, 40, 58.
- procedure in, 36, 56, 57.

Customs duties, provisions respecting, 42.**Education.**

- denominational schools, 38, 69.

Elections.

- first, 27.
- laws for, continued, 26.

Errors in names of Provinces, effect of, 46.**Executive Councils of Provinces, 30.****Existing laws, continuance of, 44.**

- as to elections.

Dominion, 26.

Ontario and Quebec.

Governor-General.

- application of provisions, respecting, 20, 21.
- assent to bills by, 29.
- disallowance of bill assented to by, 29.
- may be authorized to appoint deputies, 21.
- powers of, how exercised, 21.

Grants to Provinces yearly, 42.**Great Seals of provinces, 45.****House of Commons.**

- constitution of, 25.
- duration of, 28.

British North America Act—Continued.**House of Commons—Continued.**

- electoral districts for, 25.
- members not to sit in Senate, 25.
- quorum of, 27.
- representation in, 28.
- Speaker, 27.
- summoning, 25.
- vacancy in, 27.
- voting in, 27.

Immigration.

- concurrent jurisdiction over, 39.

Imperial Acts in force here, 50.**Intercolonial Railway, 47.****Judges.**

- appointment of, 39.
- salaries of, 39.
- tenure of office of, 39.

Languages.

- either French or English may be used in debates 44

Legislative Powers.

See LEGISLATIVE POWERS.

- of Dominion, 35.
 - enumerated, 35, 54.
 - incidental, how far extend, 54.
 - must give way to Imperial Acts, 50.
 - no extra territorial jurisdiction, 50.
 - not delegated from Imperial Parliament, 51
 - override Provincial enactments, 51.
 - "peace, order and good government," 51
 - railways, 69.
 - what is *intra vires* of, 52.
 - what is *ultra vires* of, 53.
- of provinces, 36, 57.
 - criminal law, 66, 67.
 - enumerated, 36, 59.
 - exceptions from, 51.
 - invasion of, 52.
 - procedure in courts, 65.
 - what is *intra vires* of, 59.
 - ultra vires* of, 58.

Lieutenant-Governors.

- administration in absence of, 31.
- application of provisions, re, 30, 31.
- appointment of, 29.
- how powers of executed, 30.
- oaths of, 30.
- salaries of, 30.
- tenure of office of, 29.

Lumber Dues in New Brunswick, 43.**Money Votes, 28.****Oath of Allegiance.**

- by whom to be taken, 43.
- power of, 49.

Officers.

- appointment of by Governor-General, 44.
- provincial, appointment of, 45.
- powers of, 45.
- transfer of to Dominion, 44.

Parliament of Canada

- constitution and privileges of, 22.
- session of, 22.

Penitentiary for Ontario and Quebec, 46.**Privy Council (Canada).**

- constitution of, 21.

British North America Act—Continued.**Proclamations.**

- after union, under Acts before union, 46.
- before union, to commence after, 46.

Provincial Constitutions, 29, 31, 32, 33, 34.

- executive councils, 30.
- legislative council of Quebec, 32.
- legislatures, 31, 32, 33, 34.
- provisions as to Parliament which apply to, 35.
- Lieutenant-Governors, 29, 30.
- New Brunswick, 34.
- Nova Scotia, 34.
- Ontario, 31, 32, 33.
- Quebec, 31.

Queen.

- application of provisions referring to, 19.
- assent to bills, 29.
- command of forces to remain in, 22.
- executive authority to continue in, 20.

Railways, jurisdiction of Dominion over, 69.**Records, division of, 46.****Seat of Government.**

- of Dominion, 22.
- provinces, 31.

Senate:

- adding members, 23.
- constitution of, 22.
- disqualification of Senator, 24.
- members of Legislative Council of Quebec becoming, provisions respecting, 43.
- number of members, 24.
- qualification of members, 23.
- declaration of, 49.
- quorum in, 25.
- representation in, 22.
- resignation of place in, 24.
- tenure of seat in, 24.
- summoning, 23.
- vacancies in, 24.
- voting in, 25.

Speaker of House of Commons, 27.**Temporary Acts—construction of, 45.****Townships in Quebec—constitution of, 46.****Treaty obligations—authority of Dominion to perform, 44.****Uniformity of laws in the Provinces, provision for, 39.****Union of provinces into one Dominion, 20.****Canada, meaning of in B. N. A. Act, 20.****Canada Evidence Act. See WITNESSES AND EVIDENCE.****Canada Temperance Act, 53, 59.****Canadian Copyright Act.**

- confirmed by 38, 39 Vict. (Imp.) c. 53, 50.
- repugnant to Imperial Act, 50.

Candidate for public office.

- libel of by newspaper. See DEFAMATION.

Census, 8, 28, 35.**Charitable Uses. See MORTMAIN AND CHARITABLE USES.****Charities, provincial, jurisdiction over, 37.****Chattel Mortgages. See BILLS OF SALE AND CHATTEL MORTGAGES. Also CONDITIONAL SALE OF CHATTELS.****Cheques. See BILLS OF EXCHANGE.****Civil rights in provinces, jurisdiction as to, 37, 39, 57, 63.**

Civil Servants. See PUBLIC OFFICERS.

Commissions

to examine witnesses. See WITNESSES AND EVIDENCE.
to try causes, issue of by High Court, 184.

Companies, English Act respecting, does not extend to Canada, 71.

debentures of, when assignable, 585, 593.
how treated, 15.
incorporated before Confederation may be required to take out provincial license, 63.
incorporation of,
 effect of words used in, 8.
 powers which legislature may grant on, 63.
 when within provincial legislative powers, 37, 55, 62, 63.
 when not, 58.
may convey by bargain and sale, 578, 590.
navigation, provincial powers as to, 63.
taxation of, 60.
winding-up of, 63.

Compensation, for injuries, workmen's. See WORKMEN'S COMPENSATION FOR INJURIES Act.

to families of persons killed by accident and in duels. See LORD CAMPBELL'S ACT.

Competency of witnesses. See WITNESSES AND EVIDENCE.

Compounding offences.

against provincial laws, 67.

Conditional Sales of Chattels. Act respecting (R. S. O. c. 140), 360.

effect of Act, 363.

Assignments of hire receipts, 364.

Chattels affixed to the realty to remain subject to lien, 362, 364.

Copy of receipt note to be left with vendor, 361.

Filing of instrument.

duties of clerk on, 361.
in unorganized districts, 360.
time for, 360.
when necessary, 360.
where to be made, 360.

Household Furniture, 360.

not to include pianos, etc., 360.

Notice of Sale.

requisites of, 362.
waiver of by bailee, 364.
when necessary, 361.

Requisites of valid sale.

instrument to be filed, 360.
name and address of maker to be attached, 360.
to be in writing, 360.

Statement, to be given on request, 361.

penalty for refusing, 361.
appeal from, 363.
person requiring, to give address, 361.

Taking possession, effect of, 363.

Time for redemption on seizure for breach of condition, 361.

Conflicting Acts. See B. N. A. Act.

Consolidation of actions,

of libel. See DEFAMATION.
under Workmen's Compensation Act. See WORKMEN'S COMPENSATION FOR INJURIES.

Constitutional questions.

how raised, 71, 183.
reference of to Courts, 71.

Construction of Statutes. See INTERPRETATION ACT.

Contracts.

Act authorizing proceedings against absentee on, validity of, 50.
 by married woman. See **MARRIED WOMEN REAL ESTATE ACT.**
 by workmen, when a defence to action for compensation, 137.
 in relation to goods entrusted to agents. See **GOODS ENTRUSTED TO AGENTS.**
 of insurance, provincial powers to regulate, 63.
 part performance of, when satisfaction of, 182.
 stipulations in, when not of the essence, 181.

Conveyances, by Married Women. See **THE MARRIED WOMEN'S PROPERTY ACT, THE MARRIED WOMEN'S REAL ESTATE ACT.**
 voluntary. See **VOLUNTARY CONVEYANCES.**

Co-partnerships, registration of. See **REGISTRATION OF CO-PARTNERSHIPS.**

Copyright. Canadian Act respecting repugnant to Imperial Act, 50.
 exclusive jurisdiction of Dominion over, 36, 56.
 does not curtail authority of Imperial Parliament, 56.
 protection afforded by Canadian, 56.

Corporation. See **COMPANIES.**

Corroboration. See **WITNESSES AND EVIDENCE.**

'**County**,' meaning of term, 7.

County Courts Act. The. (R. S. O. c. 55), 219.

Appeals from to a Divisional Court.

costs of, 233.
 from decision or order of a judge, 232.
 may be made after judgment signed, 232.
 motion for new trial instead of, 231.
 grounds for, 231.
 party making, debarred from appealing, 232
 powers of Divisional Courts on, 232.
 pleadings, etc., to be certified, 232, 233.
 setting down, 233.
 who may bring, 231.

Clerks.

appointment of, 220.
 death of, clerk of the peace to act *pro tem.*, on 221.
 not to draw or advise on documents, 221.
 office hours of, 220.
 place of office of, 220.
 security by, 220.
 taxation of costs by, 220.
 to account for fines, 220.

Continuation of existing courts, 219.

Costs, tariff of, how fixed, 233.

Execution, writs of, 230.

may run into other counties, 230.

Jurisdiction of.

actions not within, 223.
 abandonment of excess, 225.
 costs of, 229.
 title to land, 235.
 transfer of to High Court, 224, 226, 236.
 when continued in County Court, 224.
 actions within, 223, 224.
 for recovery of land, 225, 234, 236.
 liquidated claims, 235.
 " " combined with unliquidated claims, 235
 limitations of—by amount or value, 234.
 to a particular county, 234.
 relief which is within, 226.
 as to granting new trials, 229.
 title to land, when not within, 235.
 when within, 236.
 want of, pleading, 228.
 issue on, how taken, 229.
 when defence or counter claim involves matters beyond, 226.

County Courts Act—Continued.**New trial.**

- grounds for, 231.
- motion for, 231.
- party moving for debarred from appealing, 232.
- power to grant, 229.

Place of trial, 228.**Practice, 228, 229.****References.**

- costs of, 231.
- powers under order, 230.
- report—appeal from, 231.
- filing of, 231.

Removal of actions in, to High Court, 192, 216, 226, 227.

- for equitable reasons, 227.
- costs, 228.
- powers of High Court, 227.
- procedure, 227.
- statement of claim, need not be delivered anew, 228.

Replevin in, 248.**Rules—power to enforce, 230.**

- of court, 233.
- of law, 233.

Sheriff

- need not attend sitting of, 222.

Sittings.

- additional—power to hold, 222.
- concurrent—for trial of jury and non-jury cases, 222.
- hour for commencement of, 222.
- adjournment of by sheriff in absence of judge, 223.
- non-jury, 222.
- quarterly, 221.
- in York county, 221.
- trial, semi-annually, 222.
- in York, quarterly, 222.

Special examiners of High Court to be officers of County Court, 221.**Who to preside over courts, 219.**

- on illness or absence of judge, 219.

Venue for certain actions, 228.**Courts, constitution of. See B. N. A. ACT, COUNTY COURTS ACT, JUDICATURE ACT, SUPREME COURT ACT.****Jurisdiction of.**

- See JURISDICTION.

Legislative powers over.

- of Dominion.
 - to appoint judges of, 39, 65.
 - constitute, 36.
 - dispense with jury, 65.
 - regulate procedure in, in criminal matters, 36.
- of provinces.
 - over Division Courts, 65.
 - to allow judge of one county to preside in another, 65.
 - appoint judges of, 65.
 - constitute, 38.
 - extend jurisdiction of, 65.
 - fix procedure in, in civil matters, 38.
 - prescribe qualifications of practitioners, 65.
 - regulate attendance of jurors, 65.

Pleadings in, may be in French or English, 44.**Covenants, implied. See LAW AND TRANSFER OF PROPERTY ACT.****Creditors' Relief Act, The. (R. S. O., c. 78), 410.****Absconding Debtors, 431.****Appeals, 424.**

Creditors' Relief Act—Continued.

Application of Act, 430.

Attachment—proceedings on, 418, 423.

Books, to be kept by Clerk of County Court, 417.

effect of entry in, 417.

copy of when to be evidence, 417.

Claim.

affidavit of, 412.

filing of, 413.

form of, 413, 426.

service of, 412.

how established in another county, 416.

proceedings where disputed

by creditor, 415.

by debtor, 415.

decision in one county binding in another, 416.

how determined, 416.

where not disputed, 414.

Costs, 418.

of renewing certificate, 420.

Creditors without Execution, rights of, 430.**Decision to bind all Creditors, 423.****Distribution of Money.**

levied by Sheriff, 411, 420.

after entry of notice, 412.

contestation of, 415, 422, 430.

no preference in between writs, 412, 420, 430.

rights of subsequent execution creditors where mortgage after first execution, 422.

statement to be kept pending, 421.

under interpleader proceedings, 411.

under R. S. O., c. 78, 457.

when creditors not entitled to share in, 412.

where amount insufficient to pay in full, 420, 421.

Division Court,

proceedings in, 417, 431.

Examination of Parties, 416.**Execution.**

creditors without, rights of, 430.

debtors cannot retire specific, 430.

mortgage, after-effect of, 422.

no preference between, 412, 420.

Fees, Scale of, 425.**Forms, 426, 427, 428, 429.**

defects of, 425.

Fraudulent Conveyances—Jurisdiction in Actions to set aside, 430.**Fund in Court—payment of to Sheriff, 419.****Garnishment—rights of Creditor on, 430.****Goods in hands of Division Court Bailiff.**

delivery of to Sheriff, 419.

distribution of proceeds of, 420.

fees of bailiff on, 420.

Insolvency Laws—Act subject to, 425.**Interest, 420.****Interpleader Proceedings.**

distribution of moneys realized by sale under, 411, 430.

rights of creditors in, 411.

Interpretation of terms in Act, 410.**Judge.**

decision of, effect of, 423.

direction by, as to trial, 423.

powers of, 425.

Mortgage Actions—distribution of surplus on sale in, 430.**Notice by debtor of address for service, 413.**

revocation of, 413.

Partnership Creditors, 439.**Payment by debtor before sale, 417, 418.**

will not retire specific execution, 430.

Priority among execution creditors abolished, 411.

Creditors' Relief Act—*Continued.*

Proceedings where debtor leaves execution unsatisfied, 412.

Service.

- of affidavit of claim, 412, 413.
- on claimant where no address given, 413.
- on Toronto agent, 418.

Sheriff.

- payment by, how compelled, 421.
- to deposit moneys in bank, 423.
- to enter notice of levy forthwith, 411, 430.
- to give information, 421.
- to keep statement, 421.

Sheriff's Poundage. 420.

Time—when may be granted to Debtor, 417.

Trial—direction by Judge as to, 423.

Writs.

- effect of expiry or withdrawal of, 418
- may be sued out into any county, 416.
- no preference between, 412.

Criminal Law.

Dominion Legislative powers over, 36, 56.

to declare anything a crime, 56.

but not to thereby exclude provincial powers for protection of civil rights, 57, 64, 67.

to make a criminal prosecution bar civil remedy, 57.

Provincial enactments as to, 38, 68.

may delegate pardoning power, 67.

impose sanctions to enforce laws, 57.

provide for the application of penalties, 67.

punish by fine or imprisonment, 67.

insults to members of Legislature, 67.

the compounding of offences against provincial laws, 64, 67, 69.

not invalidated by severity of sanctions imposed, 57, 64.

nor by double liability caused by Dominion Act, 57.

when no punishment imposed, 67.

when *ultra vires*, 58, 64.

"Crown, The."

meaning of expression, 6.

no prerogative in to admit appeal in trials of election petitions, 59.

not affected by acts unless named, 13.

public lands vested in, 61.

relations of to Provinces, 72.

representation of in law courts may be decided by Provincial Legislatures, 59.

Crown Grant—does not convey precious metals, 71.

Currency—jurisdiction over, 36.

Damages

for detention of dower, 252.

in actions against Justices of the Peace. See Justices of the Peace.

instead of injunction, 182.

on libel. See Defamation.

under Lord Campbell's Act. See Lord Campbell's Act.

under Workmen's Compensation Act. See Workmen's Compensation for Injuries.

Date fixed for commencement of Act, what may be done before, 5.

when Act assented to, endorsement of an Act, 11.

Debt, arrest for. See ARREST FOR DEBT.

Debtors, absconding. See ABSCONDING DEBTORS.

Declaration.

by whom may be administered, 78.

when made out of Ontario, 85.

by whom when taken instead of an oath, 78.

form of, 78.

of partnerships. See Registration of Co. Partnerships.

of qualification to be taken by Senators and Legislative Councillors of Quebec, 43.

form of, 49.

Deeds.—See LAW AND TRANSFER OF PROPERTY ACT.

Defamation (ACT RESPECTING ACTIONS OF LIBEL AND SLANDER. R.S.O. c. 68) 109.

Apology, in mitigation of damages, 110, 115.

sufficiency of, a question for the jury, 115.
when must be published, 115.

Averments, prefatory, 110, 115.

Candidate for public office, libel of by newspaper, 111.

Damages in newspaper libel.

when only actual damage recoverable, 111, 116.
special, when need not be shown, 110.

Examination of parties on application for security for costs, 111.

Jury, function of in actions of libel, 109, 115.

Newspaper, meaning of, 109, 115.

actions for libel in :

consolidation of, 113, 117.
damages recoverable in, 111.
where actions consolidated, 114.
does not lie until notice given, 111.
joinder of certain persons as parties defendant, 114.
mitigation of damages, evidence in, 114.
place of trial of, 113.
plea of insertion without malice or gross negligence and apology, 111.
remedy over in, 117.
security for costs in, 112, 117.
no appeal from order for, 114, 117.
special case of candidate for office, 111.
time within which action must be brought, 113, 117.

Notice of action against newspapers.

when necessary, 111, 116.
how time computed, 117.

Payment into Court as amends, 111, 116.

Privileged reports.

judicial proceedings, 112, 116.
exceptions, 116.
public meetings, 112.

Security for costs in actions for newspaper libel, 112.

what defendant must show to obtain, 117.
criminal charge, 117.
good defence on merits, 117.
sufficient property, 117.
slander of a woman, 110.

Slander imputing unchastity to a woman, 110, 115.

security for costs, 110, 115.
special damages need not be proved, 110.
statement of claims to refer to Act, 110.

Statement of claim.

to refer to the section under which made in certain cases, 110.

Verdict.

jury not to be directed to return verdict of guilty on mere proof of publication and the sense ascribed, 109.
special, may be found by jury, 109.

Defects, formal, in affidavits not to invalidate, 87.

Denominational Schools. See B.N.A. ACT.

Depositions, certified copies of as evidence, 87.

Deputy Governor General, appointment of, 21.

Deputy Registrar, included in word Registrar, 8.

Deputy Speaker, 27.

Devolution of Estate Act, The. (R. S. O. c. 127), 612.

Application of Act, 612.

Administration, application for, 613.

Devolution of Estate Act—Continued.**Advancement of children, effect of, 622.**

education not to be deemed, 629.

Affidavits by administrator, 612.

may be used in proceedings under the Act, 620.

Ancestors.

lineal preferred to collateral, 623.

male line preferred, 623.

mother of more remote ancestors preferred, 624.

Assimilation of real and personal property, 631.**Attainder, effect of, 623.****Brothers and sisters, 623, 626.**

children of deceased, 626, 632.

Caution.

effect of where specifies lands, 617.

expiration of, 632.

form, 616.

registration, 616, 632.

after twelve months, 617.

effect of, 618.

renewal,

withdrawal, 617.

Children.

of deceased brother or sister, 626, 632.

rule where some living and others dead leaving issue, 625.

Co-heirs to take as tenants in common, 628.**Courtesy.**

election to take interest instead of, 613.

saving as to, 613, 628.

Debts, application of property to pay, 614.

purchaser to hold free from, 619.

Descendants.

born after death of intestate, 628.

descent on failure of, 626, 627, 628.

Descendants in equal degrees of consanguinity, 625.

rule where some dead leaving issue, 626.

Descents.

before 1st July, 1834, 621.

since 1st July, 1834, 621.

between 1st July, 1834, and 1st January, 1852, 623.

between 1st January, 1852, and 1st July, 1886, 624.

Dower.

election to take share in lieu of, 613, 622.

sale of land free from, 615.

saving as to, 613, 628.

Executors and Administrators.

powers of, 614, 618, 632.

Father, 614, 624, 626, 627.**Half blood.**

right of to inherit, 624, 623.

Heirs.

co-heirs to take as tenants in common, 628.

descent where none, 627, 628.

entitled under will to take as devisees, 622.

of person living on 1st July, 1834, effect of limitation to, 623.

proof of entry, by unnecessary, 623.

proper parties in foreclosure, 633.

vesting of estate in, after a year, 616, 617.

when personal representative deemed, 614.

when take as purchaser under limitation to ancestor, 622.

History of legislation in Ontario respecting, 631.**Illegitimate persons not to inherit, 623.****Infants.**

Official Guardian of, 614, 632.

sales of real estate in which interested, 614.

approval of by Official Guardian, 614, 618, 619, 632, 633.

Devolution of Estate Act—Continued.

Interpretation of terms in Act, 620.

Married woman.

administration of estate of, 788.
distribution of estate of on intestacy, 614.
saving as to husband's rights, 613.

Mortgages.

rule in Locke King's Act respecting not affected, 682.

Official Guardian.

approval of sale by, when infants interested, 614, 618, 619, 632.
deputy official guardian, 629.
local guardians, 614.
may frame rules and tariffs, 620.

Partition.

right of parties interested to purchase, 629.
sale instead of, 630.

Personal representatives.

of married women, 777.
powers of, 614, 632.
property to devolve on, 613.
security by, 613.
when deemed heir, 614.

Property to which Act extends, 612, 613.**Purchaser.**

descents to be traced from, 622.
from executors, protection of, 619, 620.
who deemed to be, 622.

Sales of real estate of deceased persons.

by executors and administrators, 618.
confirmation of certain sales, 619.
persons accepting shares of purchase money to be bound by, 619.
protection of purchasers at, 619, 620.
where infants interested, 614, 618, 619.

Shares on intestacy, table of, 633.**Widow.**

Share of an intestacy, 615, 616, 632.

Distress by Landlord. See LANDLORD AND TENANTS' ACT.

by mortgagee, 597.

Division Courts, provincial powers over, 65.

replevin in, 248.

Divorce, Dominion jurisdiction over, 36, 56.

limitations of, 56.

Dower Act (R.S.O. c. 164), 789. See also DEVOLUTION OF ESTATES ACT, MARRIED WOMEN'S PROPERTY ACT.**Action for dower.**

when not maintainable, 794, 798.

Arrears of equitable dower.

right of widow to, 797.

Bar of dower by contract, 798.**Conveyance free from dower, 791, 792, 793, 798.**

wife confined in asylum, 791, 792.
living apart from husband, 791, 793.
lunatic, but not in asylum, 792.

Deed without bar of dower.

effect of, 794, 798.

Dower ad ostium ecclesie and ex assensu patris abolished, 790, 797.

at Common Law, 796.

Election of widow, 613, 791.**Equitable estates, 789.****Forms, 795.**

Dower Act—Continued.**Husband living with another woman—**

protection of purchaser from. 793, 798.

Lunatic—

when husband of may convey free from dower. 791, 792, 793.

Mining lands. 790**Mortgage**

contribution to by wife. 797.

effect of bar of dower, dower-woman. 790, 796.

right of wife to redeem. 797.

same under, rights of wife of mortgagee. 790, 797.

objects of the Act. 798**Order dispensing with dower. 791, 792, 793**

may be made. Ibid. 794.

dissempowerment of land in. 794.

registration of. 793.

fee for. 794.

Order securing right of dower. 791**Payment into Court of moneys out of which married woman dowerable. 791****Right of entry by husband.**

when entitles widow to dower. 789.

Seisin—necessity for. 796

what is sufficient. 796.

Unimproved land

no dower on. 789.

Wife living apart from husband.

when husband may sell free from dower. 791, 793.

Dower Procedure Act. The. (R. S. O. c. 67.) 251.**Assignment of Dower**

after judgment.

Commissioners to admeasure

appointment of by sheriff. 252.

attendance of witnesses before. 255.

costs of, by whom paid. 255.

death of, or refusal by to act provision for. 252.

dissolution of.

to admeasure by bounds. 253.

to ascertain improvements. 255, 256.

to assess a yearly sum in lieu of, in certain cases. 253, 256.

fees of. 255.

costs to be taken by. 252.

to be officers of the Court. 252.

without action. 256.

doweress and tenant may agree upon. 251.

Detention of damages for, how estimated. 252**Report of Commissioners. 252**

appeals from. 254.

for misconduct. 254.

costs of. 254.

time for. 254.

registration of. 255.

writ of possession after. 255.

return of writ with. 255.

time for may be enlarged. 254.

Tenant in possession duty of when served with writ. 251**Yearly sum in lieu of. 253**

to be a lien on the lands. 253.

Douls. liability of principals and seconds in. See LORD CAMPBELL'S ACT.**"During pleasure," meaning of. 15****Education. See B.N.A. ACT.****Election Act. infants cannot sue for penalties under. 15.****Elections. See B.N.A. ACT.**

- Enabling words**, when compulsory, 14.
- Enacting clause** in Statutes, form of, 4.
- Enforcement of provincial laws**, jurisdiction as to, 38.
- Equitable jurisdiction of High Court**. See JUDICATURE ACT.
- Equitable waste**, right to commit, when conferred, 180.
- Equity**, rules of to prevail in case of conflict, 182.
- Errors**, in names of Provinces, 46.
- Escheated lands**, title of Provinces to, 61, 70.
- Evidence**. See WITNESSES AND EVIDENCE.
- Evidence between Vendor and Purchaser**. See VENDORS AND PURCHASERS ACT.
- Examination of witnesses**. See WITNESSES AND EVIDENCE.
- Executive Council of Ontario and Quebec**.
 how appointed, 45.
 how formed, 30.
 excepted from restriction on election of office-holders, 33.
 powers and duties of members of, 45.
- Executive Government of Canada** vested in Queen, 20.
 of Nova Scotia and New Brunswick, 30.
- Execution**, Act respecting (R. S. O. c. 77), 317.
- Church pews, sale of**, 326, 333.
- Contingent Interests**,
 liability of to seizure, 326, 332.
 exception as to dower, 326.
- Dower, inchoate right of not exigible**, 326.
- Equitable rights in chattels, seizure of**, 331, 339.
- Execution creditors, priority among**. See CREDITORS' RELIEF ACT.
- Executors, execution under judgment against**, 327, 333.
- Exemptions from seizure**, 317, 328.
 implements of trade, 328.
 interpleader, 328.
 not to extend to—
 identical goods for which debt contracted, 319
 goods liable before October 1st, 1887, 319.
 right of debtor to select which chattels to take, 318.
 elect to take proceeds of sale, 318.
 wearing apparel, 328.
 widow entitled to exemptions of debtor, 318.
- Goods, in possession of third parties**.
 seizure of 322, 330.
- Money and Securities, seizure of**, 321, 329, 330.
 collection by sheriff, 330.
 payment to sheriff under, 322.
 proceeds, how disposed of, 322.
- Mortgages**.
 action on by sheriff, 324.
 discharges of, when seized, 726.
 fees, 324.
 notice to mortgagor, 324.
 to registrar of deeds, 323.
 payment of mortgage by purchaser, 326, 332.
 sale of equity of redemption in lands, 325, 331.
 effect of, 325.
 mortgagee may purchase at, 326.
 seizure of money secured by, 323, 331.
 vacating execution against, 324.
 verification of order not needed, 324.
- Sheriff**.
 instructions and indemnity to on seizing goods claimed by third parties, 322, 330.
 not bound to sue without security for costs, 322.

Execution—Continued.**Stock.**

- seizure and sale of, 319, 320, 328.
- effect of, 320.
- incorporated companies, what are deemed to be, 321.
- service of copy of writ on company, 320.
- where company may be served at more than one place, 320.
- transfer of stock invalid after notice, 320.

Writs of Execution.

- renewal of, 319.
- to include lands and goods, 319.

Executors.—See TRUSTEES AND EXECUTORS ; DEVOLUTION OF ESTATES ACT.**Executors and Administrators,** Act to protect, (R.S.O. 131,) 405.

- costs, right of retainer for, 406.
- duty of administrator on discovery of will, 407.
- presumption of death, protection of persons acting on, 405.
- when arises, 407.
- refund of legacy under invalid will, 407.
- revoked probate, payments made under, 407.
- supposed intestacy, protection of persons acting on, 405.

Exhibits, official documents as, 89.**Factors.**—See GOODS ENTRUSTED TO AGENTS.**Felony,** meaning of, 13.**Ferries,** jurisdiction as to, 36, 55, 60.**Fisheries,** legislative powers as to, 36, 53, 54, 55, 59, 62.**Foreshore in Harbors,** Dominion jurisdiction as to, 55.**Forfeiture,** relief against, 177.

- for breach of covenant to insure, 171.

Forms, Statutory.

- different classes of, 15.
- effect of variations in, 10, 15.

Fraudulent Conveyances.—See VOLUNTARY CONVEYANCES.**French.**

- Acts of Dominion and Quebec to be printed in, 44.
- when may be used, 44.

Game Acts, jurisdiction of Dominion respecting, 55.**Gender,** how expressed.**Goods entrusted to agents,** Act respecting contracts in relation to (R.S.O. c. 150), 475.

- English law respecting, 479.
- changes made by Act, 480.
- law before Act, 479.
- object of Act, 479.

Advances to agent.

- property received after, 483.
- when deemed authorized, 477.
- when payments deemed to be, 477.

Agent.

- civil liability of not affected by Act, 478.
- conviction of for theft cannot be used as evidence against, 478.
- loans to, when deemed authorized, 477.
- mala fides* of, 477, 483.
- presumption of entrustment, 476, 482.
- revocation of authority of, 483.
- when and to what extent to be deemed owner, 476.
- when transactions by, bind owners, 477, 483.
- who is, 481.

Antecedent debts.

- do not authorize a pledge, 477.
- what are, 483.

Finishes 354

Goods entrusted to agents—Continued.**Contracts.**

- for lien, when valid, 476.
- for purchase, when valid, 476.
- must be *bona fide*, 477.
- when considered to be made with agent, 477.

Document of title.

- agent in possession of, deemed entrusted, 476.
- meaning of 475, 480.
- not obtained from principal, 482.
- not negotiable, 483.
- pledge of, effect of, 477.

Exchange of securities,

- when valid, 483.
- factor, definition of, 479.
- goods, meaning of, 475, 480.
- notice that vendor only an agent, effect of, 482.

Owner,

- may redeem pledges, 478.
- remedy of, against estate of insolvent agent, 478.
- sales of pledges binding on, 482.
- when agent deemed to be, 476.

Pledge,

- antecedent debt not to authorize, 477, 483.
- of document of title, effect of, 477.
- power to, 482.
- redemption of, 483.
- by owner, 478.

Shipped,

- meaning of, 475.

Governor-General.

- application of provisions of B. N. A. Act to, 20.
- in-Council, meaning of, 6.
- messages to be entered in Journals of Houses, 29.

Powers of.

- how exercised, 21.
- to appoint administrator in absence of Lieutenant-Governor, 31.
- deputies, 21.
- judges, 39.
- Lieutenant-Governors, 29.
- officers under B. N. A. Act, 44.
- speaker of Senate, 24.
- assent to bills, 29.
- dissolve House of Commons, 28.
- divide records of provinces, 46.
- issue writs for first elections, 26.
- order audit of Consolidated Revenue Fund, 40.
- recommend money bills, 28.
- refer constitutional questions to the courts, 71.
- remove judges, 39.
- summon House of Commons, 35.
- Senators, 23, 24.
- take oaths of Lieutenant-Governors, 30.
- Senators and members of House of Commons, 43.
- transmit copies of bills to Secretary of State, 29.
- proclamation of, how proven in evidence, 81.
- salary of, 40.

Grants, yearly, to provinces, 42.**Great Seal, meaning of, 6.**

- of Ontario and Quebec, 45.

Harbors. Public,

- foreshore may be part of, 55.
- to be property of Canada, 41, 48, 55.
- water lots in, provincial legislation respecting invalid, 55, 59.
- what included by, 55.

Headings, of portions of Statute,

when referred to to determine meaning, 15.

"Her Majesty"—meaning of expression, 6.

when affected by acts, 13.

"Herein"—meaning of, 6, 14.**High Court of Justice.—See JUDICATURE ACT.****Hire receipts.—See CONDITIONAL SALES OF CHATTELS.****Holidays,—what days are, 7.**

effect of provisions, respecting, 15.

Hospitals,

marine, jurisdiction over, 36, 37.

House of Commons,

certain provisions respecting to extend to Legislative assemblies, 34.

constitution of, 25.

duration of, 28.

election of members of, 26.

electoral districts for, 25.

increase of number of members, 28.

members to take oath of allegiance, 43.

money bills to originate in, 28.

after recommendation by Governor-General, 28.

privileges of, 22.

Senators not to sit in, 25.

summoning of, 25.

to elect a speaker, 27.

vacancy in before provision made, 27.

Husband and Wife.—See DOWER, CONVEYANCES BY MARRIED WOMEN, MARRIED WOMEN'S PROPERTY ACT, WITNESSES AND EVIDENCE.**Immigration, jurisdiction as to, 39.****Implied powers. See POWERS.****Imprisonment.**

may include hard labor, 67.

to enforce provincial laws—provincial powers respecting, 38, 57, 67.

where no place specified, 9.

Incorporation of Companies. See COMPANY.**Indians, jurisdiction of Dominion as to, 36, 56.****Lands reserved for—**

Dominion jurisdiction over, 36, 56.

recovery of moneys due in respect of, 56.

rights of Provinces to beneficial estate in, 56, 61.

Infants,

action by for penalties under Election Act, 15.

equitable rule as to, to prevail, 182.

estates of, settlement of, 173.

official guardian of. See Devolution of Estates Act

Infants, Act respecting. (R. S. O. c. 168,) 279.**Apprenticeship of, 284.**

agreements as to, 286.

Custody of,

order as to

jurisdiction to make, 279, 285.

not to be made in favour of mother guilty of adultery, 280, 286.

rescinding, 286.

separation of children not allowed, 286.

Guardians of,

application by to Court for direction, 283, 288.

appointment of, 281.

by judges of Surrogate Courts, 282, 283, 287.

authority of, 283, 284, 287, 288.

to act for, 283.

to appear in actions, 283.

to bind as apprentice, 284.

Infants, Act respecting—Continued.**Guardians of—Continued.**

- to manage estate of, 284, 287.
- mother to be guardian on death of father, 283, 288.
- when may appoint guardian, 283, 288.
- official guardian. See Devolution of Estates Act.
- removal of, 283.
- security to be given by, 282.

Maintenance of, order for.

- jurisdiction to make, 279, 286.
- where estate settled for life with power of appointment in favor of children, 281, 287.

Real estate of:

- lease of, 280, 286.
- sale of may be authorized, 280.
 - but not contrary to devise, 280, 287.
- application for, how made, 280.
- consent of infant to, 280, 287.
- deeds, how executed, 280.
- proceeds from, application of, 280.
- payment of dower out of, 281, 287.
- quality of, 281, 287.
- settlement of, 173.
- ratification of promise by, 302, 303.

Religious education of.

- Act not to affect authority of father as to, 284, 288, 289.
- religion of father to be followed, when, 289.

Surrogate Courts.

- appeal from orders of, 284.
- appointment of guardians by judges of, 282.
- what judges to act, 283.
- powers of, 282, 284.
- as to witnesses, 284.
- procedure in, 284.

Wills of, invalid, 637.**Injunction.**

- damages in addition to or instead of, 182.
- when granted on interlocutory order, 182.
- when not granted, 179.

Insolvency, jurisdiction as to, 36, 56.**Insolvent Companies, Dominion powers as to, 56.**

- provincial jurisdiction over, 56, 63, 68.

Insolvents, assignments by. See ASSIGNMENTS BY INSOLVENTS.**Instruments, written, how proved in evidence. See WITNESSES AND EVIDENCE.**

- issued under an Act, meaning of expressions in, 11.

Insurance, application of Ontario Act respecting, 71.

- companies, power of Province to tax, 60.
- contracts of, provincial powers over, 63.

Intercolonial Railway.

- duty of Dominion to construct, 47.

Interest. See also JUDICATURE ACT.

- exclusive authority of Dominion respecting, 36.
- extends only to interest on debts arising out of contract, 56.
- on provincial public debts to be paid out of Consolidated Revenue Fund, 40.

Interest, Act respecting. (60-61 Vic. (Dom.) c. 8). 312.

- equivalent rate per annum to be stated where exceeds 6 per cent. 312.
- interest post diem, when allowed, 313.
- rates which may be charged, 313.
- recovery back of over payments, 312, 313.

Interpretation Act, The. (R.S.O. c. 1). 4.

- Acts to be deemed public acts, 10.
- remedial, 10.

Affirmative words.

- effect of, 14.

Interpretation Act, The—Continued.

- Amendment or repeal of Acts in Session when passed.** 5.
- Application of Act.** 5.
- By-laws and regulations.**
 - effect of power to make, 10.
- Citation of Acts.** 4.
- Commencement of Acts, 5, 14.**
 - what may be done under the Act before, 11.
- Corporation,**
 - effect of words constituting, 8, 15.
- Crown**
 - not affected unless so declared, 13.
- Date when Act assented to or reserved to be endorsed.** 5.
- Declaration that Interpretation Act to apply, unnecessary**
 - "During pleasure,"
 - appointments by Lieutenant-Governor to be, 9.
 - meaning, of, 15.
- Enacting clause,**
 - form of, 4.
- Enabling words**
 - when compulsory, 14.
- Endorsement to be made on Acts.** 5.
- Felony, meaning of,** 13.
- Forms,**
 - effect of deviations from, 10, 15.
- Gender,**
 - masculine to include feminine, 8.
- Headings,**
 - when may be referred to, 15.
- Imprisonment,**
 - when no place specified, 9.
- Instruments issued under an Act,**
 - meaning of terms in, 11.
- Judicature Act,**
 - application of interpretation section of, 13.
- Judicial construction,**
 - adoption of, 13, 16.
 - by English courts, effect of, 16.
- Jurisdiction**
 - cannot be given to courts by Acts respecting procedure, 16.
- Justices of the Peace, implied authority of,** 8.
- "Law always speaking,"** 5.
- Lieutenant-Governor,**
 - may act by proclamation, 6.
 - term of office of person appointed by, 9, 14.
- Magistrates,**
 - implied power of, 8.
- Majority,**
 - may do an act required to be done by more than two persons, 10.
- Misdemeanour, meaning of,** 13.
- Municipal Act,**
 - application of interpretation clause of 13.
- Name commonly applied may be used,** 6.
- Number.**
 - singular to include plural, 8.
- Numbers of sections.**
 - are part of an Act, 14.
- Oath.**
 - administration of, 7.

Interpretation Act, The—Continued.**Offence.**

- under repealed Act, 12.
- where two Acts respecting, 13.

Penal statutes.

- construction of, 15.

Penalties.

- appropriation of, 9.
- how recovered where no mode prescribed, 9.
- two persons may sue for under words "a private party," 15.
- when recoverable by indictment, 9.

Preamble of Acts, 5.

- effect of, 18.
- to be part of the Act, 10.

Present tense, effect of use of, 5.**Private acts, effect of, 13.**

- what are, 15.

Provisions of Act to apply to construction of Act itself, 13.**Proviso, how construed, 14.****Public money.**

- how paid over and accounted for, 9.

Public officers.

- appointment of Lieutenant-Governor to be during pleasure, 9.
- directions to apply to successors, 9.
- implied powers of, 8.
- words authorizing appointment of, effect of, 8.

References to clauses by number to be inclusive, 10.**Repeal of Act, effect of.**

- as to acts done and offences committed, 12, 15.
- not an adoption of judicial construction, 12.
- not a declaration that Act in force, 12.
- or as to the previous or a different state of law, 12, 13.
- not to revive Act by it repealed, 11.
- on appointment and bonds, 12.
- on persons acting under it, 12.
- on rules made before repeal, 12.
- where other enactments substituted, 11.
- when take effect, 11.

Reservation of power of repeal, 11.**Retrospective construction.**

- clear words necessary for, 14.

Revised Statutes.

- how constituted, 4.
- how construed, 14.

Rules of construction, application of when consistent with Act, 13.**Rules of Court.**

- authority to make to include power to alter, 10.
- effect of, 15.

Time, how computed, 7.**Title—is part of an Act, 14.****Words and terms, defined by Act.**

- affidavit, 7.
- county, 7.
- duly qualified medical practitioner, 13.
- felony, 13.
- Governor, 6.
- Great Seal, 6.
- Her Majesty, 6.
- herein, 6, 14.
- holiday, 7, 15.
- it shall be lawful, 14.
- Justice of the Peace, 8.
- legally qualified medical practitioner, 8.
- Lieutenant-Governor, 6.

Interpretation Act. The—Continued.**Words and terms defined by Act—Continued.**

Lieutenant-Governor in Council, 6.
 Lower Canada, 6.
 magistrate, 8.
 may, 6, 14.
 misdemeanour, 13.
 month, 7.
 next, 6.
 now, 6.
 oath, 7.
 person, 7, 14.
 proclamation, 6.
 Registrar, 8.
 rules of Court, 10.
 section, 15.
 shall, 6, 14.
 security, 8.
 sureties, 8.
 The Crown, 6.
 The Queen, 6.
 two Justices, 8.
 United Kingdom, 6.
 United States, 6.
 Upper Canada, 6.
 writing, 7.
 written, 7.

Interpretation Act, The (Dom.) R. S. C. c. 1.
 how differs from Ontario Act, 16.

Intoxicating Liquors, sale of.

powers of Dominion as to, 52, 53, 55, 59.
 of Provinces, 58, 59, 68.

Intra Vires enactments.—See LEGISLATIVE POWERS.

Joint Contractors.

Actions against representatives of, 376.

Journal of the House.

both English and French to be used in, 44.
 entry to be made in of Governor General's messages, 29.

Judges. See also JUDICATURE ACT.

appointment of, 39, 65.
 of Division Courts, 65.
 of Superior, District and County Courts, 65.
 how removed, 39.
 of one county may be authorized to preside in another, 65.
 salaries of, 39.
 selection of, 39.
 tenure of office of, in Superior Courts, 39.

Judicial construction of words in Statute.

not adopted by re-enactment, 13.
 effect of repetition in subsequent Act, 16.

Judgments.

declaratory, validity of, 178.
 foreign, how proved in evidence, 83, 97.

Judicature Act, The (R.S.O., c. 51), 163.**Accountant of the Supreme Court, 210.**

expenses of office, charge on income of funds in Court, 210.
 securities vested in, 210.
 to be taken in name of, 210.
 Suitor's Fee Fund Account to be kept by, 211.
 purpose of, 211.
 to be a corporation sole, 210.
 vacancy in office of, provision for, 210.

Judicature Act. The—Continued.**Appeals.**

- from interlocutory order, 186.
- from judgment not to be heard by judge making, 185.
- only one to lie, 187.
- orders not subject to consent, 186.
- as to costs which are in the discretion of the Court, 186.
- time within which must be brought, 188, 189.
- to Court of Appeal.
 - from Divisional Courts, 188.
 - when to lie, 187.
- to Divisional Courts.
 - when to lie, 187.

Appointment under power, validity of where one object excluded, 177.**Assessors.**

- appointment of, 194.
- fees of, 194.

Assignments of debts and choses in action, 181.

- where several claimants under, 181.

Chambers.

- judge to sit in, 175.
- who to sit, 175.

Clerk of the Process.

- appointment of, 202.
- to keep his office at Osgoode Hall, 204.
- to make quarterly returns, 204.

Commissions, issue of, 184.

- of Assize, etc., Act not to affect, 216.

Constitutional questions, how raised, 183.

- effect of part performance of, 182.

Contracts, effect of part performance of, 182.

- stipulations in, when not of the essence, 181.

Costs, discretion of Court as to, 198.

- appeal from order respecting, 186.

County Courts.

- books of to be open for inspection, 217.
- cases in, when may be tried in High Court, 192, 216, 226, 227.
- fees in such cases, 193.
- certain High Court cases to be tried in, 192.
- powers of, in such cases, 192.

Court of Appeal.

- constitution of, 165, 166, 167, 175.
- Divisional Courts of, 168.
- Judges of, absence of, 169.
- may hold assizes, 167.
- powers of, 176.
- who to preside in absence of Chief Justice, 169.
- Judges of High Court Sitting in, 168, 169.
- jurisdiction of, 175, 176.
- how exercised, 176.
- to make any order required, 176.
- to quash proceedings, 176.
- quorum of, 167.
- may be made up by Judges of the High Court, 168.
- seal of, 170.
- single Judge of, powers of, 176.
- sittings of, 160, 183.

Criminal matters.

- Act not to affect procedure in, 217.

Decisions, judicial.

- See also INTERPRETATION ACT.

- effect of, 189.
- of Court of Co ordinate Jurisdiction, 189.
- of Divisional Court, 189.

Judicature Act, The—Continued.**Deputy Clerks of the Crown.**

- appointment of, 205.
- fees of, 205.
 - commutation of, 205.
 - when may be retained, 206.
- office hours of, 205.
- offices of, where to be kept, 207.
- salaries of, 206.
- seals of, 207.
- who to be, 205.

Deputy Registrars.

- appointment of, 205.
- fees of, may be commuted, 205.
 - when may be retained, 206.
- office hours of, 205.
- offices of, where to be kept, 207.
- who to be, 205.
- seals of, 207.

Divisional Courts.

- business of, 184.
- constitution of, 168.
- decision of, effect of, 189.
- how composed, 185.
- jurisdiction of, 184, 185.
- sittings of, 185.

Divisions of High Court abolished.**Equitable defences, 178.**

- jurisdiction of High Court, 177.
- relief which may be granted to defendants, 179.
- rights and duties to be taken notice of, 179.
- rules to prevail in conflict, 183.

Equitable waste, right to commit, when conferred, 180.**Fees.**

- of public officers subpoenaed as witnesses, 198.
- on proceedings in Court of Appeal, 215.
 - High Court, 215.
 - writs and process, 215.
- returns of, 207.
- when may be retained by officers, 206, 215.
- when to be paid in stamps, 204.

High Court of Justice.

- books of to be open for inspection, 217.
- cases in, when may be tried in County Court, 192.
- constitution of, 165, 166.
- County Court cases, when may be tried in, 192.
- divisions of abolished, 185.
- judges of.—See Judges.
- jurisdiction of, 170,—174, 218.
 - equitable, 170 171, 177.
 - generally, 173.
 - in alimony, 172.
 - in partition, 172.
 - in revenue matters, 171.
 - respecting validity of Provincial act, 177.
 - to enable infants to make settlements, 173.
 - to grant vesting order, 172.
 - to relieve against penalties and forfeiture, 171, 177.
 - to remove executor or administrator, 173.
 - to try validity of wills, 173.
 - where no adequate remedy at law, 171.
 - how exercised, 175.
- sittings of, 183, 185, 189, 190.
- official guardian of. See Official Guardian.

Infants—rules of Equity regarding to prevail, 182.

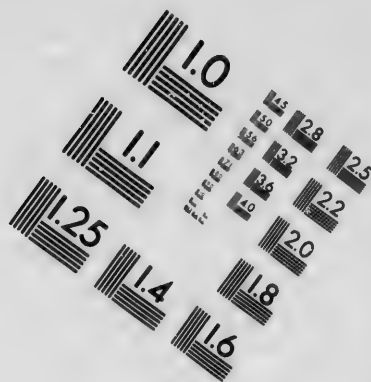
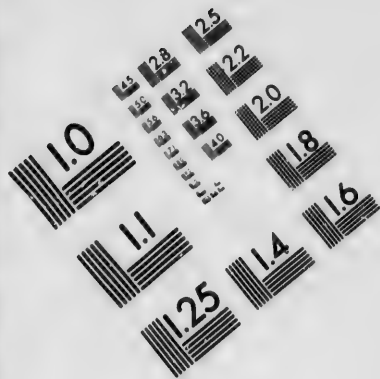
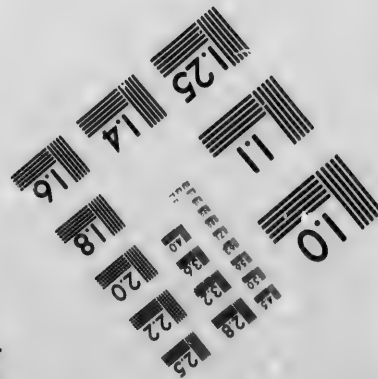
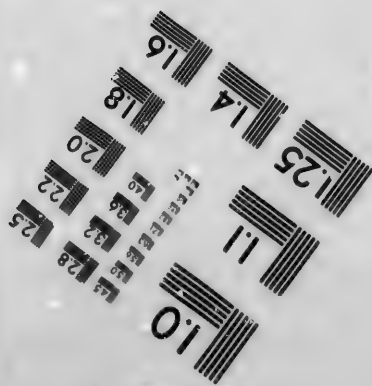
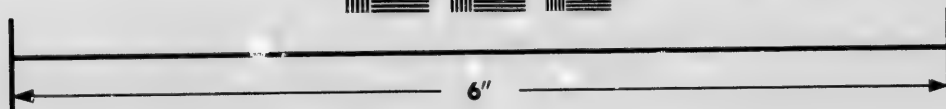
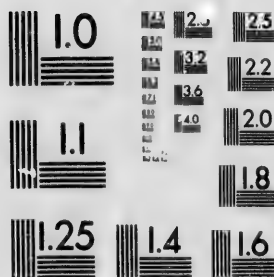


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Judicature Act, The—Continued.**Injunction,**

- when damages may be granted instead of or in addition to, 182.
- when granted by interlocutory order, 182.
- when not to be granted, 179.

Inspector of Legal offices,

- appointment of, 211.
- books to be produced to, 212.
- duties of, 211.
- inquiries to be made by, 212.
- stamps, powers as to, 212.

Interest,

- when allowed, 197.
- by way of damages, 197.
- on debts certain and overdue, 197.
- on judgments, 197.

Interpretation section, 164.

- application of, 13.

Judges,

- absence of, provision for, 167, 191.
- appointment of, 39, 65.
- detachment of from Chancery Division, 166.
- in chambers, 175.
- who to sit, 175.
- Local—County Court Judges to be, 216.
- number of, 166.
- oath of 169, 170.
- of Court of Appeal. See Court of Appeal.
- of one county presiding in another, 65.
- powers of, 165, 174.
- as to juries, 196.
- precedence of, 167.
- privileges of, 174.
- qualification of, 165.
- removal of, 39.
- resignation of after hearing case, 166.
- salaries of, 39.
- tenure of office of, 39.
- to make arrangements for transaction of business, 186.
- transfer of, 166.

Judgments, declaratory, validity of, 178.

- foreign, pleadings in, 197.
- in Quebec, actions on, 197.

Jury,

- agreement of ten jurors to be sufficient, 195.
- certain cases to be tried with, 194.
- without, 199.
- death of member of, effect of, 196.
- notice requiring, effect of, 195.
- waiver of, 195.
- when to be given, 195.
- powers of judge as to, 196.
- verdict of, effect of when given by ten jurors, 196.
- special when may be directed, 196.
- when questions may be directed to be answered, 197.
- legal claims to be given effect to, 180.

Limitations, Statutes of not to apply to express trusts, 180, 381, 392, 662, 677, 694.**Lis pendens,**

- form of, 193.
- must be registered to constitute notice, 193.
- not necessary in mortgage actions, 193.
- order vacating—generally 194.
- upon non-prosecution of action, 193.
- where claim not limited to lands, 193.
- appeal from, 194.
- costs of, 194.

Judicature Act, The—Continued.**Lis pendens—Continued.**

effect of, 194.
registry of, 194.

Local Judges,

Judges of County Courts to be, 216.

Local Master,

appointment of, 204, 205.
fees of, may be commuted, 205.
when may be retained, 206.
in case of vacancy, 204.
not to practice in certain cases, 206.
to reside in his county, 204.
unless relieved from doing so, 206.

Practice of Law,

County of York, 207.
reimbursement of, 207.
not to receive fees in criminal cases, 207.

Master-in-Ordinary, references to, 198.**Merger, by operation of law, 130.****Mortgage actions, 181.****Non-Jury actions, entry of for trial, 191.****Officers. See also PUBLIC OFFICERS.**

appointment of by Lieutenant-Governor, 202.
distribution of business among, 203.
oath of, 203.
official names of may be changed by Lieutenant-Governor, 202.
to give security, 203.
effect of neglecting to, 203.

Official Guardian *ad litem*. See also ACT RESPECTING INFANTS.

account of, return of to be made to Lieutenant-Governor, 209.
appointment of, 208.
costs of, 208.
of solicitors employed by, 209.
return of by, 209.
duties of, 208.
practising, may be debarred from, 209.
salary of, 208.
transfer on appointment of, 209.

Official referees.

appointment of, 204.
who to be, 204.

Orders-in-Council, when to be ratified by Legislature, 216.**Osgoodie Hall, certain offices to be kept at, 204.****Part performance, satisfaction of obligation by, 182.****Penalties, jurisdiction as to, 171, 177.****Prisons of the High Court, what are, 214.****Proceedings.**

multiplicity of, to be avoided, 180.
restraint of, 179.
stay of, when granted, 179.
to be disposed of by one Judge when possible, 184.

Purchaser, not affected by irregularities in Orders of the Court, 182.**Restraint of proceedings, powers as to, 179.****Rules of Court.**

council for consideration of, 201.
Court of Appeal, Judges of may make, 200.
effect of, 200, 201.
for District Courts, 201.
former rules continued where not inconsistent, 201.
Judges of High Court may make, 200.
Lieutenant-Governor may authorize judges to make, 200.
Supreme Court may make, 198.
validity of, 201.
what may be regulated by, 198, 199, 200.

Judicature Act, The—Continued.**Rules of Law, 177.**

to apply to all courts, 183.

Salaries payable out of the Consolidated Revenue Fund, 214.

Seals of Court of Appeal and High Court, 170.

Sheriff, to be an officer of the Court, 214.

Short Title of Act, 163.

Sittings of Courts, 183, 189, 190.

general docket at, 191.

hours for, 191.

non-jury actions, when may be entered for trial at, 191.

number of, 189, 190.

place where to be held, 190.

proceedings where judge absent, 191.

who to preside at, 191.

Special Examiners.

appointment of, 213.

pro tem., 214.

examinations to be taken in presence of, 214.

fees of, 213, 214.

not to solicit examinations, 214.

number of, 213.

Stay of proceedings, when granted, 179.

Stenographers.

appointment of, 212.

duties of, 212.

moneys received by, how applied, 213.

Supreme Court of Judicature, constitution of, 165.

Term, abolition of, 183.

Vacations, 184.

Witness Fees of public officers, 198.

Jurisdiction.

of courts.

County Courts. See County Courts Act.

Court of Appeal. See Judicature Act.

High Court. See Judicature Act.

how given, 16.

provincial, powers as to, 65, 71.

Supreme Court of Ontario. See Act respecting.

Vice Admiralty, 50.

of Legislatures of Dominion and Provinces. See Legislative Powers.

of Senate.

does not extend to alimony, 54.

Jurors. See also JUDICATURE ACT.

legislative powers as to, 65.

Justices of the Peace.—Act to protect from vexatious actions (R.S.O. c. 88), 121.

Actions against.

costs in, 126, 132.

damages in.

nominal, 126, 132.

where tender of amends made, 125.

Limitation of, 124.**Malice and want of reasonable and probable cause in**

what constitutes, 128, 129.

when must be alleged and proved, 121.

when not necessary, 122.

Not to lie

for anything done under warrant to compel appearance if summons disobeyed, 122.

for acts done under order of High or County Court Judge, 122.

statute held ultra vires, 123.

when conviction affirmed on appeal, 123.

for certain mistakes as to jurisdiction, 127.

for obedience to writ of mandamus, 126.

until conviction quashed, 122, 129.

notice of action given, 124.

Justices of the Peace—Continued.

Not to be brought in County or Division Court if Justice objects. 125, 232.

Notice of action in. 124, 129.

- defect in not cured by tender of amends, 131.
- form of, 130.
- is a condition precedent to the right to sue, 130.
- service of, 131.
- time within which must be given, 124, 131.
- to whom to be given, 129.
- want of must be raised by statement of defence, 130.
- what must be stated in, 131.
- when not necessary, 130.

Payment into court. 124, 131.

Plea of not guilty by statute. 125, 131.

Tender of amends. 125, 131.

What plaintiff must prove to succeed. 125.

- conviction, quashing of, before action lies, 122, 129.
- protection of justice by order, 124.
- when not necessary, 129.

Conviction under warrant by another justice, who liable for defects in. 122.

Defects in form not to deprive justice of protection. 123.

Description of offence—omission of from information. 124.

Jurisdiction of officer

- act not a trespass if justice within, 128.
- action not to lie for certain mistakes as to, 126.
- acts done in excess of, liability for, 129.
- excess of, what is, 128, 129.
- how given, 128.

Jurisdiction to appoint Justices. 60, 61, 65.

Meaning of expression "justice of the peace," 3.

Persons held to be within the act. 128.

Land Titles Offices.

- proof of instruments filed in, 89.

Landlord and Tenants' Act (R.S.O. c. 70), 806. See also **OVERHOLDING TENANTS' ACT.**

Annuities, definition of. 807.

- apportionment of, 807, 823.

Apportionment.

- of condition of re-entry, 808, 823.
- of rent and other periodical payments, 807, 822.
- money payable under policy of assurance, 808.
- part apportioned,
 - how recoverable, 807.
 - when payable, 807.
- rent to be deemed to accrue from day to day, 807.

Assignment for benefit of creditors.

- assignee may retain possession for balance of term, 817.
- preferential lien for rent on, 817.

Assignment of lease.

- leave for, how granted where lessor under disability, 809.

Distress.

- attachment of rent suspends right of, 829.
- exemptions from, 815, 828.
- goods exempt from execution, 815.
 - not property of tenant, 815.
 - of lodgers, 818, 830.
 - seizure of, 816, 819.
- lodger, declaration by, 818, 819, 830.
 - payment to landlord by, 819.
 - penalty for seizure of goods of, 819.
- tenant, meaning of in this section, 816, 829.
- must surrender possession, 816.
- sale of growing crops, 818, 829.
- liability of purchaser of, 818.

rs.

88), 121.

disobeyed, 122.

Landlord and Tenants' Act—Continued.

Dividends, definition of, 807.

Ejectment.

duty of tenant to give notice of writ of, 812, 828.

where half year's rent in arrear, 812, 828.

discontinuance on tenant paying arrears and costs, 813.

mortgagee of lease, rights of, 813.

proceedings where tenant seeks equitable relief, 813.

right of landlord to re-enter, 812.

how exercised, 812.

where lease determined and tenant refuses to go out, 814.

security by tenant, 814, 828.

limitation of action on, 815.

order for, 814.

judgment on, 814.

where landlord may require, 814.

Forfeiture of lease

application of sections as to, 810.

lease until breach, effect of, 810.

notice of breach, 825.

relief against, 171, 809, 825.

restrictions on, 809, 823.

waiver of, 824.

History of legislation respecting, 820.**License to do act forbidden under condition in lease, effect of, 810, 826.****Notice to quit.**

length of, 812, 827.

Re-entry.

apportionment of condition of, 808, 823.

forfeiture of lease by, 807, 823.

Relation of landlord and tenant.

not to depend on tenure, 807, 823.

Rents.

apportionment of, 807.

meaning of, 807, 821.

rent charge, 822.

seck, 822.

service, 822.

set off by tenant against, 817, 829.

to accrue from day to day, 807.

Reversion.

merger or surrender of, effect of, 808, 823.

not necessary for creation of relation of landlord, 807, 822.

Right of re-entry.

apportionment of, 808.

demand for rent, 818.

upheld, 809.

Short title of act, 806.**Taxes, covenant to pay, not to include local improvements, 812, 827.****Waiver of covenant.**

not to extend beyond the particular instance, 811.

Writ.

duty of tenant to notify landlord of service of, 812, 828.

Law and Transfer of Property—Act respecting (R.S.O. c. 119), 575.**Assignment to assignor and another, effect of, 585, 593.****Auctions, 582, 591.**

"auctioneer," meaning of, 582.

"puffer," meaning of, 583.

reserved—seller may bid at, 583.

seller not to purchase at, 583.

unreserved—

seller not to bid at, 583.

when deemed to be, 583.

Law and Transfer of Property—Continued.**Bargain and Sale,**

power of corporations to use, 578, 590.
 registration of not necessary, 578, 590.

Concealment of deeds, and falsification of pedigrees.

liability for, 586, 593.

Contingent interests,

not to be defeated by determination of preceding estate, 584, 588, 591.

Conveyance of land.

what construed to include, 578, 589.

Corporeal hereditaments to lie in grant, 576, 587.**Covenants to be implied, 580, 590.**

how enforced, 581.

joint and several, 590.

on conveyances by direction of beneficial owner, 581.

by trustee, 581.

for value by beneficial owner, 580, 590.

value by beneficial owner, 580.

run with the land, 590.

variation of, 581, 590.

where not implied, 581.

Debentures of corporations,

to be assignable, 585, 593.

Deed—what may be disposed of by, 577, 583.

when necessary

assignment of chattel interest in law, 577.

exchange of lands, 577.

feoffments, 576.

leases, 577, 588.

partition, 577.

surrender of certain interests in land, 577.

Improvements under mistake of title, 584, 592.

costs, 584, 585.

from unskilful survey, 584, 592.

lien on lands for, 584.

Interpretation, 575.**Payment into court, 579, 590.****Powers.**

See also POWERS OF APPOINTMENT.

execution of, 581, 590.

payment to tenant for life, effect of, 582, 591.

release of, 582, 591.

Purchaser,

rights of as to execution of deed, 577, 588.

Purchaser of value without notice.

not necessary to prove payment, 585, 593.

Purchases of reversions, 585, 592.

not to be set aside for undervalue, 585.

onus of proving undervalue on person seeking to set aside, 585.

Receipt in deed sufficient, 577, 578.**Rent-charge**

release of part of land subject to, effect of, 583, 591.

Sales freed from incumbrances, 579, 590.**Scintilla juris**

no longer necessary to support future and contingent uses, 583, 591.

Tenancy in common.

presumption in favor of, 578, 589.

Warranty.

not to be implied from words "granted" or "exchange," 577, 589.

Words of limitation,

effect of conveyance without, 576.

unnecessary, 576, 587.

Laws of England.

how far in force in Canada, 50.
in force in Provinces at Union continued, 44.

Leases. See also LANDLORD AND TENANT ACT.

covenants to insure in, relief against forfeiture for breach of, 171.
registration of, 712.
to be by deed, 577, 588.

Legislative Powers.**Powers of Legislative Bodies in Canada generally.**

concurrent powers over—
agriculture, 39.
immigration, 39.
effect of conflicting enactments, 51.
"exclusive," not to limit authority of Imperial Parliament, 50.
not delegates of Imperial Parliament, 51.
over persons outside the Dominion, 50.
to punish crimes committed outside the Dominion, 50.
to repeal Acts of the Province of Canada, 44, 72.

Of the Dominion:

classes of, 51.
enumerated, 35.
enumerated powers exclusive, 57.
incidental, how far extend, 54.
Subjects over which Dominion has powers—
bankruptcy and insolvency, 36, 56.
banks and banking, 36, 55.
copyrights, 36, 56.
criminal law and procedure, 36, 56, 57.
educational matters, 38, 69.
fisheries, 36, 53, 54, 55.
game acts, 55.
harbors, 41, 48, 55.
Indians and Indian lands, 36, 56.
interest, 36, 55.
issuing of paper money, 36, 55.
licenses generally, 55.
for butchers, 55.
sale of liquors, 55.
marriage and divorce, 35, 56.
matters relating to the peace, order and good government of Canada, 35, 51.
navigation and shipping, 36, 53, 55.
police regulations, 55.
railways, 38, 69.
taxation, 55.
to appoint judges, 36, 65.
dispense with a jury, 65.
provide for uniformity of laws, 39.
regulate trade and commerce, 35, 54.
Enactments of the Dominion held *intra vires* respecting—
actions against railway companies, 53.
banks and banking, 52.
bigamy, 50.
criminal law, 52.
criminal procedure, 52.
elections, 52.
evidence, 52.
fisheries, 53.
incorporation of companies, 52.
insolvency, 52.
railways, 53, 69.
sale of liquor, 52.
works constructed over navigable waters, 53.
penalties for bribery at Dominion elections, 52.
trial of Dominion election petitions, 52.

Legislative Powers—Continued.*Of the Dominion—Continued.*

- Enactments held *ultra vires* of the Dominion respecting—
 - crimes committed beyond the jurisdiction, 50.
 - fisheries, 53, 54, 55.
 - liquor licenses, 53.
 - prohibition, 53.
 - provincial companies, 53.
 - repeal of Temperance Act, 1864.

Of the Provinces:

- enumerated, 36.
- over companies, incorporation of, 37, 55, 62.
- winding up of, 63.
- education, 63.
- Justices of the Peace, 61.
- licenses generally, 62.
 - brewers, 62.
 - butchers, 60, 62.
 - for retail sale of intoxicating liquors, 62.
- local and private matters in the Province, 38, 51, 57, 61, 67.
 - when conflicting Dominion Act is valid, 51.
- local works, 37, 62.
- municipal institutions, 61.
- navigable rivers, 55.
- nuisances, 68.
- police magistrates, appointment of, 61, 68.
- prohibition, 58, 59, 68.
- property and civil rights, 37, 63.
- infringed as to—
 - bankruptcy and insolvency, 63.
 - criminal law, 63.
 - trade and commerce, 63.
 - cases, 64.

public lands, 61.

Queen's Counsel, appointment of, 69.

railways, 38, 69.

solemnization of marriage, 37, 63.

taxation, 55, 59, 60, 68.

tenure of Provincial offices, 60.

trials of contraverted election petitions, 59.

to define Provincial powers and privileges, 59.

“ the officers of the Crown to be represented in Courts, 59.

impose punishment to enforce Provincial laws, 38, 57, 67.

“ “ to protect members of the Legislative Assembly, 59, 69.

relieve members from civil liability for acts done in the House, 59.

Intra vires, Provincial enactments respecting—

- absentees, proceedings against, 66.
- administration of justice, 65.
- amendments of the constitution, 59.
- appeals to Supreme Court, 66.
- arrangements between railway companies and their creditors, 64.
- assignments for the benefit of creditors, 64, 65.
- bankruptcy and insolvency, 64.
- bills of lading, rights of action under, 64.
- sale, 65.
- Canada Temperance Act, 68.
- Courts, 65.
- criminal law, 57, 64, 6
- proceeding, 66.
- debts contracted under a local Act, 64.
- delegation of judicial powers, 66.
- distribution of railway estate before time provided by will, 64.
- Division Courts, 65.
- election petitions, 66.
- execution from Provincial Courts, 66.
- extension of town limits into navigable waters, 55.
- fraud in sale of milk, 64.

Legislative Powers—Continued.*Of the Provinces—Continued.**intra vires*, Provincial enactments respecting—*Continued.*

- gaol limits, 66.
- habeas corpus*, 66.
- imposition of punishment to enforce provincial laws, 67.
- imprisonment for debt, 66.
- incorporation of companies, 55, 62.
- insurance, 63, 64.
- interference with members of the Legislative Assembly, 69.
- investigation of fires, 64.
- judges, 65.
- judgment debtors, 66.
- jurors, 65.
- justices of the peace, 61, 65.
- lands dedicated to the city of Toronto, 64.
 - ownership of, 65.
 - public, 61.
- licenses, 62.
- local works, 62.
- municipal institutions, 61.
- nuisances, 68.
- police magistrates, 61, 66, 68.
- procedure in civil matters, 66.
- prohibition of retail sale of liquor, 68.
- property and civil rights, 63.
- qualifications for professions, 64.
- Queen's counsel, 65, 69.
- railways, 69.
 - when inapplicable through *intra vires*, 69.
- relief of an embarrassed society, 68.
- sale of liquors, poisons, etc., 64.
- separate schools, when not affecting schools existing at the Union, 70.
- solemnization of marriage, 63.
- subsidy to promote a railway, 68.
- taxation, direct, within province, 59, 60, 68.
 - of ferries, 55.
- tenure of provincial offices, 60.
- tolls, revocation of right to, 64.
- trade and commerce, 63.
- witnesses, punishment of, 64 (but see 66).
- workmen's compensation, 64.

Provincial enactments held *ultra vires*:

- principles governing decisions, 57.
- enactments respecting—
 - bankruptcy and insolvency, 58.
 - corporations, 58.
 - criminal law, 58.
 - fisheries, 59.
 - intoxicating liquors, 58.
 - public harbors, 55, 59.
 - railways, 58.
 - repeal of Act of Province of Canada, 72.
 - Supreme Court, 58.
 - taxation, 58.

Libel and Slander. See DEFAMATION.**Licenses.**

- jurisdiction as to
 - brewer's, 62.
 - butcher's, 55, 60, 62.
 - fishery, 62.
 - for sale of liquors, 53, 55, 62.
 - imposed by municipalities, 62.
 - in provinces as a matter of police regulation, 63.
 - limiting the number of, 62.
 - prescribing qualifications for, 62.
 - when in reality indirect taxation, 62.
- power to grant includes right to impose penalties, 62.

Lieutenant Governor,

- administration in absence of, 31.
- application of provisions of B.N.A. Act referring to, 30.
- appointment of, 29.
 - executive officers by in Ontario and Quebec, 45.
- dissolution of Legislative Assemblies by, 34.
- how far represents crown, 72.
- how powers vested in to be exercised, 30.
- exception as to jurisdiction of province to amend its constitution, 37.
- may authorize judges to make rules, 200.
- may issue proclamation after the Union under the authority of Act before Union, 46.
- may refer constitutional questions to the courts, 71.
- meaning of term, 6.
- oath of allegiance of members of Legislative Council and Assembly
 - to be taken before, 43.
- oaths to be taken by, 30.
- of Quebec, constitution of townships by, 46.
- orders in council of to be ratified by legislature, 216.
- pardoning power may be delegated to, 67.
- proclamation of, how issued, 6.
- removal from office of, 29.
- salary, 30.
- tenure of office, 29.
- to appoint executive councils in Ontario and Quebec, 30.
 - masters, accountant and taxing officers, 202.
 - Registrar of Court of Appeal, 202.
- to appoint and remove speaker of Legislative Assembly of Quebec, 32.
- to issue writs for first elections, 34.
- to summon Legislative Assembly of Province, 33.
- vacancies in Legislative Council of Quebec to be filled by, 32.

Limitation of Actions. See also ACT RESPECTING WRITTEN PROMISES AND ACKNOWLEDGMENTS OF LIABILITY AND REAL PROPERTY LIMITATIONS ACT.

- against justices of the peace, 124, 131.
- trustees, 130, 382.
- by executors, 375.
- for compensation for injuries, 137, 144, 152.
- for newspaper libel, 113, 117.
- relating to real property.—See Real Property Limitations Act.

Limitations of Actions. Act respecting R.S.O. c. 72, 294.

- for
 - escape, 294.
 - legacy, 298.
 - money levied under execution, 294.
 - penalties, 294.
 - rent upon a demise, 294, 297.
 - share on intestacy, 296, 298.
- of account between merchants, 295, 297.
- on
 - awards, 294.
 - covenants in mortgages, 295, 297.
 - recognizances, 294.
 - specialties, 294, 297.
 - where time specially limited by statute, 295.

disability of plaintiff, effect of on, 295, 296, 297.

joint-debtors, some within Ontario and some not, 295.

Non-resident defendant, 295, 297.

plaintiff, 295.

Part payment, effect of, 296, 297.

Written acknowledgment.

(See also WRITTEN ACKNOWLEDGMENTS OF LIABILITY.)

effect of, 296, 297.

when required to take case out of statute, 301.

Limited Partnerships. See also REGISTRATION OF CO-PARTNERSHIPS.

Act respecting, 484.

business within, 488.

object of, 488.

Limited Partnerships—Continued.

dissolution
by alteration, 485.
notice of to be filed, 487.

Certificate of continuance partnership, 485.

contents of, 484.
fees for filing, 485.
form of, 485, 487.
must be filed before partnership deemed to be formed, 485.
where to be filed,

Certificate of continuance of partnership, 485.**General partners, 484.**

effect of becoming, 489.
liability of, 484.
to account, 486.
to actions, 486.
to transact business, 484.

Name of partnership, 486.**Power to form limited partnerships, 494.****Requisites of, 483.****Special partners, 484.**

creditors preferred to, 486.
liability of, 484.
by intermeddling, 489.
to refund, 486.
payment by must be in cash, 488.
privileges of, 486.
representations by, 489.
restrictions upon stock of, 486.
rights of *inter se*, 489.
should not sell at a profit to partnership, 489.

Lis pendens.—See JUDICATURE ACT.**Local works—jurisdiction of provinces as to, 37.****Locke King's Act, 642, 658.****Lord Campbell's Act (R.S.O. c. 166), 154.**

See also TRUSTEES AND EXECUTORS, WORKMEN'S COMPENSATION FOR INJURIES.

actions for death caused by wrongful act or default, 154, 156.
defences to, 156.
by duel, 155.
for whose benefit to be, 156.
in whose name to be brought, 154.
limitation of, 155, 157, 160.
new cause of action given by Act, 156.
only one to lie for the same cause, 155, 160.
particulars to be set out by plaintiff, 155, 160.
where not brought by executors within six months may be brought by persons beneficially interested, 155.

Child, meaning of, 154.**Damages.**

actual damage necessary, 157.
amount of, how fixed, 154, 157.
apportionment of, 154, 155, 156, 160.
funeral expenses not allowed, 157.
how divided, 154, 155, 156.
insurance money, deduction of, 159.
legal right, loss of does not entitle to, 157.
loss to personal estate to be measure of, 157.
mental sufferings cannot be considered, 157.
payment into court, 154.
probability of life may be used in fixing, 157.
reasonable expectation of pecuniary benefit necessary to recover, 157.
what is, 158.
parents', 158.
husbands', 158.
widow's and children's, 159.
what is not, 158, 159.

Locke King's Act—Continued.

Damages—Continued.

verdict for, setting aside, 159.
when widow unable to recover, 157.

Duels—liability of principals and seconds in.
Parent, meaning of, 154.

Lord Tenderden's Act, 302

Lower Canada.

meaning of term, 6.
Province of, to constitute Province of Quebec, 20.
use of term instead of "Quebec" not to invalidate document, 46.

Lumber dues.

in New Brunswick, 43.
in other provinces, 43.

Lunatics. Act respecting, (R.S.O. c. 65,) 238.

scope of Act, 243.
English Act respecting, application of, 243.

Appeals from orders respecting, 242.

Committees of estates of.

appointment of, 245.
duties of—
to file inventory, 240.
to give security, 240.
instruments executed by validity of, 242.
petition by for leave to mortgage or seal, 241.
contents of, 241.
truth of to be inquired into, 241.
sale on, 241.
how proceeds applied, 241.

Contracts by, specific performance, of, 242.

Costs of inquiries respecting, 242, 246.

Idiot—definition of, 243.

Inquiry as to—costs of, 242.

scope of, 240, 245.
by commission, 238, 243, 244.
execution of, 244.
persons allowed to attend, 244.
petition for, 243.
protection of person pending, 244.
property pending, 240.
quashing, 244.
traverse of, 238, 244.
new trial of, 239.
security to be given on, 239.
time for, 238, 244.
trial of, 238.
when barred, 239.
who have right to, 244.

Lunacy—inquiry as to,

without commission, 239, 245.
declaration of lunacy in, 240.
examination of alleged lunatic in, 239.
jury may be required in, 239.
new trial of, 239.
production of lunatic in, 245.
traverse of, not allowed, 239.
proceedings in lieu of, 240.
summary declaration of lunacy, 245.
jurisdiction over, 238, 243.
aliens and non-residents, 245.
persons included by term, 238.

Lunatics—Continued.

- Property of, protection of, 240, 245.
 - pending commission, 244.
 - payment of debts out of, 246.
 - sale of, 241, 246.
 - succession to not to be changed, 246.
 - surplus from, how applied, 242.

Lunatic trustee, committee of to act, 242.

Magistrate, meaning of term, 8.
 police, appointment of, 61, 68.

Majority, powers of, where act required to be done by more than two, 10.

Malice. See DEFAMATION. JUSTICES OF THE PEACE.

Marriage, exclusive jurisdiction of Dominion over, 36.
 does not include solemnization of, 37, 51, 63.

Married Women's Property Act, The. (R.S.O. c. 163), 768.

See also Dower, The Married Women's Real Estate Act.

Administration of estates of married women, 788.

- distribution of, 614.
- rights and liabilities of legal personal representative, 777.

Contracts by married women. ●

- after April 13th, 1897, effect of, 769, 784.
- before April 13th, 1897, deemed made with respect to separate estate, 769.
- to bind after acquired property, 769.
- joint, 785.
- power to make, 769.

Debts for household supplies.

- liability for, 787.
- of wife, 783.
 - antenuptial, 773, 787.
 - husband and wife may be jointly sued for, 774.
 - liability of husband for, 773, 783.

Earnings.

- of minor children, protection of, 775.
- to be separate estate, 770, 781.

Execution of general power by will of married woman.

- effect of, 771.

Executrix or trustee.

- married woman as, 775, 787.

History of legislation respecting, 778.

Husband and wife.

- question of title between, summary proceeding as to, 774, 788.
- torts between, 773.

Interpretation.

- "contract," 768.
- "liabilities," 768.
- "property," 768.

Property held jointly, 772, 781.

Remedies against married women, 769, 787.

- committal to gaol, 788.
- injunction, 788.
- judgment.
 - how enforced.
 - is not personal.
 - of married woman, 778, 787.

Restraint on anticipation, 769, 785.

- power of court to bind property of married woman notwithstanding, 771, 785.

Separate estate.

- alimony is not, 781.
- property of woman married before 4th May, 1859, 769.
 - between 4th May, 1859 and 2nd March, 1872, 770.
 - since 2nd March, 1872, 771, 780.
 - since 4th May, 1859, 770.
 - on or after 1st July, 1884, 771, 781.
 - since 1st July, 1884, and acquired before that date, 77 ✓.

Married Women's Property Act. The—Continued.**Separate estate—Continued.**

- power to hold and dispose of as a *feme sole*, 768, 783.
- rights of woman married before 1st July, 1884, not affected, 777.
- statutory separate estate, 779.
- stocks, deposits, etc., when deemed to be, 771, 772.
- exception where fraudulent investment of husband's money, 772.
- husband need not join in transfer of, 772.
- under express settlement, 775, 779, 782.
- what is, 779.

Short title, 768.**Summary of law respecting, 781.****Torts.**

- between husband and wife, 773.
- of wife, liability for, 773, 786.

Married Woman's Real Estate Act, The. (R. S. O. c. 165), 799.

See also Dower, Married Women's Property Act.

Bar of dower.

- by infant wife before 5th May, 1894, 799, 804.
- since that date, 800.

Concurrence of husband.

- order dispensing with, 801, 805.
- filing of, 803.
- form of, 802.
- judge's fee on, 803.
- may be endorsed on deed, 803.
- registration of, 803.
- fee for, 803.
- unnecessary, 804.

Conveyances by married women.

- defective, when validated, 800, 804.
- exceptions, 804.
- power to make, 799.
- when married woman an infant, effect of, 805.
- with husband since 29th, March, 1873, when validated, 801.
- without husband before 29th March, 1873, when validated, 800.

Interpretation.

- "judge," 799.
- "real estate," 799.

Master and Servant.

- Act respecting, (R. S. O. c. 157), 310.
- accounts, impeachment of by workman, 311.
- agreements by which workmen may share in profits, 310, 311.
- when within the Act, 310.
- for service, 310, 311.
- verbal, not to exceed one year.

Mercantile Amendment Act. (R. S. O. c. 145). 432.**Bills of lading. See also ACT RESPECTING BILLS OF LADING. 439.**

- how far evidence, 433.
- rights and liabilities of consignees and endorsees of, 433.
- partners not within provisions as to, 438.

Sureties—

- rights of on payment of debt, 432, 437.
- securities, right of to, 437.
- what are, 438.
- who are, 437.

Warehouse receipts, 433.

See also BANK ACT.

- lien on timber for advances under, 435.
- limit of time for which goods or timber may be held under, 434, 435.
- rights and liabilities under as collateral security, 434.
- sale under, 435.
- transfer of when given for crude petroleum, 436.

Merchant Shipping Act. (Imperial).

- application of, 71.
- repeal of by colonial legislatures, 71.

Merger, by operation of law, 180.

Military Forces—command of continued in the Queen, 22.
exclusive authority of Dominion over, 35.

Misdemeanour, meaning of, 13.

"Month," meaning of, 7.

Mortgages of Real Estate, Act respecting. (R. S. O. c. 121). See also REGISTRY ACT. 594.

Advance on joint account,

effect of, 598, 608.

Application of Act, 608.

Assignee of mortgage,

validity of certain sales by, 605, 611.

Assignment instead of reconveyance,

right of mortgagor to, 595, 606.

does not apply to mortgagee in possession, 595.

not prevented by contrary stipulation, 595.

to whom extends, 595, 606.

Covenants implied

application of sections respecting, 597.

are joint and several, 597, 607.

in mortgage by beneficial owner, 596.

of chattels, 607.

of leasehold, 596.

Discharges of mortgage. See also REGISTRY ACT.

validity of 598.

by mortgages, survivors and executors, 599, 607.

where money advanced on joint account, 598.

Distress by mortgagee,

for interest payable as rent, 608.

limitation of right of, 599, 608.

reimbursement of officer or assignee paying money to relieve from, 600.

Executors of mortgagee,

powers of, 598, 607.

Insurance,

application of money payable under, 595, 607.

implied power to affect on default, 601.

Interpretation, 594.

Mortgagor,

who is, 606.

Payment

bona fide to trustee, etc., effect of, 599.

of principal after default, 600, 609.

pursuant to notice of sale to be accepted, 604.

where dispute as to costs, 604.

Power of sale implied on default.

application of provisions respecting, 603.

purchase money on sale under, 600, 602, 609.

improper exercise of not to defeat purchaser's title, 601.

notice to be given before exercising, 601.

form of, 602.

registration of, 602. See also Registry Act.

affidavit for, 602.

certified copy of as evidence, 602.

service of, 601

on infant heirs, 601.

powers incidental to, 601.

to call for title deeds and conveyance of legal estate, 603.

to convey mortgagor's interest to purchaser, 603.

to give receipts for purchase money, 601.

to insure, 601, 609.

to make conditions, rescind and buy in, 601.

when exercisable, 600.

under Short Form mortgage,

when mortgagor selling under may proceed under this Act, 603.

Mortgages of Real Estate—Continued.

Proceedings

- not to be taken until lapse of time mentioned in notice of sale, 604, 610.
- order allowing, 604.
- proof for, 604.

Purchaser of mortgage

- may set up defence of purchase for value, 605, 610, 611.

Release of equity of redemption

- effect of prior mortgagee acquiring, 597.
- as to priority under Registry Act, 598.
- not to cause merger, 595, 607.

Taxation of mortgagee's costs, 604.

Title deeds

- right of mortgagor to inspect, 595, 607.

Title of Act

- misleading, 606.

Mortgagor, suit by

- for possession, 181.
- no *lis pendens* need be registered in, 193.

Mortmain and Charitable Uses Act, The. R.S.O. c 112,) 571

- application of Act, 571, 573.
- only to legacies otherwise void, 572.

Charitable Uses, 573.

- devise to a diocese is not, 574.

Early Statutes, 572.

Jurisdiction of High Court under the Act, how exercised, 572.

Land.

- devised to charity to be sold.
- meaning of, 571, 574.
- power to retain for occupation, 572.
- where remains unsold after two years, 571.

Objects of Act, 573.

Personalty directed to be laid out in land, 572.

- impure not subject to Mortmain Acts 572.

Municipal Act.

- application of interpretation, section of 13.

Municipal Corporations.

Provincial Powers respecting 37, 61.

- cannot delegate powers not possessed by the Province, 61.
- may authorize granting of licenses by, 62.
- may extend boundary of to centre of navigable river, 55, 61.
- may impose a payment for non-payment of taxes levied by 60, 61.

Mutes.—Evidence of—see WITNESSES AND EVIDENCE.

Name.

- common, use of, 6.

Naturalization.

- Exclusive authority of Dominion over, 36.

Naval Forces—command of vested in Queen, 22.

- powers of Dominion as to, 22.

Navigable Waters.

- jurisdiction over
 - Dominion 51, 55.
 - Provincial, 55, 61, 62.

Navigation and Shipping.

- jurisdiction of Dominion as to 36, 53, 55.
- exceptions to, 55.

New Brunswick,

- limits of, 20.
- constitution of continued by B.N.A. Act 34.

STRY ACT. 594.

600.

New Brunswick—Continued.

electoral districts of, 26.
 grant to for ten years, 42.
 House of Assembly of, continued, 34.
 lumber dues in, 43.
 representation of in House of Commons, 25, 28.
 seat of government, 31.

Newspaper. See DEFAMATION.

"Next,"

how construed, 6.

Notarial Documents as evidence.

See WITNESSES AND EVIDENCE.

Notice.

judicial, see Witnesses and Evidence.
 of intention to use copy of instrument as evidence.
 See WITNESSES AND EVIDENCE.

Notice of Action.

in actions against public officers.
 See JUSTICES OF THE PEACE.
 in libel actions, see DEFAMATION.

Notice of Injury.

See WORKMENS' COMPENSATION FOR INJURIES.

Notice to quit. See EXECUTION ACT, LANDLORD AND TENANT ACT, OVERHOLDING TENANT'S ACT.

Nova Scotia,

Constitution of continued by B.N.A. Act, 34.
 Electoral districts of, 26.
 first election for Legislative Assembly in, 34.
 limits of, 20.
 Representation of in House of Commons, 25, 28.
 Seat of Government, 31.

"Now,"

how construed, 6.

Nuisances—powers of Provinces as to, 61, 68.

Number—how expressed, 8.

Numbers, of sections, constituent parts of an Act, 14.

Oath.

by Lieutenant-Governor, etc, 30.
 includes affirmation and declaration, 7.
 who may administer, 7.
 when affirmation made instead, 77, 78.
 when made out of Ontario, 85.

Oath of Allegiance.

by members of Senate and House of Commons, 43, 49.
 by members of Legislative Assembly, 43, 49.

Offence, committed under an Act afterwards repealed, 12.
 under more than one Act, 13.

Official Documents, how proved in evidence. See WITNESSES AND EVIDENCE.

Ontario, Province of.

electoral districts of, 25, 31.
 election laws of at union continued, 33.
 first election in, for Legislative Assembly, 34.
 how constituted, 20.
 legislature for, 31.
 representation of in House of Commons, 25, 28.
 seat of Government of, 31.

Operation of statutes. See INTERPRETATION ACT.

Orders for Chattels. See CONDITIONAL SALES OF CHATTELS.

Overholding Tenants Act, The. (R.S.O. c. 171), 831.

See also The Landlord and Tenant Act. The Execution Act.

Overholding Tenants Act, The—Continued.**Ejectment.**

liability of landlord for, 837.

Interpretation.

"landlord," 831.

"tenant," 831, 836.

Notice to quit. See also EXECUTION ACT.

requisites of, 836.

service of, 837.

Proceedings against overholding tenants.

affidavit of landlord in, not evidence, 837.

appearance, proceedings in default of, 832.

" " on, 832.

application to Judge for inquiry, 831.

appointment for inquiry, 832.

notice of, 832

costs of, 833.

defences of tenant in, 837.

execution on, 833.

how entitled, 833.

jurisdiction of County Court in, what necessary to give, 836.

other remedies of landlord not affected by, 833.

removal of by certiorari, 832, 837.

service of papers in 833.

summoning of witnesses in, 833.

to form part of records of Court, 832.

writ of possession, form of with costs, 834

without, 835.

writ of restitution, 833.

Scope of the Act, 836.**Short title of Act, 831.****Parties to an action,** evidence of. See WITNESSES AND EVIDENCE.**Partition,** jurisdiction of High Court in, 172.**Partnerships, Limited.** See LIMITED PARTNERSHIPS.

registration of. See Registration of Co-Partnerships.

Patents of invention, exclusive authority of Dominion over, 36.**Payment in Court.**

in actions against Justices of the Peace. See JUSTICES OF THE PEACE.

in actions under Lord Campbell's Act. See LORD CAMPBELL'S ACT.

in newspaper libel actions. See DEFAMATION.

"Peace, order and good government," jurisdiction of Dominion over matters relating to, 51.**Penalties.**

application of, 67.

for enforcing provincial laws, jurisdiction as to, 38, 57, 67.

jurisdiction of High Court respecting, 171, 177.

recovery and appropriation of where no mode specified, 9.

relief against, 171, 177.

right to grant licenses includes right to impose, 62.

under repealed Act, 12.

under Election Act, infant cannot sue for, 15.

when may be recovered on indictment, 9.

where imposed for breach of duty under private Act, 15.

"Person," meaning of, 7-14.**Plural number,** includes singular, 8.**Police Magistrates,**

appointment of, 61, 68.

Police Regulations,

jurisdiction of Dominion respecting, 55.

of Provinces respecting, 61, 63.

Possession,

actions for by mortgagor, 181.

Powers of Appointment,

- donee may release, 582.
- execution of by
 - deed, 581.
 - will, 638.
 - will of married woman, 771.
- rules of law as to illusory appointments, 177.

Powers of Attorney, Act respecting (R. S. O. c. 116,) 299.

- revocation of by death or insanity of principal before this Act, 300.
- validity of acts done in ignorance of death of constituent, 299.
- when irrevocable, 300.
- where provision expressly made for exercise after death of constituent, 299, 300.

Powers of Attorney,

- registration of, 716, 729.

Powers implied,

- of public officers, 8.
- of sale under mortgage. See MORTGAGES OF REAL ESTATE.
- vested in corporation by words constituting it, 8.
- where authority to appoint a public officer is given, 8.
- where power to enact is given, 10.

Powers,

- of confiscation, 51.
- of legislation. See LEGISLATIVE POWERS.
- delegation of 51.
- to regulate does not allow prohibition, 54.

Preamble of Statutes,

- of enacting clause to be inserted in, 4.
- to be deemed part of Act, 10.
- when may be referred to, 15.

Precious Metals,

- do not pass with a Crown grant, 71.
- unless expressly conveyed, 71.

Prescription. See REAL PROPERTY LIMITATION ACT.**Private Act,**

- application of, 13.
- how construed, 15.
- presumption against, 10, 15.
- Act not private because operation locally limited, 15.
- where penalty provides for breach of duty imposed by, no action for damages for breach of such duty, 15.

Privilege,

- in actions of libel and slander, see DEFAMATION.

Procedure,

- legislative powers as to in civil matters, 38, 66.
- in criminal matters, 36.
- uniformity in, in the provinces, jurisdiction of Dominion to make provision for, 39.

Proclamation. See also B. N. A. ACT.

- definition of, 16.
- how proved. See Witnesses and Evidence.

Promissory Notes. See BILLS OF EXCHANGE.**Public Debt,**

- authority of Dominion over, 35.
- of Nova Scotia and New Brunswick, interest to be paid on difference between and stipulated amounts, 41.
- provincial, assets connected with, 41.
- Canada to be liable for, 41, 72.
- interest on excess of to be deducted, 42.
- Liability of New Brunswick for, 41.
- of Nova Scotia for, 41.
- of Ontario and Quebec, 41, 72.
- of Upper and Lower Canada, arbitration as to, 46.

Public Lands,

exempt from taxation, 43.
of Provinces at the Union to belong to them, 41.
beds of lakes and rivers vested in Crown, 61.
conveyance of does not include precious metals, 71.
escheated lands belong to Provinces, 61.

Indian Lands,

belong to Province on extinguishment of Indian title, 56, 61.
title to vested in Crown, 61.

Public Moneys,

how paid over and accounted for, 9.

Public Officers,

actions against. See Justices of the Peace.
appointment of—
effect of words authorizing, 8.
to be during pleasure, 9, 15, 60.
directions to, to include successors, 9.
fees of, 206, 215.
when subpoenaed as witnesses, 198.
implied powers of, 8.
not eligible for election to Legislative Assembly, 33.

of Dominion,

appointment of, 61.
salaries of, 35.

of Provinces,

continued by B. N. A. Act, 44.
jurisdiction over, 37.

Public Works,

of each Province at time of Union to be the property of Canada, 41, 48.

Purchaser,

not affected by irregularities in orders of court, 182.
of mortgage may set up defence of purchase for value without notice, 605.

Punishment,

authority to impose,
of Dominion, 36.
of Provinces, 67.
of witnesses, authority of Province to impose, 64, 66.
where none provided by Provincial Act, 67.

Pardoning Power, as to offences against Provincial enactments, 67.

of Crown, extent of, 72.

Parliament, Imperial.

Acts of, in force in Canada, 50.
supreme authority of not limited by B.N.A. Act, 80.

Parliament of Canada,

certain provisions relating to, to apply to legislatures of Provinces, 35.
concurrent jurisdiction of, 39.
debates in, may be in French, 44.
empowered to pass remedial laws regarding separate schools, 38.
empowered to make provision for uniformity of laws in the provinces, 39.
exclusive jurisdiction of, 35.
incidental jurisdiction of, how far extends, 54.
how constituted, 22.
journals of,
both English and French to be used in, 44.
entry of Governor-General's messages to be made in, 29.
may confer jurisdiction on Imperial Vice-Admiralty Courts, 50.
may interfere with public rights in navigable waters, 51.
may establish a general Court of Appeal for Canada.
not a delegate of the Imperial Parliament, 51.
power given to perform treaty obligations.
session of, first, 22.
to be held yearly, 22.
to fix salaries of judges, 39.

Qualifications.

of Legislative Councillors in Quebec, 32.
 of licensees—province may prescribe 62.
 of Senators, 23.

Quarantine—exclusive authority of Dominion respecting, 36.**Quebec, Province of**

as constituted by B.N.A. Act, 20.
 election laws of at Union continued, 33.
 electoral districts of, 25, 48.
 how altered, 32,
 first election for Legislative Assembly in, 24.
 Legislature of, 31.
 Legislative Assembly, 32.
 " Council, 31.
 representation of in House of Commons, 25, 28.
 seat of Government of, 31.
 townships in, constitution of by
 Lieutenant-Governor, 46.

Queen, The

application of provisions of B.N.A. Act respecting assent by to bills, 29.
 command of armed forces vested in, 22.
 executive government of Canada vested in, 20.
 meaning of expression "The Queen," 6.

Queen's Counsel, appointment of, 60, 65, 69.**Queen's Privy Council for Canada.**

constitution of, 21.

Questions, Constitutional—see CONSTITUTIONAL QUESTIONS.

tending to criminate,—see WITNESSES AND EVIDENCE.

Quorum.

of House of Commons, 27.
 judges—see JUDICATURE ACT.
 of Legislative Assemblies of Ontario and Quebec, 34.
 of Legislative Council of Quebec, 32.
 of Senate, 25.

Railways.

belonging to Dominion not subject to Provincial Railway Act, 63, 69.
 declared to be for general advantage of Canada, 69.
 Intercolonial, 47.
 Provincial jurisdiction over, 37, 58, 62, 63, 69.

Real Property Limitation Act, The (R.S.O. c. 133) 659.

how differs from English Act, 674.
 origin of Act, 674.

Acknowledgment in writing, 680.

by one of several mortgagees, 666.
 by whom to be signed, 680.
 effect of, 681.
 equivalent to possession, 665.
 sufficiency of, 681.
 to one of several mortgagors, 666.
 to whom to be made, 681.

Administrator.

to claim as if no interval between death and grant of letters, 664.

Commencement of Act, 660.**Continual Claim.**

not to preserve right, 664, 680.

Coparceners, 680.

effect of possession by one of several, 664.

Descent cast, discontinuance or warranty not to defeat right, 664.**Disabilities, 671, 685.**

easements, 671.
 land or rent, 672.

Real Property Limitation Act—Continued.**Dower, arrear of, 682.**

- action for to be brought within 10 years, 668.
- agreement in lieu of, 684.
- arrears of for six years only to be recovered, 665.
- when right to bring action for accrues when dowress in possession, 668, 684.

Easements by prescription.

- Crown bound by, 692.
- enjoyment of, 688.
 - "as of right," 686, 692.
 - must be continuous, 691.
 - next before action, 690.
- disabilities, 671, 692.
- how periods for calculated, 670.
- in gross, 687.
- indefeasible, 688, 689.
- light—easement of by prescription abolished, 670, 690.
- outside the statute, 687.
- presumption not admissible on proof of enjoyment for less than prescribed period, 671.
- profit à prendre, 688.
- requisites of, 687.
- rights of way and water, period for, 670, 688.
- period of enjoyment for 670, 688.
- what party claiming must allege, 671.
 - how calculated, 670.
 - proof of, 671.

Entry.

- by owner on part of lands, effect of, 679.
- not deemed possession, 664.

Extinguishment of right, at end of period of limitation, 665, 674.**Fraud.**

- acquiescence in, equitable rule as to, preserved 669.
- time not to run while undiscovered, 669, 677.
- except in case of *bona fide* purchaser, 669.

Interest charged on land.

- arrears of, recoverable for 6 years only, 66.
- exception in favor of subsequent mortgagee where prior one in possession, 666, 682.

Interpretation.

- "assurance," 660.
- "land," 660.
- "rent," 660.

Joint Tenants.

- possession by one of not possession of others, 665, 680.

Land or rent, actions to recover.

- disabilities, 672.
- to be brought within ten years, 661.
- when time commences to run, 671, 675.
- against mortgagees, 676.
- remainderman, 676.
- as to future estates, 663, 676.
- wild lands, 661.
- on alienation, 661.
- on death, 661.
- on dispossession, 661.
- on forfeiture or breach of condition, 663.
- new right of remainderman on his estate coming into possession, 663.
- where rent under written lease wrongfully received, 662, 675.
- where subject to tenancy, 675.
- at will 662, 675.
- not to be deemed to be in case of mortgagee or *cestui que trust*, 662.
- from year to year, 662, 675.

Money charged on land and legacies, 682, 683.

- express trust not to enlarge time for recovering, 667, 682.
- when deemed to be satisfied, 667.

Real Property Limitations Act—Continued.**Mortgages, 684.**

- absence of redeemise clause, effect of, 683.
- acknowledgment by one of several mortgagees, 666.
- to one of several mortgagors, 666.
- action on covenant in, 683.
- foreclosure, effect of, 684.
- judgment for, 683.
- mortgagee may enter or sue within ten years from last payment, 667.
- mortgagor barred after ten years, 666, 682.
- payments under, 683.
- when time commences to run, 676.

Possession.

- acquisition of rightful title by person in, 678.
- adverse 677.
- against infants, 677.
- boundaries of 679.
- by administrator, 679.
- caretaker, 678.
- dowress, 668, 684.
- guests, 668.
- relations of heir, 665, 680.
- schoolmaster.
- trespasser, 678.
- wife, 678.
- of wild land, 679.
- under defective title, 678.

Relations.

- possession of not possession of, heir, 665, 680.

Rent. See LAND OR RENT.

- arrear of recoverable for six years only, 666, 682.
- meaning of, 674.
- receipt of deemed receipt of profits, 668.

Short title of Act, 660.**Tenants in common.**

- effect of possession by one of, 664, 680.

Tenant in tail.

- bar of bars those whose estates he might have barred, 668, 677.
- death of while time running, effect of, 668.
- possession under assurance by, effect of, 668, 684.

Title by possession, 674.**Trespassers, 675.**

- successive, 675.

Trusts, express.

- not to extend time to recover money charged on land, 667, 682.
- right of *cestui que trust* under—
- against trustee not to be barred by statute, 180, 381, 393, 669, 677, 684.
- when accrues against purchaser, 669.

Receipt Notes. See CONDITIONAL SALES OF CHATTELS.**Registered Instruments—as evidence. See WITNESSES AND EVIDENCE, REGISTRY ACT.****Registration of Co-partnerships, Act respecting (R. S. O. c. 152), 490.**

- cheese manufacturing companies excepted from, 493.
- object of, 496.

Declaration of partnership.

- allegations in, effect of, 491.
- filing of, 490.
- by person using "*and Company*," 492.
- within six months, 491.
- penalty for omitting, 492.
- suing for, 496.
- form of, 492, 494.
- how executed by absent members, 490.
- liability of, partner not signing, 491.
- persons signing deemed partners until new declaration filed, 491.

Registration of Co-partnerships—Continued.**Declaration of partnership—Continued.**

registrar to record, 492.
 requisites of, 490.
 when change in partnership.

Declaration of dissolution of partnership, 491.

form of, 494.
 necessity for, 496.

forms, 494, 495.

Partners.

actions against where no declaration filed, 491.
 individually, 496.
 in partnership name, 496.
 on instrument in writing, 492.
 liability of where fail to declare, 491.
 rights of, *inter se*, 491.

Partnerships within the Act, 497.**registrar.**

books to be kept by, 493.
 duties of, as to filing declarations, 492, 493.
 fees of, 493.

Trading in firm name.

declaration must be filed, 492, 497.

Registration of Limited Partnerships.

See LIMITED PARTNERSHIPS AND REGISTRATION OF CO-PARTNERSHIPS.

Registry Act, The (R.S.O. c. 136) 699.**affidavit of execution, 712.**

affirmation instead of, 715.
 before whom to be sworn, 713.
 certain defects in not to invalidate, 712.
 form of, 755.
 in case of instruments respecting purchase of goods, 712.
 name of witness need not be set out in full, 713.
 not necessary where seal of court or corporation appears, 716.
 parties not to take, 715.
 to be registered, 712.
 where different witnesses to different signatures, 712.
 witness absent or insane, 715.
 compellable to make, 715.
 must sign in his own handwriting, 715.

Assessment commissioner.

registrar to furnish statement to, 746.

Books of office.

absence of certificate in margin of, effect of, 739.
 abstract index, 711.
 of sub-division of blocks, 734.
 alphabetical index of names, 712.
 entries and corrections in, 730.
 general register, 708.
 index of wills omitted from, 708.
 inspection of, 749.
 minutes of registration in margin of, 720.
 absence of, effect of, 739.
 new books, 708.
 pages and instruments in to be numbered, 720.
 plan index, 733.
 registrar to deliver up when removed, 719.
 repair of, 710.
 to be certified by County Judge, 709.
 treasurer to provide, 707.
 remedy where neglects to do so, 709.
 when worn out, 710.
 where lost or destroyed—re-registration, 738.
 where place separated from a county, 709.

By-laws, registration of, 728, 764.

Registry Act—Continued.

Certificate of registration, effect of, 730.

Concealment of title deeds. See p. 586, 593.

Certified copies.

duty of registrars to certify to, 706.

of notices of sale, 722.

of powers of attorney, 716.

registration of, 716.

to be *prima facie* evidence, 717.**Crown grants, registration of, 730.****Deeds under process of the Court.**

to be registered in six months, 729.

where made before 1868, 729.

Defects in registration.

absence of certificates in margins of books not to be, 739.

before March 4th, 1868, 739.

before March 29th, 1873, 739.

where part of township changed with alteration of books, 740.

Deputy Registrars.

appointment of, 704.

liability of, 704, 705.

not to act as agent, 704.

oath by, 704.

power of to act on death or removal of Registrar, 704.

removal of, 704.

Discharges of mortgages, registration of, 723, 765.

effect of, 723.

by married women, 726.

instruments authorizing discharge to be given, registration of, 725.

partial, 726.

residence of witness to need not be given, 727.

seized under execution, 726.

validity of, 598.

when given by person other than the mortgagee, 724.

where mortgage paid off by new loan, 724.

Equitable interests, not to prevail against the Act, 731, 763.**Evidence.**

certified copies as, 717.

duplicate as, 719, 767.

registrar's abstract is not, 767.

Fees, generally, 740, 767.

disputes as to, 744.

on abstracts, 742.

affidavits, 743.

certificates, 742.

copies, 743.

registration, 740.

of certificate of discharges of lien, 744.

mortgage, 743.

payment of taxes, 744.

of mortgages not in full, 748.

of plans, 742.

producing originals in Court, 743.

searches, 741.

showing originals, 743.

payment of surplus fees to treasurer, 748.

recovery of from municipal corporations, 744.

registrar to furnish statement of, 744.

make return of, 745.

table of fees to be posted up, 744.

to be payable before registration, 745.

Forms.

abstract index, 753.

affidavit of execution, 755.

certificate of County Judge in lieu of, 756.

affidavit of justification, 751.

where instrument does not conform to plan, 758.

Registry Act—Continued.**Forms—Continued.**

- alphabetical index, 734.
- certificate of registration, 756.
 - respecting registry books, 752.
- covenant of registrar, 751.
- discharge of instrument creating a charge, 758.
 - mortgage, 757.
 - by sheriff, 757.
- minute of registration, 756.
- registrar's oath, 752.
- surveyor's certificate of plan, 758.

Ink.

- not to be used by persons searching, 741.

Inspector of Registry Offices.

- duties of, 749.
- salary of, 751.

Interpretation.

- "instrument, 700.
- "land," 700.
- "will," 700.

Judgments affecting land.

- registration of, 716.
- for alimony, 172.
- leases when under the Act, 712, 762.

Letters of administration.

- registration of, 722.

Mortgages.

- advances on after subsequent registrations, 731, 765.
- registration of not in full, 718.

Notice,

- actual, effect of, 730, 766.
- registration to be, 729, 761.
 - only affects subsequent acquirers, 765.
- time of receiving, 766.

Notice by Sheriff of seizure of mortgage.

- registration of, 322.

Notices of sale under mortgage.

- certified copy of as evidence, 722.
- registration of, 722.
 - conveyance under not to be registered before, 722.
 - proof for, 722.

Orders in Council, registration of, 721.**Plans.**

- registration of, 731, 736, 764.
- alteration of, 732, 735.
- copies of to be evidence, 733.
- delivery of copy of to municipal treasurer, 738.
- duties of registrar as to, 732, 733.
- index book of, 733.
- instruments to conform to, 732, 762.
 - when instruments which do not may be registered, 735.
- mounting of, 732.
- not to be registered,
 - for anyone but owner, 733.
 - on unpatented lands, 733, 762.
 - without mortgagee's consent, 733.
- not to bind until sale made under it, 735.
- of lands subdivided before 4th March, 1868, 735.
- of towns and villages, 736.
- penalty for refusing to register, 735.
- signatures to, 732.
- verification of, 733.

Registry Act—Continued.**Plans—Continued.**

- streets on,
 - alteration of, 732.
 - work of, 733.
- unregistered plan, instruments referring to, 734.

Powers of attorney.

- certified copies of, 716.
 - registration of, 716.
 - to be *prima facie* evidence, 717.
- deposited in Land Titles Offices, registration of, 717.
- registration where instrument executed under, 719.
- to sell lands naming commission, not to bind after one year, 729.

Priority of registration, 728, 766.**Purchase of goods,**

- instruments in relation to affidavits of execution of, 713.
- discharges of, 727.

Registrars, 702.

- appointment of, 702.
- certificate to be given by, 707.
- death or removal of—County Attorney to act if no deputy, 704.
- deputies, 704.
- disbursements by, subject to revision of inspector, 749.
- liability of, 704, 705, 767.
 - none for certain errors, 707.
- meaning of term, 8.
- not to engage in certain callings, 705.
- oath of office by, 704.
- office hours of, 706.
- production of papers by, 707.
- removal of for misconduct, 705.
- returns by as to fees.
- residence of, 705.
- salaries of, 746, 747.
- seal of office of, 707.
- security by, 702.
 - amount of, 702.
 - inspector may require new covenants, 703.
 - liability of sureties and registrar, 703, 705, 767.
 - Lieutenant-Governor may require, 703.
 - right of public to examine, 703.
 - R. S. O. c. 16 to apply to, 703.
 - sureties, 703.
- to make searches, exhibit originals and certify copies, 706.
- to see that copies in registers are correct, 720.
- to supervise the work of the office, 705.

Registration, how effected.

- certificate and its effect, 720.
- copying into books, 720.
- compulsory, 761.
- defects in, 739, 740.
- effect of, 728.
- filing, 720.
- generally, 717.
- in several registry offices, 717.
- of by-laws, 728.
- of certified copy of power of attorney, 716.
 - crown grants, 720.
 - deeds under process of the court, 729.
 - discharge of mortgage, 723.
 - notices of sale under mortgage, 722.
 - orders in council, 721.
- of tax deeds, 629.
- of wills, 721.
 - within twelve months from testator's death, 729.
- of instruments.
 - executed before 1st January, 1866, 723.

Registry Act—Continued.**Registration, how effected—Continued.**

- in foreign language, 717.
- in full when by memorial, 723.
- in several registry offices, 719.
- in relation to purchase of goods, 713.
- in two or more parts, 719.
- relating to lands in two or more counties, 719.
 - several lots in different localities, 719.
- of mortgages not in full, 718.
- of notarial copies of instruments executed in Quebec, 717.
- to be notice, 729.
- what instruments may be registered, 762.
- when deemed complete, 730, 762.
- where instrument executed under power of attorney, 719.

Registry offices.

- at Toronto, 700, 701.
- county council to provide buildings for, 702.
- general provisions as to, 700.
- office hours of, 706.
- removal of, 701.

Re-Registration.

- where books lost or destroyed, 738.

Short Title. 699.**Summary of effect of Act,** 761.**Tacking,**

- how affected by Act, 731, 763.

Tax Deeds.

- to be registered within eighteen months, 729.
- where made before 1868, 729.

Toronto,

- Registry Office at, 700.

Wills,

- registration of, 721, 765.
- in other registry divisions, 722.
- proof of testator's death, 721.
- where testator has made subsequent conveyance of lands, 722.
- within twelve months from death of testator, 729.

Repeal of Statute. See B. N. A. ACT, INTERPRETATION ACT.**Replevin,** Act respecting (R.S.O. c. 66), 247.**Action for.**

- demand, when must be made in, 250.
- estoppel in, 250.
- how commenced, 249.
- is a personal action, 249.
- notice of need not be given, 249.
- what goods can be recovered in, 249.
- when cannot be brought, 250.
 - by party to action, 247.
 - when defendant has lien upon goods, 250.
- when will lie, 249.
- in County Courts, 248.
- in Division Courts, 248.
- order for, how obtained, 249.
- power of sheriff to make search under, where concealed in defendant's dwelling
 - house, 247, 250.
 - in other enclosure, 248.
 - on person of defendant, 248, 250.

Representations, as to character, etc., to be in writing, 302.**Restraint on Anticipation.** See MARRIED WOMANS' PROPERTY ACT.**Revised Statutes of Ontario,**

- how constituted and cited, 4.
- references to former enactments in construing, 14.
- may be construed as one Act, 14.

Royalties,

reserved to Provinces, 41, 70.
what included by term, 70.

Rules of Court,

effect of, 15.
effect of repeal of Act under which made, 12.
what included by, 10.
what matters may be regulated by, 198.

Scintilla Juris,

not necessary to support a use, 583, 591.

Section,

meaning of, 15.
number of, part of Act, 14.

Security,

meaning of, 8.
number of persons necessary, 8.
given by person appointed under Act, effect of repeal of Act on, 12.

Security for Costs,

in actions for Defamation. See DEFAMATION.

Seduction,**Abandonment of Daughter,**

effect of on parent's right of action, 119.

Abatement,

not caused by death of parent, 120.

Absence of Father from Ontario,

does not deprive him of right of action, 119.
by whom action for maintainable, 118, 119.
father, 118, 119.
master, 118, 119, 120.
mother, —.

Death of Father,

effect of on right of action, 119.

Illegitimate Child,

parents of have no right of action, 119.

Pleading, 120.**Service,**

proof of dispensed with, 118, 119.
but loss of must still be shown, 119.

"Unmarried Female,"

meaning of, 119.
when right of action complete, 120.

Senate, the

appointment of speaker, 24.
cannot award alimony, 54.
privileges, 22.
quorum, 25.
representation of Provinces in, 22.
Newfoundland and P. E. I. in, 47.
vacancy in, questions as to, 24.
summons on, 24.
voting in, 25.

Senators,

addition of, 23.
declaration of qualification by, 44.
disqualification of, 24.
how summoned, 23.
members of Legislative Council of Nova Scotia or New Brunswick becoming, 43.
not to sit in House of Commons, 23.
number of, 22.
maximum, 24.
reduction to normal, 24.

Senators—Continued.

- oath of allegiance by, 43.
- privileges of, 22.
- qualifications of, 23.
- questions as to, 24.
- resignation of, 24.
- summons of first, 23.
- on vacancy, 24.
- tenure of office of, 24.

Separate Schools,

- Appeal to Governor-General-in-Council from Provincial Act affecting, 38.
- from Manitoba School Act, 1890, 70.
- excepted from jurisdiction of Provinces over education, 38.
- in Manitoba, 70.
- in New Brunswick, 69.
- Parliament of Canada empowered to make remedial laws regarding, in certain cases, 38.
- privileges of in Upper Canada extended to Quebec, 38.
- summary of law respecting, 70.

Settlements.

- of infants' estates, powers of High Court as to, 173.

Sheriff,

- appointment of, 60.
- duties of. See CREDITORS' RELIEF ACT, EXECUTION ACT.
- title under conveyance by, on Division Court judgment, how proved, 85.
- to be an officer of the Court, 214.

Slander. See DEFAMATION.**Statute of Frauds,** applies to goods to be made, etc., 302, 303.**Statutory Declarations.** See WITNESSES AND EVIDENCE.**Stay of Proceedings,** when granted, 179.**Subpoenas.** See WITNESSES AND EVIDENCE.**Supreme Court of Canada.**

- appeals to, when to lie
 - questions as to future rights, 290, 291.
 - as to title to land, 290, 291.
 - as to validity of patent, 290.
 - where amount exceeds \$1,000, 290, 291.
 - where special leave is granted, 290, 291.

Supreme Court of Ontario, Act respecting (60-61 V. c. 34, Dom.), 290.

- appeals to, when to lie, 290, 291, 292.
- application of Act, 291.
- preamble to Act, meaning of, 291.
- Judges of, residence of, 290.

Sureties, meaning of, 8.

- number necessary, 8.
- rights of on payment of debt, 432.

Surrogate Courts, jurisdiction of, in infancy matters. See INFANTS.**Taxation,** exemption of public lands from, 43.

- exclusive authority of Dominion respecting, 35, 51, 55.
- of ferries, jurisdiction of Province as to, 55.
- want of uniformity in does not invalidate, 60.
- when within Provincial Legislative powers, 37, 51, 55, 58, 59.

Taxes, municipal, provincial powers over, 60.**Tender of Amends.**

- in actions against Justices of the Peace. See JUSTICES OF THE PEACE.
- in libel actions. See DEFAMATION.

Tenure of Provincial Offices,

- provincial powers as to, 37, 60.
- to be during pleasure, 9, 15, 60.
- except where Act provides for dismissal for specified offences, 60.

Time,

- of commencement of Act. See INTERPRETATION ACT.
- where expires on holiday, 7, 15.
- limitation of. See Limitations of Actions.

Trustee Investment Act (R.S.O. c. 130), 399.

- Approval by Lieutenant-Governor of companies in which funds invested, 400.
- revocation of, 401.

Interpretation of terms in Act, 399.**Liability of trustee,**

- for lending on insufficient security, 402.
- lending more than authorized amount, 401, 403.

Relief of trustees, 404.**Retention of securities,**

- when a breach of trust, 404.

Securities in which trustees may invest, 399, 400.**Unauthorized investments, 402.****Value,**

- qualification of, 401, 403.
- when trustees not chargeable for lending on insufficient security, 401.

Trustees and Executors,

- execution on judgment against, 327, 333.
- limitation of actions against, 680, 689.
- married women as, 775.
- of mortgagee, powers of, 598.

Trustees and Executors, Act respecting (R.S.O. c. 129), 373.**Actions of tort,**

- by and against executors, 375, 391, 395.
- damages in, 375.

Advertisement for creditors, 384, 395.**Advice,**

- application to Court for, 385, 396.
- costs, 397.

Allowance,

- to trustees and executors, 385, 386.
- may be made though estate not before Court, 386.
- Surrogate Judge may allow, 386.

Appointment,

- of agent by trustees, 380, 387.
- of new trustee, 373, 389.

Bare trustee,

- married woman as, 374, 390.
- vesting of fee simple held by in personal representatives of, 374.

Breach of trust,

- at request of cestui qui trust, 381, 392.
- technical relief against, 381, 393.

Compensation,

- to trustees and executors, 385, 397.

Conditions of sale,

- by trustees, 380, 392.

Contract,

- for sale by deceased, conveyances by executors under, 378, 392.

Debts,

- to rank *pari passu* 383, 395.

Distress by executors, 376, 391.**Devisee in trust,**

- power of to raise money, 376.

Direction to sell,

- exercise of by executors, 377.

Distress by executors, 376.

- when may be made, 376.

Duties of executors, 379.

Trustees and Executors—Continued.**Estoppel of creditor, 395.****Indemnity,**

- clause for, included in every trust instrument, 393.
- does not protect in breach of trust, 387.
- exception, 380, 392.
- trustee entitled to, 389.

Insurance,

- by trustee, 381, 393.
- by trustees, 381, 393.

Investments by.

See THE TRUSTEE INVESTMENT ACT.

Joint contractors,

actions against executors, of 376, 391.

Leases,

liability of executor on covenants in, 383, 395.

Liability for acts of co-trustees, 372, 387.**Liens,**

priority of not affected, 395.

Limitation of Actions

- against directors, 393.
- executors, 383.
- trustees, 180, 382, 393, 394.

New Trustees,

- appointment of, 373, 389.
- cannot be made by surviving trustee by will, 389.
- declaratory, 390.
- who may be, 389.
- powers of 390.
- vesting of property in, 374, 390.
- except stock, etc., 374.

Payment into Court of trust funds

- held by third party, 375, 391.
- to trustees, 375, 391.

"Personal Estate,"

meaning of in Act, 372.

Powers

- of executor to raise money, 377, 991.
- inquiry as to exercise of, 377.
- to insure, 381, 393.
- raise money, 376.
- settle debts, 382, 394.
- sell in will, exercise of by administrator, 378.

"Real Estate,"

meaning of in Act, 372.

Relief of trustees, 381, 393.**Receipts of trustees,**

to be effectual discharge, 375.

Remunerated trustees.

liability of for agent, 389.

Rent charge,

liability of executor on covenants in conveyance on, 384.

Retainer,

right of abolished, 383, 395.

Rights and liabilities of Trustees, 372, 393.**Sales by executors, 377, 391.**

by trustees, when not impeachable, 380.

Set-off by executor against legatee, 395.**Specific performance, 378, 392.****Trust deed for benefit of creditors.**

distribution of assets under, 384.

Trustees and Executors—Continued.**Vendor and Purchaser Act,**

exclusion of application of by trustees, 374, 390.

"will,"

meaning of under Act, 372.

Ultra vires enactments. See **LEGISLATIVE POWERS.**

protection of justices acting under, 123.

Uniformity of laws in the provinces.

Parliament of Canada empowered to make provision for 39.

Upper Canada,

meaning of, 6

Province of, to constitute Province of Ontario, 30.

use of instead of "Ontario" not to invalidate document, etc., 46.

Vacancy.

in House of Commons before provisions made, 27.

in Legislative Council of Quebec, 32.

questions as to, how decided, 32.

in office of Speaker, in House of Commons, 27.

in Legislative Assemblies, 34.

in Senate, 24.

how filled, 24.

questions as to, how determined, 24.

Vacations of Courts, 184.**Validity, of legislative enactments.** See **LEGISLATIVE POWERS.**

jurisdiction of High Court as to. See **JUDICATURE ACT.**

Vendors and Purchasers Act (R. S. O. c. 134), 693.**Covenant to produce documents,**

inability to furnish, when not an objection to title, 693, 695.

Evidence in Actions, 694.**Memorials of discharged mortgages,**

how far evidence of the mortgage, 693, 695.

twenty years old, when and of what evidence, 693, 695.

Objects of the Act, 695.**Recitals,**

twenty years old to be *prima facie* evidence, 693, 695.

Short Title, 693.**Summary applications to High Court, 694.**

appeal, 696.

consequential relief in, 697.

costs, 698.

jurisdiction in, 696.

parties to, 696.

questions decided in, 697.

compensation, 697.

construction of contract, 697.

conveyance, 697.

references to Master in, 698.

service out of jurisdiction in not allowed, 696.

what may be done under, 696.

trustees need not exclude application of Act, 374.

Vesting Order, effect of, 172.

power of High Court to grant, 172.

Verdict. See **JUDICATURE ACT.**

in libel actions. See **DEFAMATION.**

Vice-Admiralty Courts. See **COURTS.****Voluntary Assignments, for the benefit of creditors.** See **ASSIGNMENTS FOR BENEFIT OF CREDITORS.****Voluntary Conveyances,**

Act respecting (R. S. O. c. 115), 367.

object and effect of Act, 370.

Voluntary Conveyances—Continued.**Fraudulent Conveyances**

- recital of ss. 1, 2 and 6 of 13 Eliz., c. 5, 367.
- declaration as to meaning of, 369.
- certain instruments not affected, 369.
- not to be void merely for want of valuable consideration, 367.
- but not to be rendered valid if void for other reasons, 367.
- when void, 370.

Vote,

- in House of Commons, 27.
- Senators not to have, 25.
- when Speaker to have, 27.
- in Legislative Assemblies, 34.
- in Legislative Council of Quebec, 32.
- when Speaker to have, 32.
- in Senate, 25.
- Speaker to have, 25.
- result when equal, 25.
- qualifications for in election of members of House of Commons, 26.

Wages,

- Act respecting (R. S. O. c. 156), 498.
- application of, 498.
- not to interfere with any Dominion Insolvency Act, 499.
- due to mechanics, etc., exempt to \$25.00, 499.
- payment of on distribution of estate, 499.
- protection of assignee on, 499.
- priority of in administration of estates, 499.
- in case of attachment, 499.
- in winding up proceedings, 498.
- over assignments for the benefit of creditors, 498.
- over execution creditors, 498.
- who are entitled to priority, 501.

Warehouse Receipts. See BANK ACT, MERCANTILE AMENDMENT ACT.**Waste, Equitable.**

- right to commit, 180.

Weights and Measures,

- exclusive jurisdiction of Dominion over, 36.

Wills Act of Ontario. The. (R. S. O. c. 128), 634.

- Acts repealed by, 643.

After acquired estates,

- when passed by will, 635, 636.

Alterations, 639, 654.**Appointments by will,**

- how to be made, 638, 650.

Conveyance after will,

- not to prevent its operation as to any estate left in testator, 640.

Death.

- of beneficiary, effect of, 642, 657.
- will to speak from, 640, 655.

Devise, general.

- what passes under before 1874, 635.
- since, 641.
- leaseholds, 640, 656.
- property over which testator has a general power of appointment, 641, 656.
- whole estate in land devised, 641, 656.

Devise of estates tail,

- when not to lapse, 642.
- to issue who leave issue, not to lapse, 642, 657.
- to trustee, 642, 657.

"Die without issue."

- effect of, 641, 657.

Wills Act of Ontario—Continued.**Estates tail.**

when devises of not to lapse, 642.

Execution.

attestation.

before 1874, 635.
since, 637, 648.
absence of, 650.
form of, 649.
position of, 649.

signature, 637, 646.

acknowledgment of, 648.
at foot or end, 647.
by initials, 648.
by mark, 648.
by testators direction, 648.
in presence of witnesses, 648.
in wrong name, 648.

presumption of due execution, 649.

Heir,

meaning of in devise of realty, 641, 656.

History of Legislation respecting, 645.**Indians may make a will, 646.****Infants, wills by invalid, 637.****Interpretation.**

die without issue, 641.
heir, 641.
land, 634.
mortgage, 636.
person, 636.
personal estate, 636.
real estate, 636.
testator, 636.
will, 636.

Jurisdiction of High Court.

to try validity of wills, 173.

Lapsed devises.

to sink into residuary devise, 640, 655.

Liens,

for unpaid purchase money to be primarily charged on the land, 643.

Locke King's Act, 642, 658.**Married woman.**

wills by, after 1874, 636, 646.
between 1859 and 1874, 635, 646.

Mortgage debt.

to be primarily chargeable on the land, 642, 658.
direction that debts be paid out of personalty not to affect, 643.

Nuncupative wills of personalty,

by soldiers and seamen, 638, 650.

Obliterations and interlineations to be executed, 639.**Operation of Act, 635.****Power to dispose of property by will, 636.****Proof of wills, 87, 88.****Property which may be disposed of by will, 636.**

after acquired estates, 635, 636.
contingent interests, 636.
estates *pur autre vie*, 636.
rights of entry, 637.

Publication unnecessary, 638.**Registration of wills. See Registry Act.****Revival, how effected, 640, 654.****Revocation of will, how made, 639, 653.**

by another will, 653.
burning, 653.

Wills Act of Ontario—Continued.**Revocation of will—Continued**

- by cancellation, 654.
 - marriage, 639, 652.
 - obliteration, 653.
 - otherwise destroying, 653.
 - tearing, 653.
- destruction must be authorized by testator, 653.
- none by change of circumstances, 639.
 - or dealing with property, 655.
 - with reference to other disposition, 654.

Short title, 634.**Summary of effect of Act, 645.****Trustee,**

- (See also TRUSTEES AND EXECUTORS ACT.)
- devise to, when to carry whole estate of testator, 642, 657.

Witnesses,

- before 1874, 635.
- since, 637.
- creditors may be, 638.
- executor may be, 639.
- gifts to invalid, 638, 651.
- incompetency of, not to invalidate, 638.
- signatures of, 649.

"Without impeachment of waste,"

- how construed, 180.

"Writing," meaning of, 7.**"Written," meaning of, 7.****Witnesses and Evidence.**

- The Canada Evidence Act (56 V. c. 31), 99.
- The Evidence Act (R.S.O. c. 73), 75.

Affidavits. See also REGISTRY ACT.

- formal defects not to invalidate, 87.
- made out of Ontario, before whom to be made, 85.
- not signed by deponent, when received, 97.
- required by insurance companies, 104.

Application,

- of Dominion Evidence Act, 106.
- of Provincial laws of evidence, 103.

Attesting witnesses,

- (See also REGISTRY ACT and WILLS ACT.)
- when necessary, 98.
- when need not be called, 91.

Breach of promise of marriage,

- corroboration necessary, 76, 94.
- parties as witnesses, 76, 94.

Children, Evidence of

- must be corroborated, 104.
- when admitted, 104, 106.

Comment,

- not to be made on failure of accused to testify, 99.

Commissions to examine witnesses,

- in relation to action pending in foreign Court, 90, 98.
- administration of oath in, 91.
- expenses of witnesses in, 91.
- right to refuse to answer questions in, 91.
- power to issue not affected by C.S.C. c. 79, ss. 4-11, 80.

Communications during marriage,

- not to be disclosed, 77, 94, 99.

Witnesses and Evidence—Continued.**Comparisons of disputed writings, 91, 93.****Compellable—meaning of, 93.****Competency of witnesses,**

accused, and husband and wife of, 99.

comment not to be made on failure to testify, 93, 94, 99.

crime or interest not to incapacitate, 75.

defendants to prosecutions under Provincial Acts, 94.

husband and wives, of parties, 76, 77, 93.

not competent to disclose communications made during marriage, 99.

parties to action for breach of promise of marriage, 76, 94.

proceedings in consequence of adultery, 77.

Corroboration—what is sufficient, 95.

in actions—when necessary.

by or against lunatics, 77.

representatives of deceased persons, 77, 95.

for breach of promise, 76, 4.

to prove adultery, 94.

where witness is a child of tender years, 104.

when not necessary, 95.

Depositions, certified copies of admissible in evidence, 87.**Division Court Judgment,**

how proved, 97.

title by sheriff's deed under, how proved, 85.

Evidence as between Vendor and Purchaser.

See VENDORS AND PURCHASERS ACT.

Examination of Witnesses, 80.

contradiction by proof of previous statements,

in writing, 80, 96.

oral, 80, 96.

how far a party may discredit his own witness, 80.

proof of previous conviction, 80, 96.

Foreign Judgment,

how proved, 83, 97.

Husbands and wives, evidence of, 76, 77, 93.

not compellable to disclose communications made during marriage, 77, 94, 99.

in proceedings in consequence of adultery, 76.

Infancy matters,

witnesses in, 284.

Instruments,

certain, may be proved by copies, 90.

comparison of disputed with genuine writing, 91.

impounding of, 91, 98.

methods of proving not limited by the Act, 92.

to which attestation is not necessary, how proved, 91.

filed in Land Titles offices, how proved, 89.

registered, proof of by copies, 88, 98.

duplicate originals, 88, 98.

Judicial notice, 106.

to be taken of, Imperial Statutes, etc, 100.

public Acts, 10.

signatures of judges, etc., 84.

Judicial proceedings,

how proved, 101, 106.

Division Court, 97.

foreign, 83, 97.

Mutes,

how evidence of to be given, 100.

Notaries,

copies of instruments, etc., certified by, to be received in evidence, 84, 102, 106.

how impeached, 85.

protests of notes by to be *prima facie* evidence, 85.

seal, when necessary, 87.

Witness and Evidence—Continued.**Notice,**

of intention to use copy, 88, 103, 106.

Oaths,

extra-judicial, 106.
who may administer, 78, 103.
who may affirm or declare, 77, 78, 103.
perjury under affirmation, 104, 106.

Official documents,

copies of to be filed as exhibits, 89.
except where genuineness questioned, 89.
how proved, 81, 82, 83, 97, 101, 106.
privilege in case of, 83.

Parties,

evidence of, 76, 77, 93.
resident in Great Britain, 91, 98.
summoning of by opposite parties, 78, 95.

Proceedings in consequence of Adultery.

husbands and wives competent witnesses, 76, 94.

Proclamations,

how proved, 81, 97, 100, 101, 106.

Punishment of Witnesses,

provincial powers as to, 64, 66.

Questions tending to criminate, 106.

(Dom.) witness compelled to answer, 99.
but answer not to be used against him, 99.
(Ont.) witness not compellable to answer, 76, 91, 93.
except when previously pardoned, 98.
questions may be asked, 98.
protection must be claimed by witness, 106.

Signatures,

of judges to be judicially noticed, 84.
and seals of persons authorized to take affidavits, etc., outside of Ontario, need not be proved, 86.

Statutes and Public Documents,

how proved in evidence, 81, 82, 83, 97, 101.
by-laws of corporations, 83.
Canadian and Provincial statutes, 81.
Imperial statutes, etc., 101.
copies of public books, 83, 102.
entries in departmental books, 83.
examined copies, what are, 97.
handwriting, etc., of persons certifying to copy, proof of not requisite, 102.
official notes, documents, etc., 83, 102.
privilege in case of, 83.
notice to be given to adverse party of intention to produce copy, 88, 103.
orders signed by Secretary of State, 82, 102.
Provincial Secretary, 82.
proclamations of Government of Canada, 81.
provincial governments, 82.
when privileged from production, 83, 97.

Statutory declarations,

form of, 105.
who may take, 104.

Subpoenas,

disobedience of, consequences of, 79.
expenses to be tendered with, 79.
issue of, provisions respecting, 79.
service of, 79.
how proved, 79.
to opposite parties, 78.
to Quebec, 95, 96.

Wills.

- probate of, how far evidence, 97.
- proof of, 87, 97.
- cost of, 87.
- where filed in courts, in other British possessions, 88.

Workmen's Compensation for Injuries Act, The (R. S. O. c. 160), 133.

See amending Act (62 Vic. c. 18), 838.

Admissions.

- how made, 143.

Arbitration.

- See Act of 1899, 838.

Assessors.

- absence of, 141.
- additional, 141.
- cost of, 142.
- appointment of, 140.
- by court or judge, 141.
- form of application for, 141.
- in Division Court, 141.
- duty of, 142, 153.
- fees of, 142.
- where trial does not take place, 142.

Burden of proof.

- where injury caused by certain machinery, 838, 849.

Changes effected by the Act, 145.**Compensation.**

- amount of, 137, 152.
- agreement by workman as defence to action for, 137.
- distribution of, 137, 152.
- in consolidated actions, 143.
- penalties to be deducted from, 138.
- time limited for recovery of, 137, 152.

Consolidation of actions.

- for the same cause, 142.
- terms on which granted, 143.
- damages recovered in, how assessed, 143.
- how distributed, 143.
- execution for, how raised, 143.

Contract by workman.

- when a defence, 137, 152.

Claim against employer.

- when workman to have, 134.

Defects in plant.

- when entitle workman to recover, 134, 136, 149.
- when do not, 136, 152.
- what are, 146.
- what are not, 147.

Defect in railway.

- what deemed to be, 135, 136.
- no agreement by workman to bar action for injuries from, 138.

Defences to actions for.

- contract by workman, 137, 152.
- knowledge of defect by workman, 136, 145.
- limitation of time, 138, 145.
- non-employment, 139.
- volenti non fit injuria*, 151.
- want of notice of injury, 137, 138, 145.

"Employer."

- who deemed to be, 135, 151.

Factories Act, how far non-compliance with is negligence, 151, 849.**Forms and rules, 144.**

Workmen's Compensation for Injuries Act—Continued.
Interpretation.

"claimant,"
 "court," 838.
 "defendant," 838.
 "employer," 133.
 who deemed to be, 135, 151.
 "judge," 838.
 "packing," 134.
 "plaintiff," 838.
 "railway servant," 134, 146.
 "respondent," 838.
 "suit action or proceeding," 838.
 "superintendence," 133.
 "workman," 133.

Legal Representatives of Employer.

action to be against, 138.

Limitation of Action for, 137, 152.

commencement of action, 841.
 how time computed, 144, 152.

Machinery, meaning of, 148.

burden of proof where injury caused by, 838.

Negligence.

of person to whose orders workman was bound to conform, 134, 149.
 of railway employee, 134, 150.
 of superintendent, 134, 145.

Notice of Injury.

form of, 138, 139, 153.
 not dispensed with by Act of 1899, 841.
 service of, 139, 153.
 want of, when not a bar, 139, 153.

Notice

of intention to rely on lack of notice of injury of non-employment as a defence, 139.

Orders to which workman was bound to conform, 134, 149, 150.

Penalties paid to workman to be deducted from compensation, 138.

Plant

must be connected with business of employer, 149.
 what included by, 149.
 what is not, 149.

Railways.

how far subject to the Act, 146, 150.
 injury by negligence of signalman, etc., 135.
 to workman by insufficient head-room, 135.
 unpacked frogs, 136.
 space between rails, 136.
 negligence of persons in charge of trains on, 150.
 what is a train, 150.

"Railway Servant."

meaning of in Act, 134, 146.

Rules or by-laws of Employer.

when Acts done under, entitle workman to recover, 134, 136, 150.

Statement of Claim.

form of, 140.

Stay of several actions to abide result of one, 142.

how obtained, 143.
 removal of, 143.
 terms on which granted, 143.
 varying order for, 143.

"Superintendence."

meaning of in Act, 133, 145.

Superintendent.

negligence of to entitle workman to recover, 134.

Ways, what are, 148.

Workmen's Compensation for Injuries Act—Continued.**"Workman."**

- meaning of in Act, 133.
- when not within Act, 145.
- when within Act, 145.

Works,

- what are, 148.

Workmen's Compensation for Injuries Act, 1899, The (62 Vic. c. 18) 633.

- Act to be read with R. S. O. c. 160, 844.
- Acts affected by, 849.

Action,

- proceedings by instead of arbitration, 840.
- right to bring, 844.
- time for commencing, extension of, 840.

Agreement as to compensation,

- filing of, 843.

Amount recoverable, 844.**Arbitration,**

- settlement of claims by, 839, 844.
- appeal from, 843.
- appointment for, 841.
- arbitration Act not to apply to, 844.
- award, 843.
- costs of, 843.
- defendant may apply for, 840.
- extension of time by, 840.
- notice of, 840.
- questions of law, reference of, 842.
- objection to, 840.
- pleadings in, 842.
- shorthand writer, 842.
- statement of defence in, 841.
- stay of proceedings on, 841.
- witnesses and evidence in, 842.
- venue in, 839.

Burden of proof where injury caused by certain machinery, 833, 849.**Forms,**

- use of, 844, 845, 846, 847.

Interpretation, 838.**Judge of County Court,**

- applications to instead of to Judge of High Court, 839.
- duties of, 843.
- fees of, 843.
- of another county may act by request, 842.
- powers of, 842.

Lien for costs on sum awarded, 843.**notice of enquiry, 841.****questions of law,**

- County Court Judge may refer, 842.

rules as to proceedings, 844.**Written Promises and Acknowledgments of Liability, Act respecting (R.S.O. c. 146), 301.**

- See also LIMITATIONS OF ACTIONS, REAL PROPERTY LIMITATION ACT.
- causes of action to which are applicable, 304.
- origin of Act, 304.

By whom must be made, 306.**Endorsement by payee, effect of, 302, 308.****Infants, 302, 308.****Joint contractors,**

- acknowledgment by one of not to bind others, 301, 368.
- judgment against one of where plaintiff barred as against others, 302.

New time for payment,

- effect of fixing, 306.

Written Promises and Acknowledgments of Liability—Continued.**Parol evidence.**

- when admissible, 307.
- requisites of, 304, 307.
 - must be made by the debtor, 306.
 - to the creditor, 306.
 - what have been held to be, 304, 305.
 - “ “ not to be, 307.
- conditional promises where the condition has been performed, 305.
- where new time of payment specified, 306.

Signature, necessity for, 307.

Theory upon which are founded, 297, 304.

When required to take case out of the Statute of Limitations, 301.

Consideration for promise to answer for another need not be in writing, 302

Ratification of promises by infants, 302, 308.

Representations as to character, credit, etc., of third party to be in writing, 302.

Set-off,

- application of Acts to, 302.
- consideration need not appear in memorandum under, 302.

Statute of frauds,

- sec 17 to apply to contracts for goods to be delivered at a future time, 302.

Time when may be made, 307.

To whom must be made, 297, 298, 306.

respecting (R.S.O.

Act.

rs, 302.